



LC/SC-MOT

International Civil Aviation Organization

SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE FOR THE MODERNIZATION OF THE TOKYO CONVENTION INCLUDING THE ISSUE OF UNRULY PASSENGERS

Montréal, 22 – 25 May 2012

REPORT

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PART I

INTRODUCTION

1. ACTION BY THE COUNCIL CONCERNING THE SPECIAL SUB-COMMITTEE

1.1 In September 2009, the 34th Session of the Legal Committee recommended the reactivation of the Secretariat Study Group on Unruly Passengers. The Council agreed at its 188th Session in October 2009 that the Study Group be reactivated. Two meetings of the Group were held in May and October 2011. The final report of the Study Group was submitted to the 194th Session of the Council in November 2011.

1.2 Based on the recommendation of the Study Group, the Council decided at the fifth meeting of its 194th Session on 15 November 2011, to convene the special Sub-Committee of the Legal Committee at Montréal in May 2012.

2. ESTABLISHMENT OF THE SUB-COMMITTEE

2.1 Acting under Rules 12 and 19 of the Rules of Procedure of the Legal Committee, the Acting Chairman of the Legal Committee, Mr. M. Jennison (United States), established a special Sub-Committee and decided to appoint legal experts of the following States to serve as members of the Sub-Committee: Australia, Brazil, Cameroon, Chile, China, Egypt, France, Germany, Italy, Japan, Lebanon, Mexico, Nigeria, Republic of Korea, Russian Federation, Saudi Arabia, South Africa, Switzerland and United Arab Emirates. All these States (with the exception of Germany, Nigeria, and Saudi Arabia) were represented in the Sub-Committee.

2.2 Furthermore, the Representatives of the following States, *ex-officio* members of the Sub-Committee under Rule 13 of the Rules of Procedure of the Legal Committee attended: United States (Acting Chairman of the Legal Committee), Singapore (Third Vice-Chairman) and Canada (past Chairman); the *ex-officio* members of Argentina (Second Vice-Chairman) and Senegal (Fourth Vice-Chairman) were unable to attend.

2.3 In accordance with Rule 17 of the said Rules of Procedure, the Acting Chairman of the Legal Committee appointed Mr. A. Piera (United Arab Emirates) as Rapporteur.

3. TERMS OF REFERENCE OF THE SUB-COMMITTEE

3.1 The terms of reference of the Sub-Committee as agreed by the Council are as follows: “To review the Tokyo Convention, with particular reference to the issue of unruly passengers”.

4. MEETING OF THE SUB-COMMITTEE

4.1 The Sub-Committee met at Montréal from 22 to 25 May 2012. The list of participants in the Sub-Committee is shown in **Appendix 1** hereto.

4.2 The Order of Business for the first meeting is set out in **Appendix 2** hereto.

4.3 In his capacity as Acting Chairman of the Legal Committee, Mr. M. Jennison (United States), opened the meeting. The Director of the Legal Affairs and External Relations Bureau, Mr. D. Wibaux, acting for the Secretary General, addressed the meeting.

4.4 Mr. Wibaux underlined that while the Tokyo Convention is considered a very successful instrument with 185 States Parties, it is almost fifty years old and there is a need to consider whether it is still adequate to respond to the current situation of international civil aviation given the increasing number and gravity of incidents of unruly and disruptive passengers on board aircraft, which have adverse implications for aircraft safety as well as for the crew and passengers on board, and in light of the modernization of two other conventions in Beijing in September 2010. He recalled that ICAO Circular 288, introduced in 2002, contains guidance material on the legal aspects of unruly/disruptive passengers, and that the ICAO Assembly has, since 2003 in resolution A33-4, encouraged States to enact enabling legislation to deal with unruly passengers. He emphasized that in spite of these developments, there are constant appeals from the aviation industry to consider going beyond voluntary measures and moving to develop a global framework that is codified in an international instrument. Pertinent issues to be considered include: listing specific offences; extension of States' jurisdiction over such offences; prosecution of offenders; power and duties of the aircraft commander and crew and their immunity from liability; and the status of In-Flight Security Officers (IFSOs). He emphasized that while examining these issues, the Sub-Committee should strive to achieve the necessary balance between the need for safe, secure and orderly flights and the protection of the rights of passengers. He thanked the Rapporteur, Mr. A. Piera (United Arab Emirates) for the preparation of the report and a draft instrument which will form the basis of the Sub-Committee's work.

4.5 Following the opening of the meeting, the Sub-Committee unanimously elected as its Chairperson Ms. S. H. Tan (Singapore) and as Vice-Chairperson Mr. A. Candrian (Switzerland).

4.6 The Secretary of the meeting was Mr. D. Wibaux, Director of the Legal Affairs and External Relations Bureau. Mr. J. Huang, Senior Legal Officer, acted as his Deputy. The Assistant Secretaries were Mr. A. Opolot and Ms. M. Weinstein, Legal Officers; other officials of the Organization also provided services for the Sub-Committee.

5. DOCUMENTATION

5.1 A list of the documents presented to the Sub-Committee is found in **Appendix 3** hereto.

PART II

DISCUSSIONS OF THE SUB-COMMITTEE

6. **RAPPORTEUR'S REPORT**

6.1 The Rapporteur of the Legal Committee, Mr. A. Piera (United Arab Emirates), presented his report, the text of which forms an integral part of this report of the Sub-Committee (**Appendix 4** hereto). The Rapporteur apologized for the late submission of the report and the consequent unavailability of the translated versions for the meeting. The report discussed the objectives and scope of the Tokyo Convention as well as its perceived shortcomings in particular with regard to unruly incidents aboard aircraft such as: absence of definitions of the offences or acts that may jeopardize good order and discipline on board aircraft; lack of mandatory jurisdiction for States other than the State of registry; lack of a mandatory provision on extradition; uncertainty as to the legal standard to be applied in respect of the aircraft commander's immunity; and insufficient coverage in the area of international cooperation. A draft convention was proposed at Appendix A of the Report as a starting point for discussion, which included proposals to address the above-mentioned and other perceived shortcomings of the Convention. The Rapporteur noted that the intention of the draft instrument was to supplement, and not to supersede, the Tokyo Convention taking into account those States Parties which have implemented legislation criminalizing a number of offences. The draft instrument incorporated language from Circular 288, the Beijing Convention, the Beijing Protocol, and other instruments. One key element was the inclusion of a list of offences which was broken down into three tiers, with the first tier addressing the more serious offences, the second tier less serious offences, and the third tier encompassing behaviour that may impact the safety of aircraft, such as smoking in the lavatory. Another key proposal was the expansion of jurisdiction for the State of the operator; the State over whose territory the offence is committed; the State of the nationality of the offender; the State of landing; the State of the victim; and the State of habitual residence of the offender. Significantly, the draft instrument incorporated the *aut dedere aut judicare* principle so that State Parties undertake to either extradite an offender found in their territory or to submit the case to their competent authorities for the purpose of prosecution. Only first tier offences would be extraditable. The proposed instrument also contained provisions that would take into account the increasing role that IFSOs play in the protection of passengers and crew on board international flights.

6.2 The Sub-Committee members thanked and congratulated the Rapporteur for his report and for the draft convention text which would form a basis for further consideration of the issues.

7. **GENERAL STATEMENTS**

7.1 The International Air Transport Association (IATA) presented LC/SC-MOT-WP/2 in which it informed that the current international legal regime does not have adequate deterrent effect against incidents of unruly behaviour, citing statistics indicating that the number of such incidents had increased by 30% per 1000 flights between 2009 and 2010. IATA highlighted in particular three areas of concern to the airline industry. First, the lack of a clear definition of a criminal offence in the Tokyo Convention often resulting in the alleged offenders not being pursued by States of landing, given that conduct which may be considered to be a criminal offence in the country of embarkation, the State of registry or the State

of the operator, may not be a criminal offence in the country where an unruly passenger is disembarked. Second, in many cases, the State where an alleged offender is disembarked refuses to assert jurisdiction when the aircraft is registered in another State. Third, the legal standard to be applied in respect of the aircraft commander's immunity under Articles 6 and 10 of the Tokyo Convention needs to be clarified given the divergence in case law as to what constitutes "reasonable grounds to believe" that a particular offence or act has occurred or is about to occur.

7.2 The Sub-Committee recognized that there was a growing concern in the international aviation community about the problem of unruly passengers. In the contemporary world, air transport had become a mode of mass transportation, and it was important to maintain good order and discipline on board aircraft. With respect to the mandate of the Sub-Committee, one delegation queried whether the current work should focus on the issue of unruly passengers or include other issues on the modernization of the Tokyo Convention. Another delegation stated that the scope of the Tokyo Convention modernisation was much broader than the subject of unruly passengers. It could involve changes to some fundamental concepts of international air law. While there was some support for comprehensive change to the international legal regime established by the Convention, various members urged caution with regard to extensive amendments to one of the most successful multilateral treaties concluded under the auspices of ICAO. One delegation suggested that the issue of unruly passengers and related matters be addressed through additional standards to Annex 17. Accordingly, there was general agreement that further study should be undertaken by members of the Sub-Committee with a view to collecting data in order to better assess the scope of the problem of unruly passengers. As to the form of instrument, some delegations preferred to reserve their positions at this early stage to allow time to study the extent of the modernization.

7.3 It was agreed that the working methodology of the Sub-Committee at this meeting should be to focus on the identification and consideration of the problems and issues, rather than discussing specific draft articles for amendments.

8. DISCUSSION OF THE ISSUES

8.1 The Sub-Committee considered the issues listed under Section 8 of the Rapporteur's report. It was decided to refer to specific Articles of the draft instrument at **Appendix A** of the report as illustrative of the issues under consideration. Discussions focused on jurisdiction, list of offences, extradition, immunity of the aircraft commander, IFSOs and the extent of the modernization of the Tokyo Convention.

8.2 **Jurisdiction (Chapter II, Article 5 of Appendix A, Rapporteur's Report)**

8.2.1 **State of registration** – There was general support that the existing jurisdiction of the State of registration be preserved in line with Article 1 (1) (a) of the Tokyo Convention. As an international air law instrument accepted by 185 States, the Tokyo Convention had firmly established this basic principle, which should be fully respected. Similarly, the territorial jurisdiction of a State, which had been well recognized under international law, should also be fully respected.

8.2.2 **Expanded bases of jurisdiction** – In addition to the territorial jurisdiction and the jurisdiction of the State of registration mentioned above, the Sub-Committee noted the growing practices that the bases of jurisdiction had been expanded to include the State of landing under certain circumstances. The general sentiment was that such practices would assist to allow enforcement action to be taken against unruly passengers and could thus deter and curb the increasing trend of unruly behaviour on board aircraft.

8.2.3 **State of landing** – It was generally noted that the expansion of jurisdiction to include that of the State of landing was one of the core issues to be dealt with in the context of unruly passengers. A number of delegations reported that their States had established such jurisdiction in their domestic legislation, and encouraged other States to do the same. Some delegations mentioned that in the absence of an international treaty offering a solid basis for extended jurisdiction, there was some reluctance to unilaterally extend jurisdiction to extra-territorial offences by non-nationals on board aircraft registered in another State. One delegation expressed some hesitancy with respect to the State of landing jurisdiction since in many cases there would be no link between such a State and the alleged offender. Several delegations pointed out, however, that the establishment of the jurisdiction of the State of landing would not affect that State's discretion to refrain from prosecution if the circumstances warranted. In order to facilitate the progress in the consideration of this issue, a number of delegations suggested that it would be very useful to gather the experiences and views of States with regard to their ability or lack thereof, as States of landing, to assert jurisdiction over alleged offenders.

8.2.4 **Request to prosecute** – The Sub-Committee noted that draft Article 5 (1) (e) (ii) prepared by the Rapporteur, which originated from Circular 288, contains a requirement that the aircraft commander, while delivering an alleged offender, make a request to the authorities in the State of landing to prosecute that person. Several delegations did not see the justification for the inclusion of this requirement in order for the State of landing to take jurisdiction and therefore proposed its deletion. It was noted that, further, the requirement imposed an undue burden on the aircraft commander as it placed him in a position to make legal analysis. It was emphasised that the aircraft commander should not be required to do anything else after delivering the suspected offender to the local law enforcement authorities who would take the next steps. Consequently, the Sub-Committee decided that subparagraph (e) (ii) be removed.

8.2.5 **State of the operator and other jurisdictions** – There was general support for the inclusion of the State of the operator in the bases for jurisdiction in order to align the Tokyo Convention with modern commercial practices in the aviation industry. Some support was expressed for the inclusion of the jurisdiction of the State of the offender and the optional bases in Article 5 (2) (a) and (b) relating to the State of the victim and stateless persons, on the basis that these were appropriate and were consistent with what was adopted in the Beijing Convention.

8.2.6 **Hierarchy of jurisdictions** – The Sub-Committee did not see the need for a hierarchy of jurisdictions and were satisfied with having concurrent jurisdictions noting that other penal air law conventions did not provide for such a hierarchy.

8.2.7 **Mandatory and optional jurisdictions** – With regard to the question of whether to have mandatory and optional jurisdictions, the Sub-Committee supported preserving the existing mandatory State of registry jurisdiction and the territorial jurisdiction. Most delegations could support mandatory State of the operator and State of landing jurisdictions, while jurisdiction with respect to State of the victim and stateless persons would remain optional. Other delegations expressed a preference for optional jurisdiction for the State of landing or preferred to reserve their positions on mandatory jurisdiction for the various bases noting that this would depend on the list of offences that would be established, given, for instance, that mandatory measures for relatively minor offences could present difficulties for States in light of the prosecutorial costs.

8.3 **List of Offences (Chapter I, Article 2, Appendix A, Rapporteur’s Report)**

8.3.1 The Rapporteur in his introductory remarks stated that the proposed list of offences was intended to meet the objective of promoting harmonization in international law relating to unruly behaviour by passengers on board aircraft and that the list was taken substantially from Circular 288. IATA in supplementing those remarks referred to LC/SC-MOT-WP/2 reported that the concern of the airlines was that the authorities in the State of landing on some occasions declined to take action against passengers referred to them on the basis that the acts complained of did not constitute any offence in their jurisdiction. IATA noted that there was merit in having a categorized list of offences depending on the nature and impact of the conduct in question, as proposed by the Rapporteur.

8.3.2 While many delegations acknowledged the need for a list of offences, particularly for the reason that States would know precisely what offences they would be accepting to take jurisdiction for, some delegations remained to be convinced of the need for such a list.

8.3.3 Many delegations expressed reservations about the list of offences set out in draft Article 2, noting that any list should not duplicate offences in other counter-terrorism conventions and that the offences listed should be of sufficient gravity to merit measures of international cooperation. Concern was expressed that there was a risk that such a list may not be sufficiently comprehensive.

8.3.4 The Sub-Committee tentatively agreed to reserve the list for the most serious instances of unruly behaviour. Minor offences that do not imperil the safety of a flight may well be left to States to handle. With respect to penalties there was general support for States to determine the appropriate penalties and that they may include administrative sanctions such as refusal of transportation and fines.

8.3.5 One delegation noted that while the data provided by IATA showed cumulatively the type and volume of incidents involving unruly behaviour, there was need for further data that shows whether there were problems experienced with follow-up action when such cases were reported to the authorities and to classify the incidents into minor infractions and serious acts respectively. IATA offered to revert with a response to this request at a later date.

8.3.6 The Chair proposed, and the Sub-Committee agreed, to establish an informal working group led by Mr. G. Lauzon (Canada). The group was tasked to determine the purpose of a list of offences and the content of the list.

8.3.7 After receiving a report of the informal working group (copy of which is attached to **Appendix 5** to this Report), the Sub-Committee concluded that more work needs to be done on the necessity, purpose and content of such a list.

8.4 **Extradition (Chapter V, Articles 14 to 17, Appendix A, Rapporteur’s Report)**

8.4.1 The Rapporteur in his introductory remarks reported that the extradition provisions in Articles 14 to 17 of the draft instrument substantially replicated the text of the Beijing Convention and noted that because the draft instrument included both minor and serious offences, a key issue to be considered was whether a provision on extradition was needed.

8.4.2 Several members expressed reservations about the necessity of providing for extradition in all cases of unruly behaviour, noting that extradition is a costly and cumbersome process. One member suggested that the additional bases of jurisdiction would remove the need to include the provisions on extradition.

8.4.3 The Sub-Committee reached a general consensus that it may not be appropriate to transplant the extradition system from the counter-terrorism Conventions to the Tokyo Convention to address the problem of unruly passengers. The general view of the members was that if there is to be an extradition provision, it should be reserved for serious or the most serious offences only. It was noted that the Tokyo Convention in Article 16 already contains an extradition provision which would need to be amended if the additional bases of jurisdiction are included. The Sub-Committee agreed with the suggestion that models established by certain other treaties such as the 2000 *UN Convention against Transnational Organized Crime*, the 2003 *UN Convention against Corruption* and the 2001 *Convention on Cybercrime* be considered.

8.5 Immunity (Chapter III, Article 10, Appendix A, Rapporteur’s Report)

8.5.1 The Sub-Committee considered the issue of the immunity under Article 10 of the Tokyo Convention, on the basis of the four options presented under draft Article 10 in Appendix A to the Rapporteur’s Report. Several delegations reiterated the need to preserve the immunity granted in Article 10 of the Tokyo Convention.

8.5.2 With respect to Option 3, which was intended to address concerns arising from different judicial interpretations of the immunity clause, a number of delegations expressed reservation in respect of the words “capricious and arbitrary”, noting that the reasonableness standard contemplated in the Tokyo Convention was adequate and well understood in most jurisdictions. One delegation, supported by others, suggested that the immunity should apply if the actions were “necessary and proportionate”. One observer advised that the aircraft commander must be able to rely on the information relayed by the cabin crew with regard to unruly incidents, given the requirement that the flight deck door must remain closed.

8.5.3 There was concern about the deletion of the words “the person on whose behalf the flight was performed” that appear in Article 10 of the Tokyo Convention, as this could limit the scope of the immunity granted. The Rapporteur explained that the new definition of “operator” if adopted would remove the need for using the words “the person on whose behalf the flight was performed”.

8.5.4 With respect to Option 2, some delegations expressed the preference to delete the term “any proceeding instituted by or on behalf of the person against whom the actions were taken” and to revert to the original wording of the Tokyo Convention, i.e. “any proceeding on account of the treatment undergone by the person against whom the actions were taken”.

8.5.5 They further emphasized that Option 1, i.e. the original text of the Tokyo Convention, had stood the test of time and should be retained.

8.5.6 In the discussions of Option 4, some States observed that since 11 September 2001, both the number of national IFSO programmes and the number of IFSOs deployed on international flights had increased significantly, reflecting an emerging international consensus regarding the importance of active law enforcement measures against airborne acts of unlawful interference and terrorism. This situation could not have been foreseen by the drafters of the Tokyo Convention almost 50 years ago. Accordingly, the provisions of the Tokyo Convention do not contain any reference to IFSOs. They fall into the category of ordinary passengers, even though their mission is to perform state functions integrally connected with the safety and security of air travel. These delegations believed that the status of IFSOs should be among the issues to be considered by this Sub-Committee. Several options should be considered, including extending to IFSOs more robust protections in a wide range of law enforcement actions on board international flights. A second group of delegations mentioned that the mandate of the Sub-Committee focused on the issue of unruly passengers. It should not overlap with the issue of counter-terrorism. The mission of IFSO is related to the latter. Accordingly, this group would raise that one may question

whether the Tokyo Convention is the proper instrument for this purpose. Bilateral agreements may be more appropriate. In response to this, the delegations in favour of giving IFSOs more robust protection clarified that the line between unruly incidents and a terrorist act is often blurred. For example, the difference between igniting a cigarette in the toilet and setting fire on board aircraft may not be easily discernible. Therefore, the functions of IFSOs are often extended to cover unruly incidents. A third group of delegations believed that actions of IFSOs could be treated under the existing Article 6 of the Tokyo Convention in the same way as the actions of passengers. A fourth group considered it as a sensitive issue and required more time for further study.

