



FACILITATION (FAL) DIVISION — TWELFTH SESSION

Cairo, Egypt, 22 March to 2 April 2004

Agenda Item 4: Controlling travel document fraud and illegal migration

**ANNEX 9 – FACILITATION
CHAPTER 5 – INADMISSIBLE PERSONS AND DEPORTEES**

(Presented by the International Transport Workers' Federation (ITF))

SUMMARY

The ITF counts amongst its global membership many aviation workers with front-line experience of the application of States' policies on inadmissible persons and deportation. Drawing in particular from experiences in the application of air carrier liability legislation, this working paper proposes means by which the facilitation objectives of ICAO can be more comprehensively reconciled with States' broader obligations to protect the rights of refugees, asylum seekers and deported persons.

Action by the Division is in paragraph 5.

1. INTRODUCTION

1.1 ITF affiliates in different parts of the world have widely varying experiences of the impact of immigration policies on their civil aviation infrastructure. In some cases, airlines act as lifelines for escape from persecution, while at other moments they contribute to systems of control. We understand that WP/5 by the Secretariat cannot encompass the broad range of issues concerning immigration policy, but we must agree with the conclusion in FAL/12-WP/5 that States have deepened their control and interception measures including through air carrier liability legislation. This working paper addresses means by which these control and interception measures can be better reconciled with international law on refugee and asylum rights and makes recommendations for improvements in the facilitation standards.

¹ French and Spanish versions provided by the International Transport Workers' Federation (ITF).

2. AIR CARRIER LIABILITY

2.1 In recent years many countries have witnessed a growth in the number of asylum seekers and migrants traveling by air. In response, some governments have introduced air carrier liability laws, which penalize commercial airlines that transport insufficiently documented passengers, and place upon those operators the responsibility for accommodation, repatriation and other related costs. Such measures are provided for under the framework of Annex 9.

2.2 We agree with FAL/12-WP/5 that air carrier liability and immigration procedures place an extraordinary burden on operators of air services. Paragraph 2.2 of WP/5 notes the “*considerable costs*” to the airline industry, refers to the “*inordinate amounts of service resources*” required of the entire civil aviation community, the “*time-consuming*” nature of these measures, and their “*degrading effect*” on service standards as well as their “*potential problems for the security*” of flight.

2.3 The ITF believes that it is not the function of civil commercial operators – in aviation or other transport modes - to act as agents for the legal enforcement of public immigration policy. Custody and deportation are not normal business activities of air carriers. We believe that a strong case can be made for States to abandon air carrier liability as a tool of immigration policy, and thus any need for ICAO to harmonize such measures.

2.4 Such a case can be made on practical as well as principled grounds. There is scant evidence, in particular, of the effectiveness of air carrier liability and other control measures. For example, researchers at the United Kingdom's Home Office, reviewing ten years of European interception practices concluded:

*“there is also strong circumstantial evidence (but little authoritative research) to show that restrictive measures have led to growth in trafficking and illegal entry of both asylum seekers and economic migrants”*²

3. PROTECTING THE RIGHTS OF REFUGEES AND ASYLUM SEEKERS WITHIN AIR TRANSPORT

3.1 What is known, however, is that air carrier liability laws act as a deterrent and barrier to the exercise of refugee rights. People genuinely fleeing persecution and human rights violations are often not in a position to obtain the proper documentation required to leave the country. Sometimes they are hiding from an oppressive government and must leave clandestinely. Sometimes the situation is too urgent for them to go through the proper procedures. In other cases, the functions of the State have broken down through armed conflict and obtaining documentation is impossible. In such circumstances, asylum-seekers may find that their ability to use air transportation to flee persecution is curtailed, in contravention of their fundamental rights.³

3.2 Commenting on international control measures, the UN refugee agency, the UNHCR, in its latest report on protection to the United Nations, states *“concerns arise where such agreements are not accompanied by adequate safeguards to identify those in need of international protection”*⁴. Such views are not just held by held by advocates of human rights. The following was the view expressed in 2000 by one airline that is subject to air carrier liability legislation:

*“We believe that Carriers Liability legislation can prejudice the rights of an individual to asylum. By preventing individuals from flying to a country, airlines are denying the opportunity to claim asylum. We understand that since 1987, no fewer than 400 passengers, who boarded British Airways flights with apparently correct travel documentation and yet arrived in the UK without valid documents, have been granted refugee status. Whilst opportunities to claim asylum outside the UK may exist, had we identified these passengers as being incorrectly documented on departure, we would have been obliged to refuse them carriage to the UK because of the Carriers' Liability legislation, thus prejudicing the exercise of their right to claim asylum.”*⁵

3.3 The ITF opposes the return of any person to a country where he or she might face serious human rights violations such as torture or execution. This principle of international law, known as non-refoulement is widely recognized to be binding on all States. In order to comply with this principle, States must ensure that all persons seeking asylum have access to fair procedures to determine whether or not they are in need of protection. These principles are elaborated in the 1948 *Universal Declaration of Human Rights*, and in particular, through the 1951 *Convention on the Status of Refugees*, and in its 1967 *Protocol*.

² *An Assessment of the Impact of Asylum Policies in Europe 1990-2000*, Findings 168, Home Office, United Kingdom 2003

³ *No Flights To Safety: Carrier Sanctions; Airline Employees and the Right of Refugees* Amnesty International in coordination with the International Transport Workers' Federation, November 1997

⁴ United Nations General Assembly 54th Session: UNHCR, Note On International Protection 2 July 2003.