8.6 Powers and Duties of States (Chapter IV, Appendix A, Rapporteur's Report)

8.6.1 The topics discussed under this heading included cooperation among States, preventive measures, reporting of incidents and guidance on dealing with offenders on removal from aircraft. One delegation, supported by others, stated that they could not form their positions on these issues, and more time was needed for further study.

8.6.2 One delegation noted that when an unruly passenger was disembarked in an intermediate point instead of the intended place of destination, it was not clear whether the contract of carriage had been automatically terminated. There was a possibility that a domestic court may order the airline to reimburse the ticket. Another delegation believed that the combined effects of Articles 8, 9 and 10 of the Tokyo Convention would provide the airline with sufficient protection against this type of liability. Other delegations suggested that this matter could be dealt with in the general conditions of carriage. They suggested that IATA could look into this matter.

8.6.3 In response to a proposal that the notions of disembarkation and delivery could be merged, one delegation pointed out that “delivery” was reserved for a serious offence under Article 9 of the Tokyo Convention. This distinction should be taken into account in considering whether the two notions should be merged.

8.6.4 In discussing the proposal in paragraph 8.11 of the Rapporteur's report concerning the deletion of Article 11 of The Tokyo Convention, one delegation, supported by another, noted that Article 11 actually does not duplicate the provisions of other conventions, such as Article 16 of the Beijing Convention. For instance, Article 11 contains a provision specifically relating to the restoration of control of the aircraft to its lawful commander, which is not found in other conventions. It was further noted that the parties to the various conventions may be different, which makes it necessary to maintain Article 11 intact in the Convention.

8.7 Future Work

8.7.1 In discussing the future work of the Sub-Committee, several delegations considered it premature at this stage to determine the extent of the amendments to the Tokyo Convention, or even to decide whether amendments are necessary or not. More time and efforts would be needed to identify the problems relating to unruly passengers that warrant or determine the scope of the amendments. Delegations need to report to their respective authorities and to undertake consultation with relevant departments and entities, including the airline industry. There was a unanimous view that another meeting of the Sub-Committee should be convened, preferably within the year 2012. Some delegations undertook to provide to the next meeting the relevant information of their respective countries about the problem of unruly passengers and encouraged other members of the Sub-Committee to do the same.

8.7.2 There was general consensus that the future work of this Sub-Committee should not result in duplicating offences or any matter which had been dealt with by other counter-terrorism conventions. Many delegations believed that the Tokyo Convention was generally not in need of a complete overhaul except for jurisdictional gaps identified. Modernization efforts should focus on addressing the unruly passengers problem. Some delegations therefore proposed to draft an amending protocol. One delegation cautioned that this proposal should not be taken to suggest that a protocol would be eventually needed. On this point, the Chair clarified that a draft of a stand-alone convention had been prepared by the Rapporteur and attached to his report. The purpose of a draft protocol was to provide the Sub-Committee with another possible option for consideration.

8.7.3 The Chair then summarized and the Sub-Committee agreed on the following decisions:

- a) Subject to the decision of the Council, the second meeting of the Sub-Committee should be convened at the first week of December 2012;
- b) A draft protocol should be prepared jointly by the Chair, the Rapporteur and the Secretariat, to be distributed to the members of the Sub-Committee well in advance of the second meeting; and
- c) Members and observers of the Sub-Committee are encouraged to provide additional data, material and information concerning unruly passengers in order to assist further study by the Sub-Committee.

8.7.4 The Chair also presented to the meeting her summary of the major points discussed at the meeting. Taking into account the comments offered at the meeting, the Chair has finalized the summary, which is set out in **Appendix 5** to this report.

APPENDIX 1**LIST OF PARTICIPANTS****MEMBERS**

Australia	Reid, J.D.
Brazil	De Mello Galvão, G. Landgraf, G. Reboucas, A.
Cameroon	Djon, J.
Canada	Lauzon, G., Q.C. Falls, D. Lalonde, S. Zigayer, M.
Chile	Lisboa, A. Mena, A. Espinoza, C. Faundez, M. T.
China	Guo, R. G. Chean, K. Yang, Y. Yuen, S.K.M. Zhang, J. Zhao, J.
Egypt	Ahmed, M. Ibrahim, A. I. K.
France	Olson, T. Baflast, C. Gougau-Ville, V. Mezi, E.
Italy	Bardaro, A.
Japan	Asahi, T. Kojina, M. Iwasaki, K. Koda, T. Furuhata, M.
Lebanon	Eid, S.
Mexico	Chain Serruno, C. A. Mendez, D.

Republic of Korea	Bae, J. Choy, S. Jong Kwan, J. Maeng, S.
Romania	Alexandru, A. M. Dobre, F. Muresan, R. A. I. Pop, S. A. C.
Russian Federation	Efimov, D.G. Druzhinin, A.A. Okonova, S.V.
Singapore	Tan, S. H. Kaur, R. Voon, Y. C. D.
South Africa	Chueu, M. Kotsé, T. S Mdlalose, B.
Switzerland	Noël, L. Cadrian, A.
United Arab Emirates	Piera, A.
United States	McDonald, S. Loring, C. Jennison, M.B. Burrows, T. Cors, D. Giovanniello, A. Tourtellot, C. T. Weir, E. J.

OBSERVER

African Civil Aviation Commission (AFCAC)	Gaiya, S. M.
International Air Transport Association (IATA)	Gill, M. Herbelles, N.
International Federation of Air Line Pilots' Associations (IFALPA)	McCarthy, P.

APPENDIX 2**SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE
FOR THE MODERNIZATION OF THE TOKYO CONVENTION
INCLUDING THE ISSUE OF UNRULY PASSENGERS**

Montréal, 22 – 25 May 2012

ORDER OF BUSINESS FOR THE FIRST DAY OF THE MEETING

(Conference Room 3, 1st Floor, Tuesday, 22 May 2012 at 1000 hours)

	Title	Documents for reference
1.	Opening of the Meeting	
2.	Election of the Chair and Vice-Chair	
3.	Consideration of the Rapporteur's Report	LC/SC-MOT-WP/1

APPENDIX 3

**SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE
FOR THE MODERNIZATION OF THE TOKYO CONVENTION
INCLUDING THE ISSUE OF UNRULY PASSENGERS**

Montréal, 22 – 25 May 2012

LIST OF DOCUMENTS

LC/SC-MOT-WP/1	Report of the Rapporteur
LC/SC-MOT-WP/2	The International Air Transport Association's Views on the Modernisation of The Tokyo Convention 1963 and the Emerging Problem of Unruly and Disruptive Passengers

APPENDIX 4**SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE
FOR THE MODERNIZATION OF THE TOKYO CONVENTION
INCLUDING THE ISSUE OF UNRULY PASSENGERS**

Montréal, 22 – 25 May 2012

**REPORT OF THE RAPPORTEUR OF THE SPECIAL SUB-COMMITTEE ON THE
PREPARATION OF AN INSTRUMENT TO MODERNIZE THE CONVENTION ON
OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT OF
1963**

Alejandro Piera

Introduction

During the 34th Session of the ICAO Legal Committee, which took place from 9-17 September 2009, the International Air Transport Association (IATA) tabled a proposal to form a Secretariat Study Group (SSG) in order to undertake a study on unruly and disruptive behaviour on board aircraft.¹ This proposal sought to consider whether or not the existing international legal regime should be revisited to address apparent flaws relating to the lack of jurisdiction and enforcement mechanisms when dealing with incidents occurring on board aircraft and involving unruly and disruptive passengers. Many delegations strongly supported the proposal.² With the full endorsement of its plenary session, the Legal Committee recommended to the Council that ICAO should undertake further studies on the subject matter.³ On 30 October 2009, Council approved the formation of the SSG.⁴

Following meetings in Montreal from 2-3 May 2011⁵ and in Paris from 3-4 October 2011,⁶ the SSG recommended that a Special Sub-Committee of the ICAO Legal Committee (LC-SC) be established to examine the feasibility of introducing amendments to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963*,⁷ with particular reference to the issue of unruly passengers.⁸ At the 5th meeting of its 194th Session held on 15 November 2011, Council considered SSG's report and decided to request the Chairman of the

¹ See ICAO, LC/34-WP/2-4.

² See ICAO, Doc. 9926-LC/194 at 4.1.

³ *Id.*

⁴ See ICAO, C-DEC 188/6 at 4 (f).

⁵ See ICAO, SSG-UNP/1-Report.

⁶ See ICAO, SSG-UNP/2-Report.

⁷ See ICAO Doc. 8364, *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, [hereinafter *Tokyo Convention*].

⁸ See ICAO, SG-UNP/2-Report, at 4.

Legal Committee to establish the LC-SC in order to review the existing international regime on unruly and disruptive passengers.⁹

By letter dated 20 December 2011, and pursuant to Article 17 of the Rules of Procedure of the ICAO Legal Committee (LC),¹⁰ Mr. Michael Jennison, Acting Chairman, appointed the author of this report as *rapporteur* of the LC-SC. By State Letter LM 3/21.1 IND/11/4 of 12 January 2012, the Secretary General, Mr. Raymond Benjamin invited twenty-five States to participate in the meeting of the LC-SC that will be held at ICAO's headquarters from 22 to 25 May 2012.¹¹

This report has been prepared by the rapporteur as a backgrounder to facilitate the deliberations of the LC-SC at its May 2012 meeting. The report is divided into ten sections. The first section underscores the need to employ a new terminology when dealing with disruptive behaviour on board aircraft. Section 2 explains why these incidents are a cause of growing concern. A brief description of the most salient features of the Tokyo Convention is provided in section 3, whereas section 4 highlights its major shortcomings. Section 5 identifies its legacy. A description of the strengths and weakness of the model guidance provided by ICAO on legal aspects of disruptive passengers is provided in section 6. Section 7 sheds light on why the international treaty-making machinery should be triggered. Following the mandate given by the Acting Chairman of the LC, section 8 proposes a new instrument for the consideration of the LC-SC. The full text of this proposal is reproduced in Appendix A. Appendix B includes a comparison with the Tokyo Convention. Section 9 underlines a number of issues in respect of which the author of this report has been unable to find definite answers, which the LC-SC may wish to further examine. Finally, in section 10 the author acknowledges all of those who have substantially contributed to this report.

1. A New Terminology: Unruly / Disruptive Persons on Board Aircraft

In the context of international civil aviation, the term “unruly or disruptive passenger” has always been used to refer to “passengers who fail to respect the rules of conduct on board aircraft or to follow the instructions of crew members and thereby disturb the good order and discipline on board aircraft.”¹² This suggests that passengers are at the centre of the problem and perhaps undermines the fact that there are a number of other contributing factors to the occurrence of unruly/disruptive behaviour on board aircraft. In addition, the term presupposes that only “passengers” can become unruly. Recently, however, some notorious, high profile incidents have demonstrated that crew members may also fail to respect the rules of conduct on board aircraft and may thereby become unruly or disruptive.¹³ In light of the foregoing, this

⁹ See ICAO, C-DEC 194/5.

¹⁰ See ICAO Doc. 7669-LC/139/5, Legal Committee Rules of Procedure, art. 17.

¹¹ See ICAO, State Letter LM 3/21.1 IND/11/4 of 12 January 2012.

¹² ICAO, Circular 288, Guidance Material on Legal Aspects of Unruly / Disruptive Passengers, at 1 [hereinafter *Circular*].

¹³ See Reuters, *Unruly JetBlue Pilot Charged with Interfering with the Flight* (May 1, 2012, 10:00 AM), <http://www.reuters.com/article/2012/04/13/uk-usa-jetblue-idUSLNE83C01E20120413>. The air carrier was forced to issue refunds to passengers for the inconvenience caused by the pilot's disruptive behaviour. See Los Angeles Times, *JetBlue to Issue Refunds, Vouchers after Pilot's Erratic Episode* (May 1, 2012, 10:00 AM), <http://articles.latimes.com/2012/mar/28/news/la-trb-jetblue-pilot-meltdown-20120328>. Similarly, earlier in March

report suggests that it would be more appropriate to use the terms “unruly/disruptive *persons* [instead of *passengers*] on board aircraft” or, alternatively, “unruly/disruptive behaviour on board aircraft.”

2. Incidents Involving Unruly/Disruptive Persons on Board Aircraft: A Growing Concern

Aviation is the fastest-growing mode of transportation. Air traffic demand has grown without parallel.¹⁴ Since more and more people travel by air each day, it may well be expected that more and more incidents involving unruly behaviour will occur on board aircraft. It should be of no surprise then that ICAO’s Aviation Security Panel (AVSECP) has on numerous occasions reported that the international aviation community is experiencing a steady increase in unruly and disruptive incidents.¹⁵ Clearly, the issue has attracted more attention since the 1990s.¹⁶ Back in 1997, reports indicated a peak of as much as 400% in the number of incidents as compared with 1995 levels.¹⁷ Lately, IATA’s most recent statistics have revealed a shocking 687% increase in incidents in 2009 as compared to 2007.¹⁸ A recent press report indicates that, in 2011, 127 incidents have occurred in the United States (US), 488 in Australia and 44 in the United Kingdom (UK).¹⁹ Although some commentators have expressed serious concerns about the reliability of data used to analyze these incidents due to the absence of a “commonly accepted methodology”,²⁰ these reports are nevertheless suggestive of an escalating trend.²¹

In addition to the unprecedented growth in the number of people flying, other factors may also help to explain this emerging phenomenon.²² These factors include poor, or (in some cases) inexistent airline customer service, consumption of alcohol²³ and illegal drugs, stuffy cabin air,²⁴

2012, a flight attendant also behaved erratically causing significant disruption to passengers on an American Airlines flight from Dallas-Fort Worth to Chicago. See Chicago Tribune, *American Attendant Disrupts Flight to Chicago* (May 1, 2012, 10:00 AM), http://articles.chicagotribune.com/2012-03-09/news/chi-american-airlines-flight-attendant-disrupts-flight-en-route-to-chicago-20120309_1_flight-attendant-plane-startling-passengers.

¹⁴ See Airbus, *Delivering the Future: Global Market Forecast 2011-2030* (May 1, 2012, 10:00 AM), <http://www.airbus.com/company/market/forecast/>.

¹⁵ See ICAO, AVSECP/20 Report, Discussion at 5.2.11.

¹⁶ See William Mann, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky* 861, 65 J.A.L.C. (2000) [hereinafter *Mann*].

¹⁷ See Peter Reiss, *The Disruptive Passenger: Social Inconvenience of Potential Catastrophy?* 24, 24 IFALPA International Quarterly Review (1997) at 24 [hereinafter *Peter Reiss*].

¹⁸ See ICAO, AVSECP/20-WP/21.

¹⁹ See Wall Street Journal, *Cracking Down on Crime in the Skies* (May 1, 2012, 10:00 AM), <http://online.wsj.com/article/SB10001424052970204778604577239411606291588.html>.

²⁰ Angela Dahlberg, *Air Rage: The Underestimated Safety Risk* (2001) at 47 [hereinafter *Dahlberg*].

²¹ Similarly, the majority of ICAO Member States have yet to establish a reporting system to register these types of incidents. See Jiefang Huang, *ICAO Study Group Examines the Legal Issues Related to Unruly Airline Passengers* 1, 18 56 ICAO Journal (2001) [hereinafter *Huang*].

²² See Dahlberg, *supra* note 20.

²³ See Lise Anglin, Paula Neves, Norman Giesbrecht, and Marianne Kobus-Matthews, *Alcohol-Related Air Rage: From Damage Control to Primary Prevention* 283, 292 23 The Journal of Primary Prevention (2003).

²⁴ See Margaret P. Fogg, *Air Rage: Is it a Global Problem? What Proactive Measures Can be Taken to Reduce Air Rage, and Whether the Tokyo Convention Should be Amended to Ensure Prosecution of Air Rage Offenders?* 512, 533 7 ILSA J. Int’l & Comp. L. (2000).

smoking bans, claustrophobia, persistent flight delays, insufficient leg room in the cabin, overbooking situations, confined and cramped conditions on board aircraft, fear of flying, the mental conditions of passengers and crew, intrusive security measures, inappropriate crew training, the intrinsic level of stress that the air travel experience bears nowadays, and lack of prosecution and enforcement.

Arguably, these incidents “continue to be a concern, and a lasting solution needs to be found by addressing the root cause of the problem.”²⁵ It is not disputed that “a minor infraction which may be inconsequential on the ground can produce disastrous effects in the air. For this reason, offences on board aircraft merit special attention.”²⁶

3. Tokyo Convention

In 1963, delegates from 61 States²⁷ participated in a three-week Diplomatic Conference held in Tokyo, Japan.²⁸ At the end of the Diplomatic Conference, sixteen States signed the Tokyo Convention on 14 September 1963.²⁹ The Tokyo Convention subsequently entered into force on 4 December 1969 and, today, remains one of the most widely ratified international instruments ever developed under the auspices of ICAO.³⁰

3.1.Objectives

Given that various national laws provided different scenarios for the extra-territorial application of rules of jurisdiction over crimes committed on board aircraft, the drafters of the Tokyo Convention intended to achieve some degree of international uniformity in the rules applicable to the prosecution of offences committed on board aircraft.³¹ In this respect, the *raison d’être* of the Tokyo Convention was to: (i) grant the State of registry jurisdiction over acts occurring aboard the aircraft;³² (ii) allow the aircraft commander certain prerogatives to handle passengers in those situations where they have already committed or are about to commit an

²⁵ ICAO, AVSECP/20 Report, Conclusion 5.3.1. (d).

²⁶ ICAO, C-WP/11066.

²⁷ See Gerald F. FitzGerald, *Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963* 191 2 Can. Y. B. Int’l L. (1964) [hereinafter *FitzGerald I*].

²⁸ See ICAO Doc. 8565-LC/152-1, Vol. 1 at XIV [hereinafter *Tokyo Diplomatic Conference Minutes*]. To have an idea of what the air transport environment was at the time, it is worth recalling that the year prior to the adoption of the Tokyo Convention air carriers transported only 123 million passengers – 11% more than in 1961. See ICAO News Release, 28 December 1962 cited in Gerald F. FitzGerald, *The Development of International Rules Concerning Offences and Certain Other acts Committed on Board Aircraft* 230, 233 1 Can Y. B. Int’l L. (1963) [hereinafter *FitzGerald II*]. Almost 50 years later the air transport market is substantially different. By 2014, airlines will carry 3.3 billion passengers per year. See IATA, *Industry Expects 800 Million More Travellers by 2014 – China Biggest Contributor* (May 1, 2012, 10:00 AM), <http://www.iata.org/pressroom/pr/Pages/2011-02-14-02.aspx>.

²⁹ These countries were: China, Congo, Federal Republic of Germany, Guatemala, Holy See, Indonesia, Italy, Japan, Liberia, Panama, Philippines, Republic of the Upper Volta, Sweden, United Kingdom, United States and Yugoslavia. See *Tokyo Diplomatic Conference*, *supra* note 28, at XVI.

³⁰ To date, 185 States are parties to the Tokyo Convention. See ICAO, *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (May 1, 2012, 10:00 AM), http://www2.icao.int/en/leb/List%20of%20Parties/Tokyo_en.pdf.

³¹ See *FitzGerald II*, *supra* note 28, at 232. See Also *Tokyo Diplomatic Conference Minutes*, *supra* note 28, at 227.

³² See Jacques de Watteville, *La Piraterie Aérienne* (1978) at 83.

offence or an act that may jeopardize the safety of the aircraft;³³ (iii) set forth the responsibilities of the State of landing where the alleged offender may be disembarked or delivered; and, (iv) to some extent, address the crime of hijacking³⁴ - although the convention was originally not conceived as an instrument to deal with acts of unlawful interference with aircraft.³⁵

3.2.Scope

The Tokyo Convention applies to those criminal offences committed whilst the aircraft is in-flight or on the surface of the high seas or in a non-sovereign territory, as well as to those acts, which may not be criminal offences, but may still jeopardize the safety of the aircraft or the good order and discipline on board.³⁶ The aircraft, which must be registered in a State Party,³⁷ is considered to be in-flight “from the moment when power is applied for the purpose of take off until the moment when the landing run ends.”³⁸ The drafters adopted the definition of in-flight from the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952*.³⁹

The Tokyo Convention does not establish specific criminal offences or acts that may pose a threat to the safety of the aircraft and persons on board, but rather leaves them to the discretion of each State Party. The differentiation between “offences” and “acts” allows States to establish in their national laws, on one hand, criminal offences committed on board a registered aircraft, and on the other hand, those acts that may constitute a civil violation of aviation regulations.⁴⁰

³³ See Juan J. Lopez Gutierrez, *Should the Tokyo Convention of 1963 be Ratified?* 1,4 31 J.A.L.C. (1965) [hereinafter *Gutierrez*].

³⁴ See Robert P. Boyle and Roy Pulsifer, *The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft* 305, 328 30 J. A.L.C. (1964) [hereinafter *Boyle and Pulsifer*].

³⁵ See Michael Milde, *The International Fight against Terrorism in the Air* (3 June 1993) (unpublished, on file with the author). The preparatory work that led to the adoption of the Tokyo Convention had mainly focused on issues relating to the legal status of the aircraft. It was only in 1962, the year prior to the Tokyo Diplomatic Conference, that the United States and Venezuela jointly tabled a proposal to make specific reference to aircraft hijacking. Under this proposal, the State of first landing should facilitate the restoring of the aircraft and should also permit that the aircraft, crew, and passengers continue with their journey. By codifying customary international law, this later came to be Art. 11 of Tokyo Convention. See Edward McWhinney, *Aerial Piracy and International Terrorism: The Illegal Diversion of Aircraft and International Law* (2nd Ed. 1987) at 36.

³⁶ See Tokyo Convention, *supra* note 7, art. 1 (a) & (b). See also Sofia Michaelides, *Unruly Passenger Behaviour and the Tokyo Convention* 38, 40 6 Cov. L. J. (2001) [hereinafter *Michaelides*].

³⁷ See Jacob M. Denaro, *In-Flight Crimes, The Tokyo Convention, and Federal Judicial Jurisdiction* 171, 172 35 J.A.L.C. (1969) [hereinafter *Denaro*].

³⁸ Tokyo Convention, *supra* note 7, art. 1, paragraph 3.

³⁹ See Boyle and Pulsifer, *supra* note 34, at 330. See ICAO Doc. 7364, *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface* [hereinafter *Rome Convention*].

⁴⁰ See FitzGerald I, *supra* note 27, at 194. Violations of “air regulations” may involve serious and less serious offences. Some “air regulations” applicable to passengers could be serious in that violations pose a hazard to aircraft safety (i.e. prohibition to smoke in aircraft lavatories or to tamper with a smoke detector, and prohibition to use an electronic portable device (EPD)). Other violations may be of a less serious nature, for that they may not pose a threat to the safety of the aircraft, but perhaps may endanger the safety of the passenger concerned. These could include not using seatbelts or not remaining seated in periods of turbulence when the aircraft commander so instructs. Email from Siew Huay Tan, Director Legal Services, Civil Aviation Authority of Singapore (May 5, 2012) (on file with the author) [hereinafter *Siew Huay Tan*].

3.3. Jurisdiction

Although jurisdiction is primarily vested in the State of registry,⁴¹ the Tokyo Convention “does not exclude any criminal jurisdiction exercised in accordance with national laws.”⁴² In this respect, the Tokyo Convention does not establish exclusive jurisdiction but rather opts for a system of concurrent jurisdiction.⁴³ As the State of registry, a State Party bears a “best efforts” obligation to assert its jurisdiction over criminal offences committed on board aircraft registered by it. However, there is no similar obligation for acts which may jeopardize safety or the good order and discipline on board the aircraft.⁴⁴ A State Party that is not the State of registry may exercise jurisdiction only under very specific circumstances (i.e., if the offence has effect in the territory of the State in question).⁴⁵

3.4. Powers and Duties of the Aircraft Commander

Before the adoption of the Tokyo Convention there were no international rules in place addressing the “status, powers, and duties of the aircraft commander.”⁴⁶ Under the Tokyo Convention the aircraft commander is given the authority to take “reasonable” measures which are “necessary” to restore order in the aircraft when he or she has “reasonable grounds to believe” that a person has committed or is about to commit a criminal offence or an act that may jeopardize safety.⁴⁷ For instance, it has been suggested that the aircraft commander is obliged to apprehend a passenger who poses a risk to safety. Yet the aircraft commander is not required to do so, if the offence in question does not pose a safety risk, such as in the case of theft.⁴⁸ The aircraft commander’s prerogative encompasses a two-pronged subjective/objective test.⁴⁹ The measure that the aircraft commander decides to take must not only be subjectively “reasonable” but must also be objectively “necessary” to protect the safety of the aircraft, maintain good order and discipline on board, or to allow delivery or disembarkation, given the circumstances of the particular case.⁵⁰

During the Tokyo Diplomatic Conference, the delegate of Switzerland unsuccessfully proposed that the words “reasonable grounds to believe” should be replaced with “serious grounds to believe.”⁵¹ This proposal was defeated by a vote of 13 to 11.⁵² Whilst discussing this provision, the delegate of the United States underscored that the standard of reasonable grounds would imply that “the aircraft commander would be required to have a substantial basis for his [or her] belief, that he [or she] could not act on the basis of the facts which were inadequate to

⁴¹ See Tokyo Convention, *supra* note 7, art. 3, paragraph 1.

⁴² *Id.*, art. 3, paragraph 3.

⁴³ See Nancy Douglas Joyner, *Aerial Hijacking as an International Crime* (1974) at 137 [hereinafter *Douglas Joyner*].

⁴⁴ See Tokyo Convention, *supra* note 7, art. 3, paragraph 2.

⁴⁵ *Id.*, art. 4.

⁴⁶ Arnold W. Knauth, *The Aircraft Commander in International Law* 156, 157 14 J.A.L.C. (1947) [hereinafter *Knauth*].

⁴⁷ See Tokyo Convention, *supra* note 7, art. 6, paragraph 1.

⁴⁸ See FitzGerald II, *supra* note 28, at 243.

⁴⁹ See Tokyo Diplomatic Conference Minutes, *supra* note 28, at 147.

⁵⁰ See Tokyo Convention, *supra* note 7, art. 6, paragraph 1.

⁵¹ Tokyo Diplomatic Conference Minutes, *supra* note 28, at 153.

⁵² *Id.*, at 160.

support his [or her] belief to the effect that a person had committed or was about to commit the kind of act under consideration. In other words, the aircraft commander could not act arbitrarily or capriciously.”⁵³

In order for the aircraft commander to establish whether an offence has been or is about to be committed, he or she needs to assess the relevant national laws of the State of registry. Some delegates of the Tokyo Diplomatic Conference were of the view that when carrying out this assessment, the aircraft commander could exercise common sense.⁵⁴ It is noteworthy that any crew member or any passenger may also take reasonable preventive measures without the aircraft commander’s authorization, provided that such measures are immediately necessary to protect the safety of the aircraft.⁵⁵ The words “immediately necessary” impose a much higher threshold for crew members or passengers, as compared to the standard applicable to the actions of the aircraft commander.

Other prerogatives of the aircraft commander include the power: (i) to require assistance from crew members; (ii) to request assistance from other passengers;⁵⁶ (iii) to disembark any person in any State, whether or not it is party to the Tokyo Convention, when he or she has reasonable grounds to believe that such person has committed or is about to commit an act which may jeopardize the safety or the good order and discipline of the aircraft;⁵⁷ and, (iv) to deliver to the authorities of a State Party any person when he or she has reasonable grounds to believe that such person has committed or is about to commit a serious offence under the national laws of the State of registry.⁵⁸

Although they appear similar, the concepts of “disembarkation” and “delivery” are substantially different. Disembarkation relates to a decision by the aircraft commander to off-load a person from the aircraft. In this case, the aircraft commander does not turn the person over to the competent authorities on the ground. Although the aircraft commander bears the obligation of reporting that a person has disembarked, that person may certainly walk free upon arrival, should the landing State elect not to take any measures. One may assume that disembarkation is intended to cover acts of a less serious nature, such as some violations of air regulations. Delivery, on the other hand, refers to the off-loading and turning over of the person to the authorities on the ground. It is used in cases of serious offences or acts of unlawful interference.⁵⁹

⁵³ *Id.*, at 155.

⁵⁴ See FitzGerald I, *supra* note 27, at 196.

⁵⁵ See Tokyo Convention, *supra* note 7, art. 6, paragraph 2.

⁵⁶ In seeking assistance to restrain a person on board the aircraft, the Tokyo Convention establishes a distinction between crew members and passengers. Given his or her line of authority, the aircraft commander is entitled to demand (require in the words of the Convention) that a crew member assists him or her in carrying out such restraint measures. The crew member is in no position to deny such sought assistance. However, the aircraft commander may only request assistance from a passenger. The latter can certainly opt not to cooperate with the aircraft commander. *Id.*, art. 6, paragraph 2.

⁵⁷ *Id.*, art. 8, paragraph 1.

⁵⁸ *Id.*, art. 9, paragraph 1.

⁵⁹ The following examples may help to better illustrate the distinction between these two different features. Despite being clearly intoxicated, a passenger manages to board the aircraft. The gate agents do not notice the passenger’s condition. Once the aircraft’s doors are closed, the flight attendants notice a very strong alcohol odour coming from

The Tokyo Convention provides that the aircraft commander may exercise his or her powers “from the moment when all [the aircraft’s] external doors are closed following embarkation until the moment when any such door is opened for disembarkation.”⁶⁰ This is a different and much longer temporal period as compared to the notion of an aircraft being in-flight [i.e., from the moment when power is applied for take-off until the end of the landing run] that governs all other aspects of the Tokyo Convention. During the Tokyo Diplomatic Conference, IATA unsuccessfully suggested that the Convention’s temporal scope should coincide with the period during which the powers of the aircraft commander were applicable.⁶¹

Although the Tokyo Convention was designed with the idea of granting ample powers to the aircraft commander,⁶² this does not in any way imply a “carte blanche” for the aircraft commander. The exercise of these powers must be carried out within the context of, and the parameters established by the Convention. As will be explained below, failure to do so may trigger the liability not only of the aircraft commander, but also of the aircraft operator.

In addition to these prerogatives, the Tokyo Convention imposes a number of obligations on the aircraft commander.⁶³ These include the duty to: (i) notify the State of landing that a person has been restrained and provide the justification for such measure;⁶⁴ (ii) discontinue measures taken on board once the aircraft lands;⁶⁵ (iii) report to the authorities of the State of landing when a person will be disembarked;⁶⁶ (iv) notify the State of landing that a person will be delivered to the competent authorities;⁶⁷ and, (v) provide to such authorities all evidence relating to the offence committed on board the aircraft.⁶⁸ Commentators have indicated that

the passenger. Whilst speaking to other passengers, it becomes evident that the passenger in question is under the influence of alcohol. The Purser of the flight reports the incident to the aircraft commander. The latter decides to return the aircraft to the gate and disembark the passenger. Although the authorities on the ground are notified of the incident, they decide not to take measures. Half way through the flight, a passenger becomes violent and physically assaults a flight attendant. The issue is reported to the aircraft commander, who immediately decides to divert the flight to the closest airport. The aircraft commander reports the incident and informs the authorities that the passenger will be delivered on the ground. Upon further questioning, law enforcement authorities on the ground decide to charge the passenger with the offences of assault and interference with a crew member.

⁶⁰ Tokyo Convention, *supra* note 7, art. 5, paragraph 2. During the preparatory work to the Tokyo Diplomatic Conference, a proposal was tabled to expand the timeframe of the powers of the aircraft commander from the moment when embarkation begins until such process is completed. The Tokyo Diplomatic Conference, however, rejected this proposal, for it was thought that if something were to occur from the moment the boarding process starts until the doors are closed, the aircraft commander and the crew could obtain assistance from the authorities on the ground. See FitzGerald I, *supra* note 27, at 193.

⁶¹ See ICAO Doc. 8565-LC/152-2, Vol. II at 146 [hereinafter *Tokyo Diplomatic Conference Minutes Vol. II*].

⁶² See Aaron B. Swerdlow, *Modern Approaches to the Powers of the Aircraft Commander under Article 6 of the Tokyo Convention* 105 10 Issues in Aviation Law and Policy (2010) [hereinafter *Swerdlow*].

⁶³ See Nicolas Mateesco Matte, *Treatise on Air-Aeronautical Law* (1981) at 343 [hereinafter *Matte*].

⁶⁴ See Tokyo Convention, *supra* note 7, art. 7, paragraph 2.

⁶⁵ *Id.*, art. 7, paragraph 1.

⁶⁶ *Id.*, art. 8, paragraph 2.

⁶⁷ *Id.*, art. 9, paragraph 2.

⁶⁸ *Id.*, art. 9, paragraph 3. See also Russel Kane, *Time to Put Teeth into Tokyo?* 187, 192 43 ZLW (1994) [hereinafter *Kane*].

failure to carry out these duties may deprive the aircraft commander of his or her immunity, for he or she would be deemed to be acting outside the context of the Convention.⁶⁹

3.5. Immunity

Although “reasonable” measures “necessary” to restrain a person on board the aircraft taken by an aircraft commander, a crew member, or potentially a passenger, may later be subject to legal scrutiny, the Tokyo Convention exempts the persons taking those measures as well as the aircraft operator from any responsibility and liability in any proceedings brought by the person against whom such measures were taken.⁷⁰ This includes exoneration from criminal, administrative, and civil liabilities.⁷¹ This exemption, however, does not prevent an action from being brought by another passenger (third party) who is accidentally injured by the actions of the aircraft commander.⁷²

The rationale of granting this exoneration was based on the notion that “there should be internationally adopted rules which would enable aircraft commanders to maintain order on board, whether in respect to offences or of any acts endangering safety of the aircraft or persons or goods on board an aircraft engaged in international [air] navigation.”⁷³ Boyle and Pulsifer explain that the “aircraft commander may make an incorrect determination and deliver to competent authorities a person whose act under the law of the State of registry may be only a minor offence, but, if in his [or her] opinion it was a serious offence, and this subjective judgment had some reasonable basis in fact, and was not arbitrary and capricious, the aircraft commander would be acting within the scope of his [or her] authority.”⁷⁴

This exoneration, immunity or what has otherwise been termed as the “escape clause”⁷⁵ does not apply in cases where excessive power is used.⁷⁶ This clause was the subject of one of the most heated debates during the Tokyo Diplomatic Conference.⁷⁷ In fact, a motion supporting its complete removal was ultimately defeated by a slight margin of 3 votes (19-16).⁷⁸ Those who advocated getting rid of the immunity provisions were of the view that this contradicts “the principle whereby no one can be wholly freed from responsibility for his [or her] actions, even though the circumstances of the aircraft commander’s peculiar position are grounds for not judging that responsibility too harshly.”⁷⁹

3.6. Duties of States

⁶⁹ See Sami Shubber, *Jurisdiction over Crimes on Board Aircraft* (1973) at 237 [hereinafter *Shubber*].

⁷⁰ See Tokyo Convention, *supra* note 7, art. 10. See also Boyle and Pulsifer, *supra* note 34, at 328.

⁷¹ See FitzGerald I, *supra* note 27, at 197; Philippe Richard, *La Convention de Tokyo* (1971) at 138.

⁷² Robert F. Klimek *International Law – Convention on Offences and Certain Other Acts Committed on Board Aircraft – The Tokyo Convention* 485, 502 20 DePaul L. Rev. (1971).

⁷³ Boyle and Pulsifer, *supra* note 34, at 321.

⁷⁴ *Id.*, at 336.

⁷⁵ Gerald F. FitzGerald, *Toward Legal Suppression of Acts against Civil Aviation* 49 39 Int’l Conciliation (1970) [hereinafter *FitzGerald III*].

⁷⁶ See Christian Giesecke, *Unruly Passengers and Respective Passenger Rights* 546, 552 51 ZLW (2002).

⁷⁷ See FitzGerald I, *supra* note 27, at 197.

⁷⁸ See Tokyo Diplomatic Conference Minutes, *supra* note 28, at 231.

⁷⁹ Tokyo Diplomatic Conference Minutes Vol. II, *supra* note 61, at 160.

Under the Tokyo Convention, State Parties assume a number of obligations. Amongst others, these include the duty: (i) to allow disembarkation of a person;⁸⁰ (ii) to accept delivery of a person when the aircraft commander so requests;⁸¹ (iii) to take custody of a person who has allegedly committed an act of unlawful interference;⁸² (iv) to allow the person in custody to communicate with the authorities of his or her home State;⁸³ (v) to conduct a preliminary enquiry into the facts when the aircraft commander delivers a person or when the alleged offender is involved in an act of unlawful interference;⁸⁴ (vi) to notify the State of registry and the State of the person held under custody of the circumstances that warrant such detention;⁸⁵ and, (vii) to promptly report findings when conducting an enquiry into the facts.⁸⁶ In cases involving acts of unlawful seizure of aircraft, each State Party bears “best efforts” to restore control of the aircraft to the (lawful) aircraft commander.⁸⁷ If the aircraft lands in a State Party, the State must allow passengers and crew to continue with their journeys as soon as possible.⁸⁸

4. The Shortcomings of the Tokyo Convention

The following section addresses some of the major criticisms that the Tokyo Convention has attracted.

4.1. The Lack of Definition of “Offence”

The Tokyo Convention does not define what constitutes an “offence” under criminal laws, nor does it set forth the acts that may jeopardize good order and discipline on board aircraft. These are left to the discretion of each State Party. It has also been said that the fact that the Tokyo Convention does not categorize “jeopardizing acts” as “serious crimes” is one of the instrument’s main flaws.⁸⁹

This lack of definition defies the whole purpose of harmonization in international law. In many cases, it creates an insurmountable lacuna.⁹⁰ Although it is uncontested that the high number of ratifications suggests that the Tokyo Convention enjoys almost universal acceptance, it is also true that numerous State Parties have failed to adopt implementing legislation. This undermines its practical effectiveness.⁹¹

⁸⁰ See Tokyo Convention, *supra* note 7, art. 12.

⁸¹ *Id.*, art. 13, paragraph 1. This obligation is without prejudice to the right of the State of landing with regard to the expulsion from its territory of the person being delivered. See Matte, *supra* note 63, at 347.

⁸² *Id.*, art. 13, paragraph 2.

⁸³ *Id.*, art. 13, paragraph 3. See also Denaro, *supra* note 37, at 179.

⁸⁴ *Id.*, art. 13, paragraph 4.

⁸⁵ *Id.*, art. 13, paragraph 5.

⁸⁶ *Id.*

⁸⁷ *Id.*, art. 11, paragraph 1.

⁸⁸ *Id.*, art. 11, paragraph 2.

⁸⁹ See Kane, *supra* note 68, at 195.

⁹⁰ See Michaelides, *supra* note 36, at 45.

⁹¹ A 1999 ICAO progress report on the implementation of Assembly Resolution A32-22 indicated that 45 Member States had national legislation in place implementing the organization’s aviation security instruments. This included: (i) the Tokyo Convention, (ii) The Hague Convention; (iii) the Montreal Convention; (iv) the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the

4.2. Definition of “In-Flight”

The adoption of the temporal threshold is at best problematic.⁹² Under the existing definition of “in-flight”, offences committed while the aircraft is taxiing or being pushed back before take-off by an auxiliary power unit (APU) fall outside the scope of the Tokyo Convention. Yet, the aircraft commander is authorized to exercise his or her prerogatives. If the offence is committed once the aircraft doors are closed, but before power is applied for the purpose of take-off, presumably national laws would apply.