⁵ Extract from Comments submitted by James Forster, Manager Facilitation, Government and Industry Affairs, on the Council of the European Union Initiative of the French Republic with a view to the adoption of a *Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals lacking the documents necessary for admission*, October 2000.

3.4 The ITF believes that the obligations of States under these international agreements should be given more explicit prominence within Annex 9. Specifically, we are concerned that the Note proposed within 5.4 of Chapter 5, namely:

Note. — Nothing in this provision is to be construed so as to allow the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.

is not sufficiently broad, as it refers to the narrow question of refugees rather than the broader responsibilities of *non-refoulement*, or whether a more specific *saving clause* might be required, making explicit reference to the applicable international instruments.

3.5 We also believe that a better integration between States' immigration policies and their transport facilitation measures would contribute to overcoming the widespread problems of poor implementation and lack of coordination or cooperation identified by the Secretariat in their WP/5. As a priority the ICAO should engage in a deepening dialogue with, in particular, the UNHCR and ILO, working together with stakeholders, to achieve a better convergence of policy.

4. **SPECIFIC MEASURES REGARDING INADMISSIBLE PERSONS AND REFUGEES**

4.1 The ITF believes that more specific standards and recommended practices – and guidance material – should be developed through ICAO on the question of inadmissible persons and refugees.

4.2 We recommend that Annex 9 contain a *specific* reference to obligations of States to Article 31 of the 1951 *Convention* which recognises that some refugees will have no option but to use illegal means of entry, and provides that States "shall not impose penalties" on refugees on this account. It should also be explicitly specified that in such circumstances operators would also not be liable to penalties. Such a provision would go beyond the defence against penalties provided for in proposed 5.14 in Chapter 5.

4.3 The extent to which States use the commercial sector for the provision of public services is often controversial, including in relation to penal and other law enforcement services (e.g. in regard to private prisons). However, such arrangements have generally, of course, been commercial in nature between governments and companies and limited to the provision of services rather than the transfer of responsibilities. Air carrier liability laws on the other hand, impose law enforcement functions on operators that may go beyond the subcontracting of operations. We would ask, in particular, by what principle of international jurisprudence it is possible to assert, as is proposed for the new Standard (formerly a recommended practice) in 5.9 that "*the operator shall be held responsible for the custody and care of a person from the moment that person is found inadmissible and returned to the operator for removal from the State, pursuant to 5.4*"?

4.4 If such responsibilities are to be exercised by either by public agencies or commercial operators, we believe that specific guidance should be provided through ICAO and Annex 9. In particular, we invite this Division and ICAO to incorporate within Annex 9 the specific *Conclusions on Protection Safeguards in Interception Measures* adopted on 10 October 2003 by the UNHCR⁶ which state, *inter alia*:

- ii. *All intercepted persons should be treated, at all times, in a humane manner respectful of their human rights. State authorities and agents acting on behalf of the intercepting State should take, consistent with their obligations under international*

⁶ *Conclusion on Protection Safeguards in Interception Measures*, Executive Committee Conclusions, UNHCR, October 2003.

law, all appropriate steps in the implementation of interception measures to preserve and protect the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment of persons intercepted;

- iv. Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law. Intercepted persons found to be in need of international protection should have access to durable solutions;*

4.5 Deportations represent a serious challenge to aviation operators and employees. Some of these problems are outlined by IATA in WP/35. We note that there have been deaths in custody of persons being deported, and we believe that such tragedies must be prevented at all costs. Measures for the management of unwilling deportees have all too often fallen below the minimum acceptable standards of respect for core human rights. The ITF believes that it is unacceptable to restrain passengers through drugging, through the use of excessive force, or by means of improvised restraint aids, such as electrical tape etc.

4.6 We therefore believe that it is appropriate for Annex 9 to include some reference to minimum acceptable standards for the care specified in the proposed paragraph 5.9 of the new Chapter 5. This question is addressed by the UNHCR in their *Conclusion on the return of persons found not to be in need of international protection*, which could be a basis for an ICAO SARP:

- c) Reiterates that return of persons found not to be in need of international protection should be undertaken in a humane manner, in full respect for human rights and dignity and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law;⁷*

4.7 Finally, we believe that ICAO and States need to recognise the importance of human factors and professional competence in the management of difficult and sensitive procedures. As a minimum, we invite ICAO to incorporate the following additional paragraph from the *Conclusions on Protection Safeguards in Interception Measures* adopted on 10 October 2003 by the UNHCR which states:

- i. All persons, including officials of a State, and employees of a commercial entity, implementing interception measures should receive specialized training, including available means to direct intercepted persons expressing international protection needs to the appropriate authorities in the State where the interception has taken place, or, where appropriate, to UNHCR⁸*

5. ACTION BY THE DIVISION

5.1 The Division is invited to adopt the following B-type Recommendations:

⁷ *Conclusion on the return of persons found not to be in need of international protection* Executive Committee Conclusions, UNHCR, October 2003.

⁸ *Conclusion on Protection Safeguards in Interception Measures*, Executive Committee Conclusions, UNHCR, October 2003.

Recommendation B/XX —

It is recommended that ICAO, working cooperatively with other bodies, promotes the integration of facilitation measures with States' broader obligations to protect the rights of refugees, asylum seekers and deported persons.

Recommendation B/XX —

States are encouraged to take all action to ensure that interception and control measures, including carrier liability, should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened.

Recommendation B/XX —

States are encouraged to work cooperatively nationally and internationally with stakeholders, including operators and employees, as well as other interested parties, including the UNHCR and ILO, to develop protocols and procedures relating to standards of custody and care and matters related to the application of interception and control measures.

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