To avoid this dual regime, ICAO decided to depart from this approach in the *Convention for the Suppression of Unlawful Seizure of Aircraft of 1970*⁹³ and the *Convention of the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971*.⁹⁴ Similarly, the *Convention on Compensation for Damage Caused by Aircraft to Third Parties*, and the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* define in-flight as commencing “from the moment when all [the aircraft's] external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.”⁹⁵ Most recently, the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation of 2010*⁹⁶ employs a very similar definition. For this instrument, “an aircraft is considered to be in-flight at any time 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 flight shall be

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1988); and (v) the Convention on the Marking of Plastic Explosives for the Purpose of Detection (Montreal, 1991). In 2000, a subsequent report noted that the number of States rose to 50, but a year later when providing another report, this time on the implementation of Assembly Resolution A33-22, the number dropped again to 46 States. In the best case scenario, the numbers correspond to roughly 26% of ICAO's membership. Leaving inaccuracies aside, these numbers may well be very indicative of the level of Member States' implementation of ICAO's aviation security conventions. Although no recent data are available, nothing would seem to suggest that a significant improvement has recently taken place in this respect. The adoption of national implementing legislation becomes essential. See ICAO, C-WP/11103, Appendix A; ICAO, C-WP/11445, Appendix A.

⁹² See Kane, *supra* note 68, at 195.

⁹³ See Convention for the Suppression of Unlawful Seizure of Aircraft, art. 3, paragraph 1, Dec. 16, 1970, 860 U.N.T.S. 12325 [hereinafter *The Hague Convention*]. For The Hague Convention, “an aircraft is considered to be in flight at any time 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 flight shall be deemed to continue until the competent authorities take over the responsibility of the aircraft and for persons and property on board.”

⁹⁴ See Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 2, paragraph (a), Sep. 23, 1971, 974 U.N.T.S. 14118 [hereinafter *Montreal Convention*]. The Montreal Convention incorporates the same definition of “aircraft in-flight.”

⁹⁵ See ICAO Doc. 9919, *Convention on Compensation for Damage Caused by Aircraft to Third Parties*, signed in Montreal on 2 May 2009 [hereinafter *General Risks Convention*]. See also ICAO Doc. 9920, *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* [hereinafter *Unlawful Interference Convention*].

⁹⁶ See Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Sep. 10, 2010 [hereinafter *Beijing Convention*].

deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.”⁹⁷

Inexplicably though, the Tokyo Convention does not apply this more rational temporal threshold. The two definitions of “in-flight” can only result in confusion.

4.3. No Definition of “Good Order” and “Discipline”

As constitutive elements of acts that trigger the Tokyo Convention’s application, the terms “good order” and “discipline” may be regarded as imprecise and may be subject to conflicting judicial interpretation.⁹⁸ For instance, in *U.S. v. Flores*, a United States Court held that not every assault interferes with a flight attendant’s duties.⁹⁹ Likewise, a German Court has found that smoking in the lavatory did not interfere with the safety of the flight.¹⁰⁰ Albeit not expressly mentioned in any of these decisions, the Courts dicta imply that none of these acts jeopardized good order and discipline on board.

4.4. Lack of Mandatory Jurisdiction

Although the State of registry is competent to exercise jurisdiction over offences and acts committed on board its aircraft,¹⁰¹ commentators often contend that this does not in any way imply an obligation to exercise jurisdiction. The Tokyo Convention does not provide for mandatory jurisdiction.¹⁰² In fact, the State of registry is only obliged to “take measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.”¹⁰³ This only speaks about “offences.” Given this language, it is even questionable whether there is any legal basis for the State of registry to exercise jurisdiction over acts that are not criminal offences but which may nonetheless jeopardize the safety of the aircraft or the good order and discipline on board.¹⁰⁴ Under the current regime, this would seem to be optional for States Parties.¹⁰⁵

The wording of the Tokyo Convention grants States Parties so much flexibility that, in practice, the exercise of jurisdiction even for the State of registry, is reduced to a mere “best efforts” obligation. Although the lack of mandatory jurisdiction has been identified as one of the Convention’s weak points, in practice this is the approach most often adopted in many international instruments related to the prevention and suppression of international terrorism and concluded under the auspices of the United Nations of which the Tokyo Convention is one.

4.5. The Jurisdictional Gap

⁹⁷ *Id.*, art. 2 (a).

⁹⁸ See Christian Giesecke, *Unruly Passengers: The Existing Legal System and Proposed Improvements* 46, 53 26 *Annals of Air & Space Law* (2001) [hereinafter *Giesecke*].

⁹⁹ *U.S. v. Flores*, 968 F.2d 1366 (1992).

¹⁰⁰ See Giesecke, *supra* note 98, at 53.

¹⁰¹ See Tokyo Convention, *supra* note 7, art. 3 (1).

¹⁰² See Douglas Joyner, *supra* note 43, at 134.

¹⁰³ Tokyo Convention, *supra* note 7, article 3, paragraph 2.

¹⁰⁴ See Giesecke, *supra* note 98 at 53.

¹⁰⁵ See Kane, *supra* note 68, at 190.

Numerous unruly persons are left unpunished due to lack of jurisdiction. In fact, in many cases the State of landing is unable to exercise jurisdiction.¹⁰⁶ There is a jurisdictional gap. The Tokyo Convention produces a paradoxical and sometimes absurd result. Although the State of landing cannot assert jurisdiction when the offence is committed on board an aircraft registered in another State, unless the offence affects in some manner its territory or it involves national security issues,¹⁰⁷ it is nonetheless required to meet obligations such as: accepting passengers delivered by the aircraft commander, taking custody of certain persons, and making immediate preliminary enquiries into the facts.¹⁰⁸ One is left to wonder how these obligations are to be performed by the State of landing in the absence of the power to exercise jurisdiction.

This jurisdictional gap was identified as far back as 1997.¹⁰⁹ The following hypothetical example may better illustrate the Tokyo Convention's jurisdictional gap:

Thai Airways (TG) flight # 1974 takes off from Bangkok International Airport (Thailand) bound for Osaka Kansai (KIX) (Japan). During the flight, a Mongolian passenger twice smokes a Cuban cigar in the business class lavatory. When a TG flight attendant (FA) demands that the passenger stops smoking, the passenger verbally and physically assaults her. As a result of the incident, the FA suffers severe physical injuries. Upon arrival at KIX, TG's Captain demands that KIX police detain the passenger. The latter is delivered to the police. After an assessment of the factual elements of the case, KIX police concludes that there is no jurisdiction to prosecute offences which were committed: (i) on board an aircraft registered in a State other than Japan (Thailand); (ii) outside Japanese territory (i.e., somewhere over the high seas); (iii) by an offender who was not Japanese (Mongolian). Reasoning that there were insufficient connecting elements that link the case to Japan, and on the basis that the Japanese legal system does not extend Japan's jurisdiction to cover these types of acts, KIX police free the Mongolian passenger without trial or penalty. Despite having seriously jeopardized the safety of flight TG 1974, the Mongolian passenger walks away in absolute impunity.

Enabling the State of landing to exercise jurisdiction presents a number of advantages. As has been wisely noted by Mendelsohn, "when the aircraft lands, all the passengers, ergo, all potential witnesses to the offence, are present."¹¹⁰ In addition to closing the jurisdictional gap, it also discourages the occurrence of criminal acts on board aircraft.¹¹¹ *A contrario*, it has been

¹⁰⁶ See J. M. Sharp *Canada and the Hijacking of Aircraft* 451, 454 5 Man. L. J. (1972).

¹⁰⁷ See Tokyo Convention, *supra* note 7, art. 4.

¹⁰⁸ See Ruwantissa I.R. Abeyratne, *Unruly Passengers – Legal, Regulatory and Jurisdictional Issues* 46, 53 24 Air & Space Law (1999).

¹⁰⁹ See Peter Reiss, *supra* note 17, 25.

¹¹⁰ Allan I. Mendelsohn, *In-Flight Crime: The International and Domestic Picture Under the Tokyo Convention* 509, 514 53 Va. L. Rev. (1967) See also See John Fenston and Hamilton De Saussure, *Conflict in the Competence and Jurisdiction of Courts of Different States to Deal with Crimes Committed on Board Aircraft and the Persons Involved Therein* 66, 86 1 McGill L. J. (1953).

¹¹¹ See Gutierrez, *supra* note 33, at 4.

suggested that the disadvantage of the State of landing relates to the fact that such State may lack interest in exercising jurisdiction when most of the elements are foreigners to its legal system (i.e. aircraft registered in another State, offender from another State, victim from another State).¹¹² This line of reasoning is “that the mere fact that an aircraft lands in a State does not supply a sufficient nexus with that State to give it the right to extend its laws.”¹¹³ Thus, “there [might] not [be] the slightest connection between the offence and the criminal law of the place where the aircraft happens to land after the offence has been committed.”¹¹⁴

Critics of the notion that the State of landing should have jurisdiction often forget that even when a given offence may only involve elements that are foreign to the State of landing, failure to provide such a State with the basis for exercising jurisdiction, if the facts of the case so merit, may significantly undermine the integrity of the air transport system as a whole. It may also contribute to the creation of an undesirable sense of lawlessness – something that the international community should not tolerate. States ought to undertake measures to prevent the occurrence of offences and acts that may jeopardize the safety of those flying by air even when a given case concerns only foreign elements. States would certainly like to avoid a situation in which their own nationals are left unprotected on the basis that the State of landing in another country was unable to exercise jurisdiction. As John Fenstos noted almost 60 years ago, offences committed on board an aircraft in flight are “*crimes de droit commun*” which “each civilized nation is charged with the duty and responsibility to suppress and punish.”¹¹⁵

The idea of jurisdiction for the State of landing is not a novel concept. In fact, the aviation law committee of the International Law Association studied this issue as early as 1922. In 1929, Pholien prepared a report on this subject.¹¹⁶ Later, in 1953 Honig advanced some of the advantages of the State of landing jurisdiction.¹¹⁷ Some reference to this also appeared in early drafts of the Tokyo Convention.¹¹⁸ During the Tokyo Diplomatic Conference, jurisdiction of the State of landing within a system of priorities was discussed. Although the idea received the support of a number of States, the proposal was ultimately defeated.¹¹⁹ Despite this setback, ICAO has embraced the State of landing jurisdiction in The Hague¹²⁰ and Montreal Conventions,¹²¹ and most recently in the Beijing Convention,¹²² and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft of 2010*.¹²³

4.6. Leased Aircraft

¹¹² See Matte, *supra* note 63, at 332.

¹¹³ Gary L. Bohlke, *Crimes Aboard Aircraft: Jurisdictional Considerations* 139, 148 5 J. L. & Econ. Dev. (1971).

¹¹⁴ Jan Piet Honig, *Legal Status of Aircraft* (1956) at 141 [hereinafter *Honig*].

¹¹⁵ John Fenstos and Hamilton De Saussure, *supra* note 110, at 81.

¹¹⁶ *Id.*, at 78.

¹¹⁷ See Honig, *supra* note 114, at 141.

¹¹⁸ See Margerite E. Ritchie, *Crimes Aboard Aircraft* (1958) at 44.

¹¹⁹ See Boyle and Pulsifer, *supra* note 34, at 329.

¹²⁰ See Hague Convention, *supra* note 93, art. 4, paragraph 1 (b).

¹²¹ See Montreal Convention, *supra* note 94, art. 5, paragraph 1 (c).

¹²² See Beijing Convention, *supra* note 96, art. 8, paragraph 1 (c).

¹²³ See Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4, paragraph 1 (c), Sep. 10, 2010 [hereinafter *Beijing Protocol*]. Collectively, the Beijing Convention and the Beijing Protocol will be referred as “Beijing instruments.”

As mentioned above, the State where the aircraft is registered may exercise jurisdiction. However, this State may not necessarily be that of the aircraft operator, for example, in cases where the aircraft has been leased. In addition, given the powers granted to the aircraft commander, the principle of flag jurisdiction implicitly presupposes that the aircraft commander has a minimum knowledge of the criminal laws of that State with respect to offences committed on board the aircraft. Where the aircraft is operated under a dry lease arrangement, it is unlikely that the aircraft commander would be familiar with the laws of the State of registry.¹²⁴

At its 12th meeting held in Munich back in 1959, the ICAO Legal Committee considered that an aircraft may be registered in one State, but operated under a bare-hull charter by an aircraft operator of another State.¹²⁵ Similarly, during the Tokyo Diplomatic Conference a special working group was tasked to address this issue. The group recommended that when an aircraft is leased without crew, the State of the entity to which the aircraft is leased (operator) may also exercise jurisdiction. However, the Tokyo Diplomatic Conference was not persuaded.¹²⁶ The Tokyo Convention remains silent and the issue remains unresolved.¹²⁷

4.7. Disembarkation

Some commentators have (incorrectly) noted that the Tokyo Convention does not require a State Party to conduct a preliminary enquiry into the fact in cases where a person is disembarked.¹²⁸ This criticism fails to recognize the distinction between disembarkation and delivery of a person to the competent authorities on the ground. As explained above, disembarkation means that, although the aircraft commander has decided to remove a person from the aircraft, he or she has opted not to turn the person in question over to the authorities on the ground. Since those authorities are not involved, there cannot be an obligation on the State of landing to conduct a preliminary enquiry into the facts.

4.8. Delivery

The fact that the aircraft commander is only authorized to deliver a person to the authorities when he or she has reasonable grounds to believe that a person has committed a serious crime under the national law of the State of registry has been identified as a further weakness of the Tokyo Convention.¹²⁹ The aircraft commander cannot turn over a person who has committed a minor offence but that may have endangered the safety of the aircraft, such as using an EPD when prohibited. The Tokyo Convention does not shed light on what constitutes a “serious offence.” The aircraft commander must carry out that assessment when deciding whether or not to deliver a person to the authorities on the ground under the national law of the State of registry. There may be situations in which a person “is delivered to the authorities in a

¹²⁴ See John Balfour and Owen Highley, *Disruptive Passengers: The Civil Aviation (Amendment) Act 1996 Strikes Back* 184 22 Air & Space Law (1997) [hereinafter *Balfour and Highley*].

¹²⁴ See Boyle and Pulsifer, *supra* note 34, at 324.

¹²⁵ *Id.*

¹²⁶ See FitzGerald I, *supra* note 27, at 203.

¹²⁷ See Shubber, *supra* note 69, at 327.

¹²⁸ See Ruwantissa Abeyratne, *The Fear of Flying and Air Rage: Some Legal Issues* 45, 66 J Transp. Secur. (2008).

¹²⁹ See Margaret P. Fogg, *supra* note 24, at 533.

country whose penal laws do not mirror those of the [State of registry].”¹³⁰ In these situations, the alleged offender may be set free.

4.9. Lack of Guidance on Persons Removed from the Aircraft

Although the Tokyo Convention addresses issues relating to disembarkation and delivery of persons to competent authorities on the ground, it does not provide guidance on what to do or what procedures should be in place with regard to an alleged offender once he or she is removed from the aircraft.¹³¹

4.10. Extradition

The Tokyo Convention has also been criticized for not providing a mandatory extradition provision.¹³² State Parties have no obligation to extradite an alleged offender.¹³³ In fact, the Convention does not offer much guidance at all.¹³⁴ The insufficient wording may be explained by the fact that the Tokyo Convention was ICAO’s first attempt to deal with extradition matters. Subsequent international instruments developed under the auspices of ICAO adopted the principle “*aut dedere aut judicare*”, which would remove some, but definitely not all, of the Tokyo Convention’s deficiencies.¹³⁵

4.11. Unlawful Seizure of Aircraft

Some scholars argue that the Tokyo Convention fails to deal appropriately with issues relating unlawful seizure of aircraft (hijacking).¹³⁶ However, this criticism overlooks the fact that the Convention was never intended to deal with such issues.¹³⁷ In fact, the hijacking provision was introduced pursuant to a joint proposal tabled by the United States and Venezuela very late in the negotiation process at the Tokyo Diplomatic Conference.¹³⁸ In spite of this, a number of the provisions of the Tokyo Convention may nonetheless be applicable to incidents involving unlawful seizure of aircraft.¹³⁹ The Tokyo Convention “does not deal directly with the act of unlawful seizure of aircraft” but rather it “addresses only the aftermath of such act and stipulates the duties of the State of landing.”¹⁴⁰ In addition, it is worth recalling that, at the time, the international community was simply not ready to codify into an international instrument this type

¹³⁰ William P. Schwab, *Air Rage: Screaming for International Uniformity* 401, 414 14 *Transnat’l Law* (2001).

¹³¹ See Kane, *supra* note 69, at 44.

¹³² See Gutierrez, *supra* note 33, at 12.

¹³³ See Michael Milde, *International Air Law and ICAO*, (2012) at 232 [hereinafter *Milde*]. See also Michaelides, *supra* note 36, at 41.

¹³⁴ *Id.*, at 44.

¹³⁵ See The Hague Convention, *supra* note 93, arts. 7 & 8; The Montreal Convention, *supra* note 94, arts. 7 & 8; Beijing Convention, *supra* note 96, arts. 10 & 12; Beijing Protocol, *supra* note 123, arts. 7 & 8.

¹³⁶ See Zdzislaw Galicki *Unlawful Seizure of Aircraft* 171, 175 3 *Polish Y. B. Int’l L.* (1970).

¹³⁷ See Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War against Terrorism* 649, 663 41 *Colum. J. Transnat’l L.* (2002).

¹³⁸ Robert P. Boyle, *International Action to Combat Aircraft Hijacking* 460, 463 *Law. Am.* (1972); Ian E. McPherson, *Recent Developments in Aerial Hijacking: An Overview* 145, 147 6 *Akron L. Rev.* (1973).

¹³⁹ See Knute E. Malmberg, *International Efforts to Deter Aerial Hijacking* 129, 130 *A.B.A. Sec. Ins. Negl. & Comp. L. Proc.* (1971).

¹⁴⁰ Milde, *supra* note 133, at 230.

of behaviour.¹⁴¹ As Milde notes, “there was not yet a clear consensus among States about the nature of the act of unlawful seizure of aircraft and several States felt that the act was of a “political” nature and thus beyond the purview of ICAO.”¹⁴² In light of recently adopted international instruments in the field of aviation security, this criticism has become somewhat redundant.¹⁴³

4.12. Insufficient Encouragement for International Cooperation

During the SSG’s first meeting, IATA raised that the Tokyo Convention does not sufficiently encourage cooperation amongst State Parties.¹⁴⁴ As a matter of fact, it is silent on this issue. Fostering international cooperation is warranted to prevent unruly behaviour from happening on board aircraft.¹⁴⁵ It was also suggested that cooperation should be strengthened in order to harmonize enforcement procedures amongst Member States.¹⁴⁶

5. The Legacy of the Tokyo Convention

Despite its numerous shortcomings and its arguably limited effect in today’s environment,¹⁴⁷ the Tokyo Convention has laid down the foundations for a legal framework for the international civil aviation community.¹⁴⁸ It was the first- ever instrument within the United Nations system on these issues. Subsequent treaties developed under the auspices of ICAO and elsewhere have benefited from the legacy of the Tokyo Convention. It should also be recognized for having coined the term “unlawful seizure of aircraft”, which sought to replace the more colloquial “aircraft hijacking.”¹⁴⁹

6. ICAO’s Guidance Material on Legal Aspects of Unruly / Disruptive Persons on Board Aircraft

ICAO started discussions on unruly passenger issues back in 1995.¹⁵⁰ Given the exponential growth of incidents involving unruly and disruptive passengers, on 3 June 1996, Council decided to include in the work programme of the Legal Committee the issue of “Acts or Offences of Concern to the International Aviation Community and not Covered by Existing Air Law Instruments.”¹⁵¹ On 6 June 1997, Council established a Study Group to examine this issue.

¹⁴¹ See Robert P. Boyle, *Recent Development in Aerial Hijacking: The Role of International Negotiation* 153 6 Akron L. Rev. (1973).

¹⁴² Milde, *supra* note 133, at 229.

¹⁴³ See The Hague Convention, *supra* note 93, art. 9; The Montreal Convention, *supra* note 94, art. 10; Beijing Convention, *supra* note 96, art. 16.

¹⁴⁴ See ICAO, SSG/UNP-WP/3.

¹⁴⁵ See ICAO, SSG-UNP/2-WP/4.

¹⁴⁶ See ICAO, SSG-UNP/1 Report at 3.

¹⁴⁷ See Zdzislaw Galicki, *supra* note 130, at 175.

¹⁴⁸ See Paul Dempsey, *supra* note 137, at 666. See also Paul Stephen Dempsey, *Aerial Piracy and Terrorism: Unilateral and Multilateral Responses to Aircraft Hijacking* 427, 434 2 Conn. J. Int’l L. (1986).

¹⁴⁹ Email from Michael Milde, Emeritus Director, Institute of Air and Space Law, McGill University (May 5, 2012) (on file with the author).

¹⁵⁰ See ICAO, C-WP/11066.

¹⁵¹ *Id.*

After five meetings,¹⁵² this group developed Circular 288, “*Guidance Material on Legal Aspects of Unruly / Disruptive Passengers.*”¹⁵³ The main purpose of the Circular was to set out a model law on certain offences committed on board civil aircraft to be transposed into national legislation by ICAO Member States.¹⁵⁴

The 33rd Session of the ICAO Assembly, held in Montreal from 25 September to 5 October 2000 unanimously adopted Resolution A33-4, which calls upon Member States “to enact as soon as possible national law and regulations to deal effectively with the problem of unruly or disruptive passengers, incorporating so far as practical” the Circular’s model legislation.¹⁵⁵ The Circular proposes 3 categories of offences:¹⁵⁶

- i) Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft (such as assault, threat and intimidation of crew, refusal to follow instructions);¹⁵⁷
- ii) Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft (such as assault or intimidation of fellow passengers, damage or destruction of property, consuming alcoholic beverages¹⁵⁸ or drugs resulting in intoxication);¹⁵⁹ and
- iii) Other Offences Committed on Board a Civil Aircraft (such as smoking in lavatory, tampering with a smoke detector, operating an EPD).¹⁶⁰

This list was considered desirable “to provide a common denominator for offences” and to “offer uniform criteria for States to extend their respective jurisdiction.”¹⁶¹ Judging from the Circular’s limited implementation record, the extent to which the goals pursued have been attained is debatable.

It is noteworthy that the Circular introduces a model clause on jurisdiction, where the State of “next landing of the aircraft” may assert jurisdiction, irrespective of the State of registry or the nationality of the offender.¹⁶² At least in theory and if implemented, this may very well solve the problem of the jurisdictional gap. On this point, it is important to bear in mind that granting jurisdiction to the State of first landing, through a system of priorities was already

¹⁵² *Id.* See also ICAO, C-WP/11191, C-WP/1385, and C-WP/1632. The latter contains both the reports of the 4th and 5th meeting.

¹⁵³ Circular, *supra* note 12.

¹⁵⁴ *Id.*

¹⁵⁵ ICAO, A33-4, Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/Disruptive Passengers).

¹⁵⁶ See Huang, *supra* note 21, at 18.

¹⁵⁷ See Circular, *supra* note 12, at 3.

¹⁵⁸ Making the consumption of alcohol an offence has been criticized by academics, since “there is no definition of [when] a person is considered to be intoxicated.” See Giesecke, *supra* note 98, at 63.

¹⁵⁹ See Circular, *supra* note 12, at 4. Most likely, this category of offences will not capture a non-violent criminal theft committed on board the aircraft.

¹⁶⁰ *Id.*, at 4.

¹⁶¹ *Id.*, at 3.

¹⁶² *Id.*, at 16.

considered and rejected in the drafting of the Tokyo Convention.¹⁶³ The Circular also seeks to tackle the issue of leased aircraft by granting jurisdiction to the State of the principal place of business or the permanent residence of the operator.¹⁶⁴

It has been recognized that “implementation by States of the measures outlined in the Circular will largely remove the [existing] legal void” with regard to offences committed on board aircraft engaged in international flights.”¹⁶⁵ Regrettably, this has not happened. As its name indicates, the Circular only serves as guidance material that Member States may or may not decide to use. It has no binding force whatsoever. The Circular’s principal weakness lies not in its content but, rather in the relative failure of ICAO Member States to implement it. Furthermore, in 2003, the ICAO Secretariat conducted a survey which revealed that only 18 States had incorporated the Circular, in whole or in part, into their domestic legislation.¹⁶⁶ That is less than 10% of the ICAO membership (191 States). Thus, we are left with a meritorious legal document with little practical application.

At the time the Circular was being studied at ICAO, only the United Kingdom,¹⁶⁷ the United States, Canada, and Australia had domestic legislation in force to extend jurisdiction that may capture issues likely to fall within the jurisdictional gap. Although a few countries may have joined this group of States, the fact of the matter is that the problem persists in the majority of ICAO Member States. This is even problematic for those States which have already decided to extend their jurisdiction, because their passengers and air carriers may be exposed to the flaws of the system when flying to a country that has not opted to do so.

7. Why a New International Instrument is Warranted

The Circular was intended to be a short-term response.¹⁶⁸ Ten years have passed since its adoption and it is now evident that the majority of ICAO Member States have not implemented it. In fact, ICAO has repeatedly urged Member States “to enact National Law to exercise jurisdiction in appropriate cases to prosecute criminal acts and offences [involving disruptive persons] on board aircraft registered in other States.”¹⁶⁹ Unfortunately, evidence indicates that very little progress has been achieved in this regard. The poor implementation record may also suggest that it does not carry enough persuasive weight. Even the Circular’s drafters had acknowledged that if its recommendations did not carry sufficient weight, in the long term an international legal instrument would need to be considered.¹⁷⁰ In addition, the existing

¹⁶³ See Boyle and Pulsifer, *supra* note 34, at 329.

¹⁶⁴ See Circular, *supra* note 12 at 16.

¹⁶⁵ ICAO Doc. 9811, at 4.4.5.

¹⁶⁶ See ICAO, C-WP/12081.

¹⁶⁷ The United Kingdom (UK) amended its legislation to extend jurisdiction over acts committed aboard foreign aircraft, “as long as: (i) the UK is the first place of landing after the offence has been committed; and (ii) the act is an offence in the UK as well as in the country where the aircraft is registered.” Sarah-Jane Prew, *Unruly Passengers* 1, 5 2 Aviation Security International (1997).

¹⁶⁸ See Huang, *supra* note 21, at 20.

¹⁶⁹ ICAO, AVSECP/20 Report, Recommendation 5.4.1. (e).

¹⁷⁰ See ICAO, C-WP/11632.

international regime could well be considered inadequate to deter unruly behaviour on board aircraft.¹⁷¹

As Balfour and Highley have authoritatively put it, “there is a strong case for these problems to be looked at on an international level in a systematic and coherent manner with a view to bringing about consistency on a worldwide basis.”¹⁷² A new international instrument may eventually achieve that goal. However, such an instrument must not only be “fundamentally acceptable” to the international community, but it must also represent a “positive contribution” to international law-making.¹⁷³ The degree of acceptance by Member States will determine its applicability and usefulness.¹⁷⁴ To this end, as with many other conventions, it will be of utmost importance that States with significant aviation traffic adopt the new regime.¹⁷⁵ Although law-making is rather a modest “damage control” response to a problem that arguably requires preventive measures,¹⁷⁶ it may significantly contribute to closing the gap and making it clear that disruptive behaviour will not be tolerated on board aircraft.

8. Proposed New Instrument

The following section provides a brief explanation of the proposed new instrument that this report submits for the consideration of the LC-SC as an update of the Tokyo Convention.

8.1. Overview

By incorporating language from the Circular and that of other recently-adopted ICAO international conventions, the new instrument seeks to address most of the Tokyo Convention’s shortcomings, as identified above. Under this proposal, the new instrument would supplement rather than supersede the Tokyo Convention. It is expected that the latter will continue to apply, in particular for those offences against penal law of Art.1, paragraph 1 (a) of the Tokyo Convention. This proposal adopts the format of a new stand-alone international instrument. However, the LC-SC may instead decide to proceed using the format of a protocol.

8.2. Definitions

A list of definitions is included as part of Article 1 of the proposed new instrument. In this vein, the notion of “aircraft in flight” is aligned with that adopted most recently in the Beijing instruments. That is to say that an aircraft would be considered to be in-flight from the moment all of its external doors are closed following embarkation until the moment when those doors are opened for disembarkation. This uniform, temporal threshold will govern all aspects of the new instruments, including when the pilot-in-command may exercise his or her powers.

¹⁷¹ See ICAO, SSG/UNP-WP/3 at 1.

¹⁷² Balfour and Highley, *supra* note 124, at 200.

¹⁷³ Ira M. Sheppard, *Air Piracy: The Role of International Federation of Airline Pilots Association* 79, 86 3 Cornell Int’l L.J. (1970).

¹⁷⁴ See ICAO, SSG-UNP/2-WP/5.

¹⁷⁵ See James S. G. Turner, *Piracy in the Air* 548, 565 62 Int’l L. Stud. Serv. US Naval War Col. (1980).

¹⁷⁶ See Mann, *supra* note 16, at 890.

During the SST's first meeting, IATA identified as one of the deficiencies of the Tokyo Convention the fact that its temporal threshold is not aligned with that of the Warsaw¹⁷⁷ or Montreal 1999 Conventions.¹⁷⁸ In those instruments, carrier liability extends to embarkation and disembarkation. However, there are, around the world, a number of conflicting judicial interpretations on the issue of when a passenger is considered to have embarked or disembarked.¹⁷⁹ Expanding the new instrument's temporal threshold to cover these processes may not seem appropriate, as it would create a significant degree of uncertainty.

As will be explained below, during the SSG's discussions, some delegates were of the view that issues dealing with "in-flight security officers" (IFSOs) should also be addressed when tackling the modernization of the Tokyo Convention. To capture this concern, the new instrument introduces options in Articles 6 and 10. Should the LC-SC decide to keep these options, the term "in-flight security officer" would require definition. Therefore, under this section the new instrument proposes to include the definition of this term that is used in Annex 17. However, at the outset it should be noted that this Annex 17 definition presupposes that in-flight security officers exercise their duties to protect the aircraft, passengers and its crews against acts of unlawful interference. The new instrument does not necessarily deal with such acts, but rather with other less serious offences.

The new instrument also proposes to re-examine the scope of application of the Tokyo Convention. In order to do this, a new definition of "international flights" is required. Under the new instrument's definition, an international flight would cover any flight whose place of departure and whose intended destination are situated within the territories of two States Parties. Language for this definition has been predominantly taken from the General Risks¹⁸⁰ and the Unlawful Interference Conventions,¹⁸¹ which were concluded in 2009.

The Tokyo Convention does not specify who is deemed to be the aircraft operator. Given existing commercial arrangements involving aircraft, the concept of the "operator" becomes extremely relevant. It was thought necessary to introduce a definition of this term in order to clarify any doubts. In this respect, language was again taken from the General Risks and the Unlawful Interference Conventions.

The instrument also proposes to adopt definitions for the terms "pilot-in-command" and "State Parties" to replace "Aircraft Commander" and "Contracting Parties", respectively. The former was taken from Annex 2 and the latter from the General Risks and the Unlawful Interference Conventions. In square brackets, the Annex 2 definition of "pilot-in-command" is expanded to capture a situation in which the captain engages in unruly behaviour on board the

¹⁷⁷ See Convention for the Unification of Certain Rules relating to International Carriage by Air, Oct. 12, 1929, 137 L.O.N. 3145.

¹⁷⁸ See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 39917.

¹⁷⁹ See Paul S. Dempsey and Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005) at 157; Norberto E. Luongo, *Tratado de Daños y Perjuicios en el Transporte Aéreo* (2009) at 226.

¹⁸⁰ See General Risks Convention, *supra* note 95, art. 1 (d).

¹⁸¹ See Unlawful Interference Convention, *supra* note 95, art. 1 (d).

aircraft and as a result becomes incapable of carrying out his or her duties as the “pilot-in-command.” Should this occur, the second-in-command, which would be the co-pilot or the first officer, should become the “pilot-in-command,” which is what happened in the previously referenced case involving a disruptive JetBlue Captain.

8.3. “Aircraft Commander” v. “Pilot –in-Command”

In spite of a proposal tabled by IATA and seconded by Canada and Ceylon to use the term “pilot-in-command”, the drafters of the Tokyo Convention opted for “aircraft commander,” “commandant d’aéronef” (French), and “comandante de la aeronave” (Spanish).¹⁸² It is noteworthy that this is the only instrument where such terminology is used. The Paris Convention 1919 adopted “commanding officer” and “le commandant.”¹⁸³ Although in a different context, the Chicago Convention employs the terms “pilot”, “pilote”, and “piloto.” These only appear when addressing issues such as pilotless aircraft¹⁸⁴ and licenses of personnel.¹⁸⁵ In its annexes, circulars, manuals and guidance materials, ICAO refers to the “pilot-in-command”, “pilote commandant de bord”, and “piloto al mando”, respectively. The term is defined as “the pilot designated by the operator, or in the case of general aviation, the owner, as being in command and charged with the safe conduct of a flight.”¹⁸⁶

Unfortunately, the minutes of the Tokyo Diplomatic Conference do not provide an explanation of why the drafters favoured “aircraft commander.”¹⁸⁷ One can speculate that this was due to the previous adoption of the term in the draft convention on the “Legal Status of the Aircraft Commander” that the Comité Technique d’Experts Juridiques Aériens (CITEJA) proposed in the 1930s.¹⁸⁸ It is worth recalling that CITEJA worked predominantly in French. Commentators have already expressed serious concerns on quality of both the English and Spanish translations of CITEJA’s proposed instrument.¹⁸⁹ Given that at present ICAO does not use “aircraft commander” elsewhere than in the Tokyo Convention, there would seem to be no compelling reason against incorporating “pilot-in-command” in the new instrument.

8.4. “Contracting States” v. “States Parties”

Throughout its entire text, the Tokyo Convention uses the term “Contracting States.” Following the trend of recently-adopted ICAO international instruments, it is more appropriate to adopt the term “States Parties.” The *Vienna Convention on Law of Treaties* establishes a very subtle difference between the two terms. The former refers to a State that has consented to be bound by a treaty which has yet to enter into force.¹⁹⁰ The latter refers to a State that has

¹⁸² See FitzGerald I, *supra* note 27, at 196.

¹⁸³ See Convention Relating to the Regulation of Aerial Navigation, art. 12.

¹⁸⁴ See Convention on International Civil Aviation, art. 8, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter *Chicago Convention*].

¹⁸⁵ *Id.*, art. 32.

¹⁸⁶ Annex 2, Rules of the Air, Chapter I, at 1-5.

¹⁸⁷ See Tokyo Diplomatic Conference Minutes Vol. II, *supra* note 61, at 148.

¹⁸⁸ See Knauth, *supra* note 46, at 157.

¹⁸⁹ *Id.*, at 158.

¹⁹⁰ Email from John Augustin, Deputy Director of ICAO’s Legal Bureau (Apr. 30, 2010) (on file with the author).

consented to be bound by a treaty that is already in force.¹⁹¹ Given that treaty obligations will only apply once the instrument enters into force, it is more reasonable to use the terms “State Party” or “States Parties.” This is the approach that the new instrument has taken.

8.5.List of Offences

One of the major flaws of the Tokyo Convention is the fact that each State Party is left to determine what constitutes an offence against penal laws, as well as establishing those acts that may jeopardize safety and good order and discipline on board the aircraft. Critics have pointed out that this formula defies the whole purpose of the harmonization of international law. To remedy this deficiency, the new instrument proposes to establish a number of offences within a three-tier system. Language for most of these offences has been taken from the Circular.

The first tier addresses the more serious offences. This includes offences committed against crew members, such as assault, physical and verbal intimidation, interference with the performance of their duties, and refusal to comply with their instructions. Protection of crew members is desirable, given that “they are responsible not only for maintaining good order and discipline on board but also for the safety of the aircraft.”¹⁹² This section also captures offences against other persons on board the aircraft, including acts of physical violence and sexual assaults. Given the gravity of these types of behaviour, these offences *per se* constitute acts endangering safety or jeopardizing good order and discipline on board.¹⁹³ Therefore, there is no need to establish “the endangering or jeopardizing nature of the relevant act of the alleged offender.”¹⁹⁴ Under the new instrument, both of these types of behaviour would be the only extraditable offences.

The second tier deals with less serious types of behaviour on board aircraft, which includes physical or verbal assaults, intentional destruction of property, and consumption of alcohol resulting in intoxication. However, this behaviour would only constitute an offence to the extent that the alleged offender endangers the safety of the aircraft or jeopardizes the good order and discipline on board.¹⁹⁵ Unlike offences described in the preceding paragraph, here the prosecutor carries the burden of proof of establishing that the alleged offender’s conduct does in fact endanger safety or jeopardize good order and discipline on board.¹⁹⁶ For instance, if a passenger consumes substantial quantities of alcohol, and, as a result, becomes significantly intoxicated but remains on his or her own seat without creating any disturbance at all during the flight, such conduct would not constitute an offence for the purpose of the new instrument. Likewise, if, whilst using wireless internet on board the aircraft, a passenger carries out an act which is deemed to be electronic fraud, that would fall outside of the scope of the new

¹⁹¹ See Vienna Convention on the Laws of the Treaties, art. 2 (f) & (f), May 22, 1969, 1155 U.N.T.S. 18232.

¹⁹² Circular, *supra* note 12, at 4.

¹⁹³ *Id.*, at 5.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

instrument because it does not endanger safety nor jeopardize good order and discipline on board.¹⁹⁷

The third tier encompasses behaviour not expressly mentioned in the previous two categories but that may pose significant challenges to the safety of the aircraft. This covers acts such as smoking in the lavatory, tampering with a smoke detector, and operating an EPD when its use is prohibited.¹⁹⁸ It also contemplates a safeguard clause to capture other types of behaviour not described elsewhere.

Lastly, the new instrument clarifies that these new offences do not supersede but rather supplement those offences under penal laws mentioned in the Tokyo Convention. This is done because State Parties to the Tokyo Convention might have adopted implementing legislation, thereby criminalizing a number of offences.¹⁹⁹ This list does not seek to derogate those offences.²⁰⁰

8.6. Scope of Application

This proposal advances three options to deal with the scope of application of the new instrument. The first option would be to retain the existing wording of the Tokyo Convention. Under this alternative, the instrument would only be applicable, if the following conditions were met. First, the offence must be committed on board an aircraft that it is registered in a State Party. Second, such aircraft must be in flight or over the high seas or outside the territory of any State. Given its convoluted language, it not clear for instance, whether the Tokyo Convention applies to an offence committed immediately after take-off but while in the territory of the State of departure. In addition, provisions dealing with the powers and duties of the pilot-in-command would only apply provided that the points of departure and intended arrival are situated in a State other than the State of registry. The rationale of adopting different scopes of application for the pilot-in-command and the rest of the provisions in the instrument may be questionable.

The second option would require three conditions for the new instrument to apply. First, the offence would have to be committed on board an aircraft in-flight. Second, that aircraft would have to be engaged in an international flight. Third, the aircraft in question would have to

¹⁹⁷ Given that aircraft operators are gradually starting to introduce internet access on commercial flights, one can certainly expect cases of online fraud and other illicit online activities occurring on board aircraft. See Jim Hackett, *Onboard Electronic Fraud: Piracy in the Twenty-First Century?* 453, 454 36 Air and Space Law (2011).

¹⁹⁸ Recent reports reveal that EPDs pose serious challenges in maintaining good order and discipline on board. Passengers are often reluctant to put them away when requested by crew members. See The Wall Street Journal, *Turn Off All Electronic Devices, or Else* (March 8, 2012). In addition to becoming a “potential hazard to the aircraft”, they can also trigger the liability of a number of different actors involved in any given aircraft operation. See Tare Brisibe, *Legal Problems Relating to the Use of Portable Electronic Devices Onboard Aircraft* 201, 217 54 ZLW (2005). Recently, the US Federal Aviation Administration (FAA) gave a warning to a Delta Air Lines passenger who admitted to having used an EPD to videotape a bird strike right after take-off. The FAA sent a warning letter to the passenger. See CNN, *FAA Issues Warning to Passenger who Filmed Bird Strike* (May 3, 2012, 15:00 PM), http://www.cnn.com/2012/05/02/travel/faa-bird-strike-video/index.html?hpt=tr_c2.

¹⁹⁹ Email from Ludwig Weber, Consultant to ICAO and former Director of ICAO’s Legal Bureau (Apr. 17, 2012) (on file with the author).

²⁰⁰ Email from Gilles Lauzon, former Chairman of ICAO’s Legal Committee (May 3, 2012) (on file with the author) [hereinafter *Lauzon*].

be registered in a State Party. The language of this option is much more comprehensible, as compared with the Tokyo Convention. However, the new instrument's applicability would be reduced to a minimum, if States with high volumes of aircraft registration did not ratify or accede to it.²⁰¹

The third option would maintain the first two requirements of the previous option but remove the requirement that the aircraft be registered in a State Party. This considerably expands the new instrument's chances of applicability. If for instance, the landing State is a State Party, the new instrument would apply, provided that the aircraft in question is engaged in an international flight and despite the fact that the State of registry, the State of the operator, and the State of departure were not State Parties.²⁰²

Lastly, as is standard practice in ICAO, none of these three options foresees the application of the new instrument to aircraft used in military, customs and police services.

8.7. Penalties

Although perhaps desirable, the new instrument does not set forth specific penalties for offences which fall within its scope. All United Nations international instruments related to the prevention and suppression of international terrorism have taken this approach. Under the new instrument, State Parties undertake to make the offences punishable by appropriate penalties, consistent with national laws and taking into account the gravity and nature of those offences. Some elements of this obligation have been taken from the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.²⁰³ Such penalties may include, amongst others, the deprivation of the right to fly and monetary sanctions.

8.8. Jurisdiction

²⁰¹ The Rome Convention adopts a similar approach. For this instrument to apply, two concurrent conditions must be satisfied. First, damages on the ground ought to occur in the territory of a State Party. Second, the aircraft which causes such damages must also be registered in a State Party. See Rome Convention, *supra* note 39, art. 23. It is a well known fact that States with more developed aviation markets never demonstrated great enthusiasm for an international instrument addressing third party damages on the ground. For these countries, national laws have always properly addressed these issues. The bulk of aircraft registered worldwide lie in these countries. The fact that most of these countries have opted not to ratify the Rome Convention explains why the instrument has never been applied in practice – at least there are no records of reported case law. One of the two required elements to trigger the instrument's application has been missing for almost 60 years.

²⁰² This hypothetical scenario also raises an interesting policy issues for the LC-SC to consider. Assume for the sake of discussion that a passenger becomes extremely disruptive while the aircraft is engaged in an international flight, and the pilot-in-command imposes measures to restraint the passenger. Upon arrival, the passenger is delivered to the competent authorities of the State of landing. The passenger is detained for a couple of days and then set free. Seeking financial compensation for unreasonable restraint, a couple of months later the passenger sues the aircraft operator before courts in the State of landing. The latter is a State Party to the new instrument, but the State of registry and the State of the operator are not. In spite of this, the court in the State of landing would scrutinize whether the measures taken by the pilot-in-command's actions were reasonable.

²⁰³ See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 5.

To address the jurisdictional gap identified above as one of the flaws of the Tokyo Convention, the new instrument combines language provided in the Circular, as well as options contained in The Hague and Montreal Conventions, and in the Beijing instruments.

Most notably, the new instrument recognizes the following jurisdictions: (i) State of registry; (ii) State of the operator; (iii) State over whose territory the offence is committed; (iv) State of the nationality of the offender; and (v) State of landing.

In addition, as in the Beijing instruments, States have the option to exercise jurisdiction in cases where the victim is a national of the State in question, or when the offence has been committed by a stateless person whose habitual residence is in such State.²⁰⁴ Just as for the Tokyo Convention, the new instrument does not exclude any criminal jurisdiction exercised in accordance with national law.

8.9.Powers of the Pilot-in-Command & Immunity

During the discussions of the SSG, IATA expressed concerns that there have been inconsistent judicial interpretations of the powers and immunity provisions of the Tokyo Convention.²⁰⁵ In fact, these provisions have been subject to recent and significant legal scrutiny.

In 1993, a US District Court ruled that the use of doses of the tranquilizer “Valium” was a reasonable measure to restrain a passenger and therefore the air carrier was entitled to the immunity provision of the Tokyo Convention.²⁰⁶ In 2007, the Superior Court of Quebec found reasonable the disembarkation of a passenger who had acted in a disruptive manner on board a flight from Toronto to Kingston, Jamaica.²⁰⁷ More recently, the Magistrates Court of Haifa, Israel held that measures taken against a passenger who allegedly smoked in the lavatory of the aircraft were reasonable.²⁰⁸ Amongst other, these included delivery to the competent authorities on the ground, ban on future travel, and disembarkation from another flight for which the passenger had bought an onward ticket.²⁰⁹ The Court stressed that, in order to benefit from the immunity provision of the Tokyo Convention, it was not necessary for the air carrier to demonstrate that the passenger actually smoked in the aircraft lavatory, but rather that, at the time of the occurrence of the event, the intervening person had reasonable grounds to believe that an offence was being committed.²¹⁰ Similarly, in the United States, law enforcement authorities were of the view that measures taken to subdue a passenger on board a domestic flight who had

²⁰⁴ Although *a priori* it may seem that a “stateless” person would not be able to travel by air, for he or she may not have a valid travel document, a number of States have issued travel documents to foreigners domiciled or that temporarily reside in their territory. Although these foreigners are in most cases in the process of becoming either permanent residents or citizens of that State, during this transition period there might be situations where they are nationals of no State.

²⁰⁵ See ICAO, SSG/UNP-WP/3.

²⁰⁶ *Levy v. American Airlines, Inc.*, 1993 U.S. Dist. LEXIS 7842 (S.D.N.Y. June 9, 1993).

²⁰⁷ *Gustadt v. Air Canada*, 2007 QCCCS 4374.

²⁰⁸ See Moshe Leshem, *Court Analyzes the Elements of Air Carriers Immunity Under the Tokyo Convention 1963: Zikry v. Air Canada* 220 32 Air & Space Law (2007).

²⁰⁹ *Id.*

²¹⁰ *Id.*, at 222.

stormed the cockpit were reasonable, despite the fact that the passenger later died of compressional asphyxia. As a result, no charges were pressed.²¹¹

Perhaps the most controversial case on this issue has been *Eid v. Alaska Airlines*, where a US Circuit Court dismissed the defendant's motion for summary judgement, holding that it should be up to a jury to decide whether the actions taken by the pilot-in-command (in this case, the diversion of the flight) were reasonable.²¹² The defendant unsuccessfully argued that the Tokyo Convention contemplates a deferential standard under which the airline's actions should be deemed reasonable, unless proven to be arbitrary or capricious.

When examining the right of an air carrier to refuse transportation on a domestic flight, in *Cerqueira v. American Airlines*, a US Court followed an "arbitrary and capricious" standard. In particular, the Court held that the review of the aircraft commander's decision should be "limited to the information actually known by [him] at the time of the decision."²¹³ The Court also noted that the aircraft commander should be "entitled to accept at face value the representations made to him by other air carrier employees."²¹⁴

The notion of "arbitrary and capricious," as developed in common law jurisprudence, creates a presumption of reasonableness of the acts undertaken by the pilot-in-command.²¹⁵ This sets a deferential standard in favour of the pilot-in-command. Plaintiffs carry the burden of demonstrating that the pilot-in-command's actions were arbitrary and capricious. Similarly, in a number of civil law jurisdictions, Courts tend to refer to this standard in the context of public law when examining the reasonableness of administrative acts performed by governmental entities.

It is clear that Courts have handed down rulings with different and sometimes conflicting interpretations on this issue. However, this may not necessarily be attributed to an intrinsic deficiency of the Tokyo Convention, but rather to the failure to properly understand the intention of its drafters in the development of the instrument. Therefore, as far as the powers of the pilot-in-command to impose measures to restore the good order on board the aircraft are concerned, the new instrument tends to favour the existing language of Article 6 of the Tokyo Convention – although it also presents another option to deal with the issue of IFSOs, should the LC-SC be in favour of that approach. The IFSOs' complexity is explained in greater details below.

With regard to the immunity provision, the new instrument advances four proposals. The first option retains *verbatim* the existing language of Art. 10 of the Tokyo Convention. Although maintaining the original rationale, the second option introduces some editorial changes. These seek to clarify that the immunity covers those actions instituted by or on behalf of the person

²¹¹ See William P. Schwab, *supra* note 130, at 402.

²¹² *Eid v. Alaska Airlines*, 621 F.3d 858. See also Gerard Chouest, *Eid v. Alaska Airlines No. 06-16457 (9th Cir, 30 July 2010)* 337 36 Air & Space Law (2011); Oliver Beiersdorf and Jennifer A. Guidea, *Recent Developments in Aviation Law* 207 72 J.A.L.C. (2007); Paula L. Wegman, *Recent Developments in Aviation and Space Law* 225 46 Tort Trial & Ins. Prac. L.J. (2011); Linda L. Lane and Kimberly R. Gosling, *Recent Developments in Air Carrier Litigation* 197 76 J.A.L.C. (2011).

²¹³ *Cerqueira v. American Airlines*, 520 F. 3d (1st Cir., 2008).

²¹⁴ *Id.*

²¹⁵ *Id.*

against whom the actions were taken.²¹⁶ This would also capture the alleged offender's heirs and successors.²¹⁷ The third option makes it explicit that the immunity provision adopts the deferential standard, but incorporates the notion of "arbitrary" and "capricious." Although, from a purely aviation safety viewpoint, raising the threshold to provide additional protection to the pilot-in-command and his or her crew is highly desirable, the LC-SC is also encouraged to examine whether this approach is appropriate from a public policy perspective. Finally, the last option seeks to recognize the need to provide some sort of protection to IFSOs, as some have recommended.

8.10. In-Flight Security Officers (IFSOs)

At the SSG's second meeting, one delegate suggested that the Tokyo Convention does not properly take into account the increasing role that IFSOs play in the protection of passengers on board international flights.²¹⁸ More specifically, it was indicated that the Tokyo Convention: (i) fails to grant IFSOs any special status; (ii) does not exonerate IFSOs from responsibility in a number of cases where he or she may be acting within the scope of its official duties but perhaps outside the scope of the existing international regime; and (iii) does not shield them from third party claims.²¹⁹ It was also explained to the SSG that under the Tokyo Convention, IFSOs may only take measures to protect passengers on board without the authorization of the pilot-in-command to the extent that they have reasonable grounds to believe that those measures are immediately necessary.²²⁰ This is the same standard afforded to other crew members and passengers.

In light of these considerations, it was recommended to the SSG that the modernization of the Tokyo Convention should include provisions to: (i) recognize the special status of IFSOs; (ii) protect IFSOs taking actions that are in accordance with the national laws of the State of registry; (iii) provide exoneration against claims from third parties; and (iv) limit the jurisdiction for proceedings against IFSOs to only the State of registry.²²¹

²¹⁶ See Lauzon, *supra* note 200.

²¹⁷ Email from Michael Simon Gill, Senior Legal Counsel, Divisional Counsel – Member & Government Relations, IATA (May 3, 20120) (on file with the author) [hereinafter *Gill*].

²¹⁸ See ICAO, SSG-UNP/2-Report, at 1.

²¹⁹ *Id.*, at 2.

²²⁰ *Id.*, at 3.

²²¹ *Id.*, at 4. In a similar line of reasoning, Paul FitzGerald advocates that if the State of registry decides to deploy IFSOs and such State is willing to accept responsibility for potential damages caused by IFSOs, jurisdiction dealing with them should only rest with the State of registry. The author suggests that, provided that all previously-mentioned conditions are satisfied, authorization from all "States concerned" should not be warranted. See P. Paul FitzGerald, *Air Marshals: The Need for Legal Certainty* 357, 406 75 J.A.L.C. (2010). This proposition, however, ignores the politics and realities of international relations. It also fails to recognize that exclusive jurisdiction vested only in the State of the registry is unsustainable from a public policy perspective. Just imagine a situation in which an IFSO takes measures to restrain a passenger on board an aircraft. As a result of the IFSO's actions, the passenger later dies just before landing. Upon the arrival of the flight, the State of landing realizes that it cannot institute an investigation into the death of one of its nationals on board a foreign aircraft. It would be almost "unsellable" for the State of landing to explain to the general public that it cannot take any other measure given the exclusive jurisdiction granted to the State of registry. When drafting legislation, policy makers factor in a myriad of different considerations other than a simple risk management allocation of liability.

Other SSG members were of the view that the recognition of IFSOs in any new instrument would pose significant challenges. Although the scope of national aviation security programmes dealing with IFSOs varies considerably, in the majority of Member States these special law enforcement agents are deployed on commercial flights with the sole purpose of protecting the aircraft and its occupants against acts of unlawful interference. This is consistent with the definition of IFSOs in Annex 17.²²² They are not authorized to intervene in cases of other minor offences that may endanger safety and jeopardize the good order and discipline on board the aircraft. Including IFSOs in the context of the new instrument would require an expanded definition term – an exercise that should be carried out with caution given that the expertise in this field lies with ICAO’s AVSECP.

Providing additional immunity for IFSOs’ actions on board an aircraft in-flight may be an extremely difficult policy decision to justify, since such treatment is normally not given to other law enforcement agents. In addition, limiting the jurisdiction for proceedings against IFSOs to only the State of registry is counterintuitive to the basic idea of modernizing the Tokyo Convention, which has been built on the premise that there is a need to extend the scope of jurisdiction to close the gap in the international legal regime.

For these reasons this report considers that the new instrument would not be the best legal vehicle to recognize the special status of IFSOs. This may be better achieved through special bilateral arrangements between the States concerned. Having said this, if the LC-SC nonetheless considers that the new instrument should attempt to capture the special case of IFSOs, a second option is provided in Article 6. This would expressly allow IFSOs to intervene when such action is immediately necessary to protect the safety of the aircraft.

8.11. Unlawful Seizure of Aircraft

The new instrument proposes to simply delete Article 11 of the Tokyo Convention dealing with unlawful seizure of aircraft. The Hague, Montreal, and the Beijing Conventions, as well as the Beijing Protocol, already cover this issue.²²³

8.12. Extradition

On extradition, the new instrument proposes to follow language employed in The Hague and Montreal Conventions, as well as the more recently-adopted Beijing instruments. Under this wording State parties undertake to either extradite an offender found in their territory or submit the case to its competent authorities for the purpose of prosecution, thus applying the principle “*aut dedere aut judicare*.” This wording leaves States with a wide discretion to extradite or

²²² Annex 17’s definition suggests that IFSOs are officers, authorized by both the State of the operator and the State of registry, deployed in certain flights with the purpose of protecting the aircraft and passengers against acts of unlawful interference. See Annex 17 – Security – Safeguarding International Civil Aviation Against Acts of Unlawful Interference. (Ninth Edition, March 2011), Chapter 1. Deployment of IFSOs requires agreement of all States concerned. States are required to consider, but definitely not obliged to accept, requests from States wishing to deploy IFSOs on international flights. See Annex 17, Chapter 4, Standard 4.7.5 at 4-4.

²²³ See The Hague Convention, *supra* note 93, art. 9, paragraph 2; Montreal Convention, *supra* note 94, art 10, paragraph 2; Beijing Convention, *supra* note 96, art. 16, paragraph 2; Beijing Protocol, *supra* note 123, art. XIV.

prosecute the offender. It is unrealistic to impose on State Parties an obligation to extradite alleged offenders every time a request is made. In addition, it is worth recalling that only first-tier offences are extraditable.

8.13. Cooperation Amongst States

Just as for previously-adopted ICAO conventions, the new instrument seeks to promote cooperation amongst States Parties for the prevention of instances of unruly behavior on board aircraft. This had also been identified as one of the weakness of the Tokyo Convention. To this end, State Parties are required to assist each other in proceedings involving these offences. States are also required to provide any available information when they have reason to believe that an offence is about to be committed.

8.14. Preventive Measures

Arguably, the eradication of unruly incidents on board aircraft requires a number of preventive measures. International law-making will not of itself resolve the problem. Just as appropriate training of aviation staff is required,²²⁴ authorities must also strongly emphasize education of the travelling public.²²⁵ In this respect, ICAO has already developed samples notices to passengers on the consequences on unruly behaviour.²²⁶ In order to encourage States to adopt such measures, the new instrument contains language that would require States to inform passengers that engaging in such disruptive behaviour is unacceptable, as well as of the legal consequences entailed. Similarly, States are required to ensure that airports, operators, and public authorities provide adequate training to staff involved in the identification and management of these types of behaviour. Language for these provisions has been taken from Annex 9.²²⁷ Following the precedent set by the Montreal and Beijing Conventions,²²⁸ the new instrument also encourages States to take all practicable measures to prevent the occurrence of offences.

8.15. Dispute Settlement

It is proposed that the new instrument's provision on the settlement of disputes should replicate that of The Hague and Montreal Conventions, as well as the Beijing instruments.

9. Additional Issues to Consider

The LC-SC is also invited to further examine the following issues:

- i) Whether the definition of "international flight" needs to include not only the notion of "intended" but also "actual" destination. The word "actual" would capture a flight

²²⁴ See Aaron B. Swerdlow, *supra* note 62, at 105.

²²⁵ See Yang Chen-Hua and Chang Hsin-Li, *Exploring the Perceived Competence of Airport Ground Staff in Dealing with Unruly Passenger Behaviour* 611 33 Tourism Management (2012); Kane, *supra* note 68, at 196.

²²⁶ See ICAO Doc. 8973/7, Security Manual for Safeguarding Civil Aviation against Acts of Unlawful Interference Volume IV. (7th Ed. 2007).

²²⁷ See Annex 9, recommended practices 6.44 and 6.45.

²²⁸ See Montreal Convention, *supra* note 94, art. 10; Beijing Convention, *supra* note 96, art. 17.

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- that although domestic in nature, somehow lands in the territory of a different State, for instance, in the case of diverted aircraft operations;
- ii) Whether the terms “good order and discipline” would require further elaboration;
 - iii) Whether the term “drugs”²²⁹ warrants definition;²³⁰
 - iv) Whether the reference to general aviation in the definition of “pilot-in-command” is required for the purpose of the new instrument. The definition proposed herein has been taken *verbatim* from Annex 2. Further, whether the language in square brackets captures a situation in which the pilot-in-command becomes incapacitated and one of the designated co-pilots has to exercise the function of the pilot-in-command. It should also be considered if this definition is suitable for those cases where the flight may not have a co-pilot or where multiple pilots are carried on board because of the duration of the flight;²³¹
 - v) Whether the new instrument needs to capture types of behaviour, such as theft or online fraud that do not necessarily endanger safety or jeopardize good order and discipline on board the aircraft;
 - vi) Whether it is desirable to establish, as preconditions for the State of landing to exercise jurisdiction, that the pilot-in-command not only delivers the alleged offenders to the authorities of such State, but also that he or she makes a request that such person be prosecuted and confirms that no similar requests have been made to another State. Although language in this provision has been taken *verbatim* from the Circular, it may be advisable to reexamine whether or not from a public policy perspective the jurisdiction of the State of landing is dependent on the action, request, and confirmation of the pilot-in-command;²³²
 - vii) Whether language is required to provide guidance to State Parties on how to deal with alleged offenders once they are removed from the aircraft;
 - viii) Whether in today’s international civil aviation environment it makes sense to distinguish between disembarkation and delivery of persons, or whether both concepts could be combined in the single term “delivery of persons.” Under the conditions of carriage, the aircraft operator may refuse transportation for a number of reasons. These include, but it is not limited to, an intoxicated passenger, the passenger’s medical condition, and the passenger’s non-cooperative attitude prior to dispatch. The disembarkation provisions would seem to address only situations of a

²²⁹ Another option would be to employ the term “controlled substances.” Email from Mark Andrew Glynn, Associate at Fernandes Hearn LLP (May 5, 2012) (on file with the author). In any case, it may also warrant definition.

²³⁰ See Gill, *supra* note 217.

²³¹ Email from Paul McCarthy, former Representative of IFALPA to ICAO (May 3, 2012) (on file with the author).

²³² See Siew Huay Tan, *supra* note 40.

- person who has committed or is about to commit an act that may endanger the safety of the aircraft;
- ix) Whether the new instrument should recognize the aircraft operator's right to refuse transportation under certain circumstances, or whether this issue should be left to the conditions of the contract of carriage;
 - x) Whether the new instrument should recognize the right of the aircraft operator to claim compensation from the passenger for damages incurred as a result of an incident of unruliness caused by that passenger;
 - xi) Whether for the purpose of this new instrument, the inclusion of provisions dealing with IFSOs is warranted; and
 - xii) Whether the new instrument needs to incorporate an obligation on Member States to report incidents involving unruly behaviour on board aircraft, as found in The Hague and Montreal Conventions, which was also replicated in the Beijing instruments.

10. Acknowledgments

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APPENDIX A

NEW INSTRUMENT TO MODERNIZE THE CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

PREAMBULAR CLAUSES

CHAPTER I – DEFINITIONS, OFFENCES, AND SCOPE OF APPLICATION

Article 1

For the purpose of this Convention:

- (a) an aircraft is considered to be “in flight” at any time 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 flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;
- (b) a “crew member” means a person assigned by an aircraft operator to duty on an aircraft during a flight duty period;
- (c) “in-flight security officer” means a person who is authorized by the government of the State of the operator and 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. This excludes persons employed to provide exclusive personal protection for one or more specific person(s) travelling on the aircraft, such as personal bodyguards;
- (d) “international flight” means any flight whose place of departure and whose intended [or actual] destination are situated within the territories of two States, whether or not there is a break in the flight, or within the territory of one State if there is an intended stopping place in the territory of another State;
- (e) “operator” means the person who makes use of the aircraft, provided that control of the navigation of the aircraft is retained by the person from whom the right to make use of the aircraft is derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority;
- (f) “pilot-in-command” means the pilot designated by the operator, or in the case of general aviation, the owner, as being in command and charged with the safe conduct of a flight.

[Where the pilot-in-command becomes incapacitated for whatever reason, the designated second-in-command assumes the function of the pilot-in-command];

- (g) “State Party” means a State in which this Convention is in force.

Article 2

1. Any person commits an offence on board an aircraft if that person:
 - (a) assaults, threatens, or intimidates a crew member, whether physically or verbally, or interferes with the performance of the duties of the crew member or lessens the crew member’s ability to perform those duties; or
 - (b) refuses to follow a lawful instruction given by the pilot-in-command, or on behalf of the pilot-in-command by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on board or for the purpose of maintaining good order and discipline on board.
2. Any person commits an offence on board an aircraft if that person:
 - (a) performs or threatens to perform an act of physical violence against another person; or
 - (b) sexually assaults another person.
3. Any person acting in a manner that is likely to endanger the safety of the aircraft or of any person on board or jeopardizing the good order and discipline on board the aircraft, commits an offence on board an aircraft if that person:
 - (a) assaults, threatens or intimidates, whether physically or verbally, another person; or
 - (b) intentionally causes damage or destruction to property; or
 - (c) consumes alcoholic beverages or drugs¹ resulting in intoxication.
4. Any person commits an offence on board an aircraft if that person:
 - (a) smokes in a lavatory, or smokes elsewhere in a manner likely to endanger the safety of the aircraft; or²
 - (b) tampers with a smoke detector or any other safety-related device on board the aircraft; or

¹ The use of the term “controlled substances” may also be considered.

² Other alternatives could be the following: “smokes in a lavatory, or smokes elsewhere when such act is prohibited”, or “smokes anywhere on board, including but not restricted to in a lavatory.”

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- (c) operates a portable electronic device when such act is prohibited; or
 - (d) otherwise acts in a manner that poses threat to the safety of the aircraft or to persons or property on board the aircraft.

5. The offences listed in this article shall leave unaffected any offences against penal law of Article 1, paragraph 1 (a) of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963* and the jurisdiction associated therewith.

Article 3

(Option 1 – Tokyo Convention 1963)

1. This Convention shall not apply to aircraft used in military, customs or police services.
2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed by a person on board any aircraft registered in a State Party, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.
3. The provisions of Chapter III shall not apply to offences committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

(Option 2)

1. This Convention shall not apply to aircraft used in military, customs or police services.
2. This Convention shall apply to offences committed by a person on board an aircraft in flight registered in a State Party, provided that such aircraft is engaged in an international flight.

(Option 3)

1. This Convention shall not apply to aircraft used in military, customs or police services.
2. This Convention shall apply to offences committed by a person on board an aircraft in flight, provided that such aircraft is engaged in an international flight.

Article 4

Each State Party undertakes to make the offences set forth in Article 2 punishable by appropriate penalties, consistent with its national law and taking into account the gravity and nature of those

offences. Such penalties may include, amongst others, the deprivation of the right to fly and monetary sanctions.

CHAPTER II – JURISDICTION

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in the following cases:

- (a) when the offence is committed on board an aircraft registered in that State; or
- (b) when the offence is committed on board an aircraft leased with or without crew to an operator; whose principal place of business or, if the operator has no such place of business, whose permanent residence is in that State; or
- (c) when the offence is committed on board an aircraft on or over the territory of that State; or
- (d) when the offence is committed by a national of that State; or
- (e) when the offence is committed on board an aircraft in flight outside that State; if
 - (i) the next landing of the aircraft is in that State; [and
 - (ii) the pilot-in-command has delivered the suspected offender to the competent authorities of that State, with the request that the authorities prosecute the suspected offender and with the affirmation that no similar request has been or will be made by the pilot-in-command or the operator to any other State.]

2. Each State Party may also establish its jurisdiction over any such offence in the following cases:

- (a) when the offence is committed against a national of that State;
- (b) when the offence is committed by a stateless person whose habitual residence is in the territory of that State.

3. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 17 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this Article with regard to those offences.

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4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

CHAPTER III – POWERS OF THE PILOT-IN-COMMAND

Article 6

(Option 1 – Tokyo Convention 1963)

1. The pilot-in-command 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 contemplated in Article 2, impose upon such person reasonable measures, including restraint, which are necessary:

- (a) to protect the safety of the aircraft, or of persons or property on board; or
- (b) to maintain good order and discipline on board; or
- (c) to enable him or her to deliver such person to competent authorities, or to disembark such person in accordance with the provisions of this Convention.

2. The pilot-in-command may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he or she is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is necessary to protect the safety of the aircraft, or persons or property on board.

(Option 2 – In-Flight Security Officers)

1. The pilot-in-command 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 contemplated in Article 2, impose upon such person reasonable measures including restraint which are necessary:

- (a) to protect the safety of the aircraft, or of persons or property on board; or
- (b) to maintain good order and discipline on board; or
- (c) to enable him or her to deliver such person to competent authorities or to disembark such person in accordance with the provisions of this Convention.

2. The pilot-in-command may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person

whom he or she is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is necessary to protect the safety of the aircraft, or persons or property on board.

3. Any crew member, in-flight security officer or passenger may also take any reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property board.

Article 7³

1. Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

- (a) Such point is in the territory of a non-State Party and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1 (c) in order to enable his or her delivery to competent authorities;
- (b) The aircraft makes a forced landing and the pilot-in-command is unable to deliver that person to competent authorities; or
- (c) That person agrees to onward carriage under restraint.

2. The pilot-in-command shall as soon as practicable, and, if possible, before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provision of Article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8⁴

1. The pilot-in-command may, in so far as it is necessary for the purpose of subparagraph (a) or (b) of paragraph 1 of Article 6, disembark in the territory of any State in which the aircraft lands any person who he or she has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 2.

2. The pilot-in-command shall report to the authorities of the State in which he or she disembarks any person pursuant to this article, the fact of, and the reasons for such disembarkation.

Article 9⁵

³ This article corresponds almost entirely to Article 7 of the Tokyo Convention.

⁴ This article corresponds almost entirely to Article 8 of the Tokyo Convention.

⁵ This article corresponds almost entirely to Article 9 of the Tokyo Convention.

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1. The pilot-in-command may deliver to the competent authorities of any State Party in the territory of which the aircraft lands any person who he or she has reasonable grounds to believe has committed on board the aircraft an offence contemplated in Article 2.
 2. The pilot-in-command shall as soon as practicable and if possible before landing in the territory of a State Party with a person on board whom the pilot-in-command intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of its intention to deliver such person and the reasons therefor.
 3. The pilot-in-command shall provide the authorities, to which any suspected offender is delivered in accordance with the provisions of this article, with all evidence and information lawfully in his or her possession.

Article 10

(Option 1 – Tokyo Convention 1963)

For actions taken in accordance with this Convention, neither the pilot-in-command, any other member of the crew, any passenger, the owner or the operator, nor the person on whose behalf the flight was performed, shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

(Option 2)

For actions taken in accordance with this Convention, neither the pilot-in-command, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding instituted by or on behalf of the person against whom the actions were taken.

(Option 3 – Deferential Standard)

For actions taken in accordance with this Convention, neither the pilot-in-command, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding by or on behalf of the person against whom the actions were taken, unless such actions were taken in an arbitrary and capricious manner.

(Option 4 – In-Flight Security Officer)

For actions taken in accordance with this Convention, neither the pilot-in-command, any in-flight security officer, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding by or on behalf of the person against whom the actions were taken.

CHAPTER IV – POWERS AND DUTIES OF STATES

Article 11⁶

⁶ This article corresponds almost entirely to Article 12 of the Tokyo Convention.

1. Any State Party shall allow the pilot in command of an aircraft registered in another State Party to disembark any person pursuant to Article 8, paragraph 1.
2. Any State Party shall take delivery of any person whom the pilot-in-command delivers pursuant to Article 9, paragraph 1.⁷
3. Upon being satisfied that the circumstances so warrant, any State Party shall take custody or other measures to ensure the presence of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as reasonably necessary to enable any criminal or extradition proceedings to be instituted.⁸
4. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which that person is a national⁹
5. Any State Party, to which a person is delivered pursuant to Article 9, paragraph 1, shall immediately make a preliminary enquiry into the facts.¹⁰
6. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State of the operator and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant detention. The State which makes the preliminary enquiry contemplated in paragraph 5 of this article shall promptly report its finding to those States and shall indicate whether it intends to exercise jurisdiction.¹¹

Article 12¹²

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, and when such person cannot or does not desire to continue his or her journey and the State of landing refuses to admit him or her, that State may, if the person in question is not a national or permanent resident of that State, return the person to the territory of the State of which the person is a national or permanent resident or to the territory of the State in which the person began his or her journey by air.
2. Neither disembarkation, nor delivery, nor the taking into custody or other measures contemplated in Article 11, paragraph 3, nor return of the person concerned, shall be considered

⁷ This corresponds almost entirely to paragraph 1 of Article 13 of the Tokyo Convention.

⁸ This corresponds to a modified version of paragraph 2 of Article 13 of the Tokyo Convention.

⁹ This corresponds to paragraph 3 of Article 13 of the Tokyo Convention.

¹⁰ This corresponds almost entirely to paragraph 4 of Article 13 of the Tokyo Convention.

¹¹ This corresponds almost entirely to paragraph 5 of Article 13 of the Tokyo Convention.

¹² This article corresponds almost entirely to Article 14 of the Tokyo Convention.

as admission to the territory of the State Party concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a State Party relating to the expulsion of persons from its territory.

Article 13

1. Without prejudice to Article 12, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, and who desires to continue his or her journey shall be at liberty as soon as practicable to proceed to any destination of his or her choice unless his or her presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.¹³

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a State Party in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, shall guarantee to such person fair treatment, including enjoyment of all rights and guarantees in conformity with its laws and applicable provisions of international law, including international human rights law.¹⁴

CHAPTER V – OTHER PROVISIONS

Article 14¹⁵

1. Offences other than those set forth in paragraph 1 (a) (b) and 2 (a) (b) of Article 2 shall not be deemed extraditable.

2. The State Party in the territory of which the alleged offender of an offence set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 is found shall, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 15¹⁶

1. The offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between the States Parties.

¹³ This corresponds partially to paragraph 1 of Art. 15 of the Tokyo Convention.

¹⁴ This is a combination of paragraph 2 of Art. 15 of the Tokyo Convention and Art. 11 of the Beijing Convention (fair treatment clause).

¹⁵ This corresponds to Art. 10 of the Beijing Convention.

¹⁶ This corresponds almost entirely to Art. 12 of the Beijing Convention.

States Parties undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Each of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with subparagraphs (a), (b), (d) and (e) of paragraph 1 of Article 5, and who have established jurisdiction in accordance with paragraph 2 of Article 5.

Article 16¹⁷

None of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 17¹⁸

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person for any of these reasons.

Article 18¹⁹

¹⁷ This corresponds almost entirely to Art. 13 of the Beijing Convention.

¹⁸ This corresponds almost entirely to Art. 14 of the Beijing Convention.

¹⁹ This corresponds to Art. 15 of the Beijing Convention and Art. 18 of the Tokyo Convention.

The States Parties having established joint air transport operating organizations or international operating agencies, which operate aircraft subject to joint or international registration shall, by appropriate means, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registry for the purpose of this Convention and shall give notice thereof to the Secretary General of the International Civil Aviation Organization who shall communicate the notice to all States Parties to this Convention.

Article 19²⁰

When, due to the commission of one of the offences set forth in Article 2, a flight has been delayed or interrupted, any State Party in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable.

Article 20

1. States Parties shall, in accordance with international and national law, endeavor to take all practicable measures for the purpose of preventing the offences set forth in Article 2.²¹
2. States Parties shall take all necessary measures to increase passenger awareness of the unacceptability and legal consequences of the types of behavior set forth in Article 2 in aviation facilities and on board aircraft.²²
3. States Parties shall endeavor to ensure that airports, operators, and public authorities provide training to relevant personnel concerning the identification and management of the types of behaviors set forth in Article 2, including the recognition and resolution of escalating situations, and crisis containment.²³

Article 21

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in Article 2. The law of the State requested shall apply in all cases.²⁴
2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.²⁵

²⁰ This corresponds to paragraph 2 of Article 16 of the Beijing Convention.

²¹ This corresponds to paragraph 1 of Article 16 of the Beijing Convention.

²² Language taken from recommended practice 6.44 of Annex 9.

²³ Language taken from recommended practice 6.45 of Annex 9.

²⁴ This corresponds to paragraph 1 of Article 17 of the Beijing Convention.

3. Any State Party having reason to believe that one of the offences set forth in Article 2 is about to be committed, shall, in accordance with its national law, furnish any relevant information in its possession to those States Parties which it believes would be the States set forth in paragraphs 1 and 2 of Article 5.²⁶

4. States Parties shall take appropriate measures to ensure cooperation of operators and their crews and passengers in legal proceedings instituted with respect to the commission of any of the offences set forth in Article 2.

Article 22²⁷

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary.

FINAL CLAUSES

²⁵ This corresponds to paragraph 2 of Article 17 of the Beijing Convention.

²⁶ This corresponds to Art. 18 of the Beijing Convention.

²⁷ This corresponds to Art. 20 of the Beijing Convention.

APPENDIX B

New Instrument to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft

Chapter I. Scope of the Convention PREAMBULAR CLAUSES

CHAPTER I – DEFINITIONS, OFFENCES, AND SCOPE OF APPLICATION

Article 1

~~1. This Convention shall apply in respect of:~~

~~(a) Offences against penal law;~~

~~(b) — Acts which, whether or not they are offences may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.~~

~~2. Except as provided in Chapter III, this convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.~~

~~3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.~~

~~4. This Convention shall not apply to aircraft used in military, customs or police services.~~

For the purpose of this Convention:

(a) an aircraft is considered to be “in flight” at any time 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 flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board;

(b) a “crew member” means a person assigned by an aircraft operator to duty on an aircraft during a flight duty period;

- (c) “in-flight security officer” means a person who is authorized by the government of the State of the operator and 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. This excludes persons employed to provide exclusive personal protection for one or more specific person(s) travelling on the aircraft, such as personal bodyguards;
- (d) “international flight” means any flight whose place of departure and whose intended [or actual] destination are situated within the territories of two States, whether or not there is a break in the flight, or within the territory of one State if there is an intended stopping place in the territory of another State;
- (e) “operator” means the person who makes use of the aircraft, provided that control of the navigation of the aircraft is retained by the person from whom the right to make use of the aircraft is derived, whether directly or indirectly, that person shall be considered the operator. A person shall be considered to be making use of an aircraft when he or she is using it personally or when his or her servants or agents are using the aircraft in the course of their employment, whether or not within the scope of their authority;
- (f) “pilot-in-command” means the pilot designated by the operator, or in the case of general aviation, the owner, as being in command and charged with the safe conduct of a flight. [Where the pilot-in-command becomes incapacitated for whatever reason, the designated second-in-command assumes the function of the pilot-in-command];
- (g) “State Party” means a State in which this Convention is in force.

Article 2

~~Without prejudice to the provisions of article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.~~

1. Any person commits an offence on board an aircraft if that person:
 - (a) assaults, threatens, or intimidates a crew member, whether physically or verbally, or interferes with the performance of the duties of the crew member or lessens the crew member’s ability to perform those duties; or
 - (b) refuses to follow a lawful instruction given by the pilot-in-command, or on behalf of the pilot-in-command by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on board or for the purpose of maintaining good order and discipline on board.
2. Any person commits an offence on board an aircraft if that person:

-
- (a) performs or threatens to perform an act of physical violence against another person; or
- (b) sexually assaults another person.
3. Any person acting in a manner that is likely to endanger the safety of the aircraft or of any person on board or jeopardizing the good order and discipline on board the aircraft, commits an offence on board an aircraft if that person:
- (a) assaults, threatens or intimidates, whether physically or verbally, another person; or
- (b) intentionally causes damage or destruction to property; or
- (c) consumes alcoholic beverages or drugs¹ resulting in intoxication.
4. Any person commits an offence on board an aircraft if that person:
- (a) smokes in a lavatory, or smokes elsewhere in a manner likely to endanger the safety of the aircraft; or²
- (b) tampers with a smoke detector or any other safety-related device on board the aircraft; or
- (c) operates a portable electronic device when such act is prohibited; or
- (d) otherwise acts in a manner that poses threat to the safety of the aircraft or to persons or property on board the aircraft.
5. The offences listed in this article shall leave unaffected any offences against penal law of Article 1, paragraph 1 (a) of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963* and the jurisdiction associated therewith.

CHAPTER II. JURISDICTION

Article 3

- ~~1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.~~

¹ The use of the term “controlled substances” may also be considered.

² Other alternatives would be to adopt the following language: “smokes in a lavatory, or smokes elsewhere when such act is prohibited”, or “smokes anywhere on board, including but not restricted to in a lavatory in a manner likely to endanger the safety of the aircraft.”

~~2. Each Contracting State/State Party shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.~~

~~3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.~~

(Option 1 – Tokyo Convention 1963)

1. This Convention shall not apply to aircraft used in military, customs or police services.

2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed by a person on board any aircraft registered in a State Party, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

3. The provisions of Chapter III shall not apply to offences committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board.

(Option 2)

1. This Convention shall not apply to aircraft used in military, customs or police services.

2. This Convention shall apply to offences committed by a person on board an aircraft in flight registered in a State Party, provided that such aircraft is engaged in an international flight.

(Option 3)

1. This Convention shall not apply to aircraft used in military, customs or police services.

2. This Convention shall apply to offences committed by a person on board an aircraft in flight, provided that such aircraft is engaged in an international flight.

Article 4

~~A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:~~

~~(a) The offence has effect on the territory of such State;~~

~~(b) The offence has been committed by or against a national or permanent resident of such State;~~

~~(e) The offence is against the security of such State;~~

~~(d) The offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;~~

~~(e)(a) The exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.~~

Each State Party undertakes to make the offences set forth in Article 2 punishable by appropriate penalties, consistent with its national law and taking into account the gravity and nature of those offences. Such penalties may include, amongst others, the deprivation of the right to fly and monetary sanctions.

CHAPTER III. JURISDICTION ~~POWERS OF THE AIRCRAFT COMMANDER~~

Article 5

~~1. The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of take-off or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board~~

~~1. Notwithstanding the provisions of article 1, paragraph 2, an aircraft shall for the purposes of this Chapter, be considered to be in flight at any time 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 competent authorities of a State take over the responsibility for the aircraft and for the persons and property on board.~~

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 2 in the following cases:

(a) when the offence is committed on board an aircraft registered in that State; or

(b) when the offence is committed on board an aircraft leased with or without crew to an operator; whose principal place of business or, if the operator has no such place of business, whose permanent residence is in that State; or

(c) when the offence is committed on board an aircraft on or over the territory of that State;
or

(d) when the offence is committed by a national of that State; or

(e) when the offence is committed on board an aircraft in flight outside that State; if

(i) the next landing of the aircraft is in that State; [and

(ii) the pilot-in-command has delivered the suspected offender to the competent authorities of that State, with the request that the authorities prosecute the suspected offender and with the affirmation that no similar request has been or will be made by the pilot-in-command or the operator to any other State.]

2. Each State Party may also establish its jurisdiction over any such offence in the following cases:

(a) when the offence is committed against a national of that State;

(b) when the offence is committed by a stateless person whose habitual residence is in the territory of that State.

3. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 17 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this Article with regard to those offences.

4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

CHAPTER III – POWERS OF THE PILOT-IN-COMMAND

Article 6

Option 1

1. The ~~aircraft commander~~pilot-in-command 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 ~~21, paragraph 1,~~ impose upon such person reasonable measures, including restraint, ~~which~~ which are necessary:

(a) To protect the safety of the aircraft, or of persons or property ~~on board~~therein; or

(b) To maintain good order and discipline on board; or

(c) To enable him to deliver such person to competent authorities, or to disembark such person ~~him~~ in accordance with the provisions of this Chapter.

2. The ~~aircraft commander~~pilot-in-command may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers

to restrain any person whom he or she is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property on board. therein.

(Option 2 – In-Flight Security Officers)

1. The pilot-in-command 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 contemplated in Article 2, impose upon such person reasonable measures including restraint which are necessary:

(a) to protect the safety of the aircraft, or of persons or property on board; or

(b) to maintain good order and discipline on board; or

(c) to enable him or her to deliver such person to competent authorities or to disembark such person in accordance with the provisions of this Convention.

2. The pilot-in-command may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he or she is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is necessary to protect the safety of the aircraft, or persons or property on board.

3. Any crew member, in-flight security officer or passenger may also take any reasonable preventive measures without such authorization when he or she has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property on board.

Article 7

1. Measures of restraint imposed upon a person in accordance with article 6 shall not be continued beyond any point at which the aircraft lands unless:

(a) Such point is in the territory of a non ~~Contracting State~~State Party and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with ~~A~~article 6, paragraph 1 (c) in order to enable his or her delivery to competent authorities;

(b) The aircraft makes a forced landing and the ~~aircraft commander~~pilot-in-command is unable to deliver that person to competent authorities; or

(c) That person agrees to onward carriage under restraint.

2. The ~~aircraft commander~~pilot-in-command shall as soon as practicable, and, if possible, before landing in the territory of a State with a person on board who has been placed under restraint in accordance with the provisions of article 6, notify the authorities of such State of the fact that a person on board is under restraint and of the reasons for such restraint.

Article 8

1. The ~~aircraft commander~~pilot-in-command may, in so far as it is necessary for the purpose of subparagraph (a) or (b) of paragraph 1 of ~~A~~article 6, disembark in the territory of any State in which the aircraft lands any person who he or she has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in ~~Article 2. article 1, paragraph 1(b).~~

2. The ~~aircraft commander~~pilot-in-command shall report to the authorities of the State in which he or she disembarks any person pursuant to this article, the fact of, and the reasons for, such disembarkation.

Article 9

1. The ~~aircraft commander~~pilot-in-command may deliver to the competent authorities of any ~~Contracting State~~State Party in the territory of which the aircraft lands any person who ~~he or she~~ has reasonable grounds to believe has committed on board the aircraft an ~~offence contemplated in Article 2, act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft.~~

2. The ~~aircraft commander~~pilot-in-command shall as soon as practicable, and, if possible, before landing in the territory of a ~~Contracting State~~ State with Party with a person on board whom the ~~aircraft commander~~pilot-in-command intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.

3. The ~~aircraft commander~~pilot-in-command shall furnish the authorities to ~~which whom~~ any suspected offender is delivered in accordance with the provisions of this article with all evidence and information ~~which, under the law of the State of registration of the aircraft, are lawfully in his~~ or her possession.

Article 10

Option 1

For actions taken in accordance with this Convention, neither the ~~aircraft commander~~pilot-in-command, any other member of the crew, any passenger, the owner or operator ~~of the aircraft~~, nor the person on whose behalf the flight was performed, shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

(Option 2)

For actions taken in accordance with this Convention, neither the pilot-in-command, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding instituted by or on behalf of the person against whom the actions were taken.

(Option 3 – Deferential Standard)

For actions taken in accordance with this Convention, neither the pilot-in-command, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding by or on behalf of the person against whom the actions were taken, unless such actions were taken in an arbitrary and capricious manner.

(Option 4 – In-Flight Security Officer)

For actions taken in accordance with this Convention, neither the pilot-in-command, any in-flight security officer, any other member of the crew, any passenger, the owner nor the operator, shall be held responsible in any proceeding by or on behalf of the person against whom the actions were taken.

CHAPTER IV. UNLAWFUL SEIZURE OF AIRCRAFT POWERS AND DUTIES OF STATES

Article 11

~~1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.~~

~~2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.~~

~~3.1.~~_____

1. Any State Party shall allow the pilot in command of an aircraft registered in another State Party to disembark any person pursuant to Article 8, paragraph 1.

2. Any State Party shall take delivery of any person whom the pilot-in-command delivers pursuant to Article 9, paragraph 1.³

³ This corresponds almost entirely to paragraph 1 of Article 13 of the Tokyo Convention.

3. Upon being satisfied that the circumstances so warrant, any State Party shall take custody or other measures to ensure the presence of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as reasonably necessary to enable any criminal or extradition proceedings to be instituted.⁴
4. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which that person is a national⁵
5. Any State Party, to which a person is delivered pursuant to Article 9, paragraph 1, shall immediately make a preliminary enquiry into the facts.⁶
6. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft, the State of the operator and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant detention. The State which makes the preliminary enquiry contemplated in paragraph 5 of this article shall promptly report its finding to those States and shall indicate whether it intends to exercise jurisdiction.⁷

CHAPTER V. POWERS AND DUTIES OF STATES

Article 12

~~1. Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph~~

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, and when such person cannot or does not desire to continue his or her journey and the State of landing refuses to admit him or her, that State may, if the person in question is not a national or permanent resident of that State, return the person to the territory of the State of which the person is a national or permanent resident or to the territory of the State in which the person began his or her journey by air.

2. Neither disembarkation, nor delivery, nor the taking into custody or other measures contemplated in Article 11, paragraph 3, nor return of the person concerned, shall be considered as admission to the territory of the State Party concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a State Party relating to the expulsion of persons from its territory.

⁴ This corresponds to a modified version of paragraph 2 of Article 13 of the Tokyo Convention.

⁵ This corresponds to paragraph 3 of Article 13 of the Tokyo Convention.

⁶ This corresponds almost entirely to paragraph 4 of Article 13 of the Tokyo Convention.

⁷ This corresponds almost entirely to paragraph 5 of Article 13 of the Tokyo Convention.

Article 13

~~1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to article 9, paragraph 1.~~

~~2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person suspected of an act contemplated in article 11, paragraph 1 and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.~~

~~3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.~~

~~4. Any Contracting State, to which a person is delivered pursuant to article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.~~

~~5. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 4 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.~~

1. Without prejudice to Article 12, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, and who desires to continue his or her journey shall be at liberty as soon as practicable to proceed to any destination of his or her choice unless his or her presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.⁸

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a State Party in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, shall guarantee to such person fair treatment, including enjoyment of all rights and guarantees in conformity with its laws and applicable provisions of international law, including international human rights law.⁹

CHAPTER V – OTHER PROVISIONS

⁸ This corresponds partially to paragraph 1 of Art. 15 of the Tokyo Convention.

⁹ This is a combination of paragraph 2 of Art. 15 of the Tokyo Convention and Art. 11 of the Beijing Convention (fair treatment clause).

Article 14

~~1. When any person has been disembarked in accordance with article 8, paragraph 1, or delivered in accordance with article 9, paragraph 1, or has disembarked after committing an act contemplated in article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the State of landing refuses to admit him, that State may, if the person in question is not a national or permanent resident of that State, return him to the territory of the State of which he is a national or permanent resident or to the territory of the State in which he began his journey by air.~~

~~2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.~~

1. Offences other than those set forth in paragraph 1 (a) (b) and 2 (a) (b) of Article 2 shall not be deemed extraditable.

2. The State Party in the territory of which the alleged offender of an offence set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 is found shall, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Article 15

~~1. Without prejudice to article 14, any person who has been disembarked in accordance with article 8, paragraph 1, or delivered in accordance with article 9, paragraph 1, or has disembarked after committing an act contemplated in article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings.~~

~~2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with article 8, paragraph 1, or delivered in accordance with article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.~~

1. The offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between the States Parties.

States Parties undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Each of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be treated, for the purposes of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with subparagraphs (a), (b), (d) and (e) of paragraph 1 of Article 5, and who have established jurisdiction in accordance with paragraph 2 of Article 5.

CHAPTER VI. OTHER PROVISIONS

Article 16

~~1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the State of registration of the aircraft.~~

~~2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.~~

None of the offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 17

~~In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.~~

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in paragraphs 1 (a) (b) and 2 (a) (b) of Article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person for any of these reasons.

Article 18

~~The~~ ~~If Contracting State~~ State Parties s having established joint air transport operating organizations or international operating agencies, which operate aircraft subject to joint or international registration not registered in any one State those States shall, by appropriate means, according to the circumstances of the case, designate for each aircraft the State among them which shall exercise the jurisdiction and have the attributes of the State of registry for the purpose of this Convention and , for the purposes of this Convention, shall give notice thereof to the Secretary General of ~~be considered as the State of registration and shall give notice thereof to~~ the International Civil Aviation Organization who shall ~~which shall~~ communicate the notice to all States Parties to this Convention.

CHAPTER VII. FINAL CLAUSES

Article 19

~~Until the date on which this convention comes into force in accordance with the provisions of article 21, it shall remain open for signature on behalf of any State which at the date is a Member of the United Nations or of any of the Specialized Agencies.~~

When, due to the commission of one of the offences set forth in Article 2, a flight has been delayed or interrupted, any State Party in whose territory the aircraft or passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable.

Article 20

~~1. This Convention shall be subject to ratification by the signatory States in accordance with their constitutional procedures.~~

~~2.1. _____ The instruments of ratification shall be deposited with the International Civil Aviation Organization.~~

1. States Parties shall, in accordance with international and national law, endeavor to take all practicable measures for the purpose of preventing the offences set forth in Article 2.¹⁰
2. States Parties shall take all necessary measures to increase passenger awareness of the unacceptability and legal consequences of the types of behavior set forth in Article 2 in aviation facilities and on board aircraft.¹¹
3. States Parties shall endeavor to ensure that airports, operators, and public authorities provide training to relevant personnel concerning the identification and management of the types of behaviors set forth in Article 2, including the recognition and resolution of escalating situations, and crisis containment.¹²

Article 21

~~1. As soon as twelve of the signatory States have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.~~

~~2. As soon as this Convention comes into force, it shall be registered with the Secretary General of the United Nations by the International Civil Aviation Organization.~~

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in Article 2. The law of the State requested shall apply in all cases.¹³

2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters.¹⁴

3. Any State Party having reason to believe that one of the offences set forth in Article 2 is about to be committed, shall, in accordance with its national law, furnish any relevant information in its possession to those States Parties which it believes would be the States set forth in paragraphs 1 and 2 of Article 5.¹⁵

4. States Parties shall take appropriate measures to ensure cooperation of operators and their crews and passengers in legal proceedings instituted with respect to the commission of any of the offences set forth in Article 2.

¹⁰ This corresponds to paragraph 1 of Article 16 of the Beijing Convention.

¹¹ Language taken from recommended practice 6.44 of Annex 9.

¹² Language taken from recommended practice 6.45 of Annex 9.

¹³ This corresponds to paragraph 1 of Article 17 of the Beijing Convention.

¹⁴ This corresponds to paragraph 2 of Article 17 of the Beijing Convention.

¹⁵ This corresponds to Art. 18 of the Beijing Convention.

Article 22

~~1. This Convention shall, after it has come into force, be open for accession by any State Member of the United Nations or of any of the Specialized Agencies.~~

~~The accession of a State shall be affected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.~~

~~1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.~~

~~2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not be bound by the preceding paragraph with respect to any State Party having made such a reservation.~~

~~3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Depositary.~~

Article 23

~~1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.~~

~~2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.~~

Article 24

~~1. Any Dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.~~

~~2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.~~

~~3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.~~

~~Article 25~~

~~Except as provided in article 24 no reservation may be made to this Convention.~~

~~Article 26~~

~~The International Civil Aviation Organization shall give notice to all State Members of the United Nations or of any of the Specialized Agencies:~~

- ~~(a) Of any signature of this Convention and the date thereof;~~
- ~~(b) Of the deposit of any instrument of ratification or accession and the date thereof;~~
- ~~(c) Of the date on which this Convention comes into force in accordance with article 21, paragraph 1;~~
- ~~(d) Of the receipt of any notification of denunciation and the date thereof; and~~
- ~~(e) Of the receipt of any declaration or notification made under article 24 and the date thereof.~~

~~IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.~~

~~DONE at Tokyo on the fourteenth day of September, One Thousand Nine Hundred and Sixty three in three authentic texts drawn up in the English, French and Spanish languages.~~

~~This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all States Members of the United Nations or of any Specialized Agency.~~

FINAL CLAUSES

APPENDIX 5**SPECIAL SUB-COMMITTEE OF THE LEGAL COMMITTEE
FOR THE MODERNIZATION OF THE TOKYO CONVENTION
INCLUDING THE ISSUE OF UNRULY PASSENGERS**

Montréal, 22 – 25 May 2012

General Summary (final)

1. There is a growing concern in the international aviation community concerning the problem of unruly passengers. Further study needs to be undertaken with a view to collecting data in order to better assess the scope of this problem.
2. The existing State of Registry jurisdiction over offences under the penal laws of such State as set out in the Tokyo Convention is to be preserved.
3. The general sentiment is that the inclusion and exercise of the State of the Operator and the State of Landing jurisdictions will assist to curb the increasing trend of unruly behavior on board aircraft. Naturally, territorial jurisdiction is to be included. The inclusion of the other bases of jurisdiction will require further discussion. The proposed requirement that makes the State of Landing jurisdiction conditional upon a pilot-in-command's request is to be removed. Whether all these bases of jurisdiction (if included) should be mandatory or optional requires further deliberation. There is no need for a hierarchy of jurisdictional bases.
4. Although there is a general sentiment that a list of offences over which new bases of jurisdiction would be founded would serve a useful purpose, some Delegations remain to be convinced of the need for such a list. Some other Delegations are concerned that such a list may not be sufficiently comprehensive. More work is needed on the necessity, purpose and content of such a list. Further details may be found in the Report of the Working Group on the List of Offences which is attached.
5. The general consensus is that any list of offences considered for inclusion in the Tokyo Convention should not duplicate offences in the other counter-terrorism Conventions and they should be of sufficient gravity to engage the international community and warrant the assumption of criminal jurisdiction. There is reservation about the inclusion in the list of minor offences which are more suitable for administrative sanction by the relevant States or action by the operators.
6. There is general consensus that it may not be appropriate to transplant the extradition system from the counter-terrorism Conventions to the Tokyo Convention to address the problem of unruly passengers. If there is to be an extradition provision, it should be reserved for serious or most serious offences only. It is noted that the Tokyo Convention already contains an extradition provision which would need to be amended if the additional bases of jurisdiction are included. Models established by certain other treaties (e.g. UN Convention against Transnational Organised Crime, UN Convention against Corruption and the Budapest Convention on Cybercrime) could also be considered.

7. There is general consensus that the existing immunity afforded by the Tokyo Convention to the pilot-in-command, crew, passenger and owner and operator of the aircraft is to be retained. It is noted that the Tokyo Convention already prescribes a reasonableness standard to the conduct to which this immunity applies. Whether there is a need to apply an additional or alternative standard to this immunity (such as necessity and proportionality) is to be further deliberated. Further, the extent of the immunity, whether for “any proceeding on account of the treatment undergone by the person against whom the actions were taken” or only for those proceedings “by or on behalf of the person against whom the actions were taken”, is to be further considered.
8. Some Delegations prefer that in-flight security officers (IFSOs) be recognized in the revised Tokyo Convention and accorded a special status with a related provision on immunity. Some other Delegations have expressed doubt on whether the revised Tokyo Convention is the proper instrument for this purpose. Others believe that IFSOs can be dealt with within the existing Tokyo Convention framework under the category of passengers.
9. There is no consensus to delete the current Art. 11 of the Tokyo Convention relating to restoration of the control of the aircraft.
10. There is general support for States to determine the appropriate penalties and that they may include administrative sanctions such as refusal of transportation and fines.
11. The need for and extent of the modernization of the Tokyo Convention is to be further studied and determined. The following aspects / considerations would be relevant to such study and determination: (a) matters already dealt with in the updated counter-terrorism Conventions need not be duplicated; (b) certain commercial practices and issues raise the need for modernizing the Tokyo Convention (e.g. those raising the need for the State of the Operator jurisdiction) but others may well be resolved by commercial and other operator actions; (c) except for the jurisdictional gaps identified, the Tokyo Convention itself is generally not in need of a complete overhaul and many Delegations prefer that the modernization effort focus on addressing the unruly passenger problem.
12. Following from the above, many Delegations expressed the need for another Sub-Committee meeting and some urged that it be held within this year to maintain the momentum of the work. A number of Delegations also requested that a draft Protocol be developed to assist the Sub-Committee in its deliberations at the next meeting. There was a sense that many Delegations had not had sufficient time to prepare for this Sub-Committee meeting and hence, more time should be provided for the Delegations to collect more data and to study the issues as well as the Draft Protocol to prepare well for the next meeting.

ATTACHEMENT TO APPENDIX 5:

REPORT OF THE WORKING GROUP ON THE LIST OF OFFENSES

The Group was reminded of its remit which was:

1. To determine the purpose of a list of offenses; and
2. To determine the content of the list.

The Working Group first looked into the purpose of a list of offenses.

Although there was a general feeling that a list of offenses to found the exercise of the new bases of jurisdiction would serve a useful purpose, certain delegations remained to be convinced of a need for such a list and wished to see more data gathered as to the problems generated by the current absence of a list under the Tokyo Convention. It was recognized that the drafting of a list brought about the risk that some important item might be forgotten. On the other hand, reference was made to the expanding scope of the convention which, in the view of certain delegations, made the existence of a list natural. It was noted that States that took an expansive view of the scope of their jurisdiction under International Law might take the existence of a list as a limitation or a fetter, while States that took a more conservative approach to their jurisdiction were looking for a degree of specificity in the international authority to move ahead. For many, it was also advisable to be in a position to advise the political instances of their governments precisely what fresh jurisdiction they were assuming under the new instrument as well as the implications for them of the new concurrent jurisdictions and the requirement for cooperation between the parties.

While noting that certain States currently had reservations as to the need for a list, the Group discussed the possible content of a list. It was first determined that items on the list should not duplicate any offenses set out in the 1971 Montreal and 2010 Beijing instruments. It was noted that homicide, serious assault, serious sexual assault and attempts to commit those offenses possessed a sufficient level of gravity to engage the international community when committed on board an aircraft in flight and could constitute good grounds for the assumption of criminal jurisdiction under at least some of the new bases for concurrent jurisdiction under discussion. On the other hand, interfering with crew members in the performance of their duties, refusing to follow instructions given by the pilot-in-command or a member of the crew, damaging property or smoking were more suited to the imposition of administrative remedies by the relevant States or actions by the aircraft operators which could extend to blacklisting.

Finally it appeared useful to conserve the aircraft commander's authority to maintain good order and discipline on board the aircraft as currently contemplated in Articles 1(1)(b) and 6(1)(b) of the Convention.