



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

NOTE OF THE SECRETARIAT

(Presented by the Secretariat)

1. **BACKGROUND OF THE LEGAL WORK RELATING TO UNRULY PASSENGERS PRIOR TO THE 35TH SESSION OF THE LEGAL COMMITTEE**

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

1.2 In September 2009, the International Air Transport Association noted during the 34th Session of the ICAO Legal Committee that incidents involving disruptive and unruly passengers had continued to rise steadily. Its proposal to form a working group to address this issue was supported by the Committee. Accordingly, the Secretariat Study Group on Unruly Passengers was reactivated in early 2011 based on a decision of the Council at the sixth meeting of its 188th Session in October 2009. The reactivated Secretariat Study Group held its first meeting in Montreal from 2 to 3 May 2011 and its second meeting in Paris from 3 to 4 October 2011. It identified a number of legal issues related to unruly passengers which needed to be addressed, including a review of the jurisdictional clauses under the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo Convention, 1963) in order to align them with modern practice; the establishment of common standards and practices with regard to offences; the strengthening of international cooperation in harmonizing enforcement procedures; the powers of the aircraft commander and related immunity; and the status of In-Flight Security Officers (IFSOs). The Study Group reached the conclusion that the issue of unruly passengers needed to be addressed by the international community, that ICAO was the proper forum for this purpose, and that the Tokyo Convention should be reviewed and the feasibility of its amendment examined, with particular reference to the issue of unruly passengers. To that end, the Group recommended that a Sub-Committee of the Legal Committee be established and be tasked to prepare a draft text to modernize the Tokyo Convention.

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

1.4 Based on the report of the Rapporteur, the Sub-Committee focused its discussions on jurisdiction, a list of offences, extradition, immunity of the aircraft commander, IFSOs and the extent of the modernization of the Tokyo Convention.

1.5 With respect to jurisdiction, the Sub-Committee expressed the sentiment that the inclusion and exercise of the State of the Operator and State of Landing jurisdictions will assist to curb the increasing trend of unruly behaviour on board aircraft. There was general agreement in the Sub-Committee that the establishment of such jurisdictions is desirable. Other bases of jurisdiction were also considered. What remained to be determined was whether such jurisdictions would be mandatory or optional.

1.6 With respect to a list of offences, the Sub-Committee agreed not to include such a list in the draft instrument, but its majority proposed a new Article 15 *bis* in the Tokyo Convention to include two types of acts. These would be the act of assault against a crew member and the act of refusal to follow a lawful instruction given by or on behalf of the aircraft commander.

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

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

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

1.10 The Sub-Committee considered the possible forms for amending the Tokyo Convention. If a decision was eventually made to amend the Tokyo Convention, the Sub-Committee recommended that such amendments be effected through a supplementary protocol instead of a new and stand-alone convention. The Sub-Committee prepared for the consideration of the Legal Committee “Main Operative Clauses for the Draft Protocol to Amend the Tokyo Convention”.

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

1.12 At the second meeting of its 198th Session on 20 February 2013, the Council considered a report on the Second Meeting of the Sub-Committee and decided to convene the 35th Session of the Legal Committee in May 2013.

2. WORK RELATING TO UNRULY PASSENGERS DURING THE 35TH SESSION OF THE LEGAL COMMITTEE

2.1 The 35th Session of the Legal Committee, chaired by Mr. M.B. Jennison (United States), was held in Montréal from 6 to 15 May 2013. Its main agenda item was to consider the text prepared by the Special Sub-Committee. The Committee focussed its discussion on jurisdiction, offences and in-flight security officers (IFSOs). The Draft Text of the Protocol to the Tokyo Convention of 1963 Proposed by the Legal Committee is set forth in DCTC Doc No. 3.

2.2 With respect to jurisdiction, there was an overwhelming consensus for the State of landing jurisdiction and most delegations supporting this jurisdiction would prefer it to be on a mandatory basis. There was also general support for the inclusion of the jurisdiction of the State of the operator. Accordingly, the final draft of the text reflects these two jurisdictional grounds without any square brackets in Article III, although certain reservations were expressed. The jurisdiction of the State of nationality of the victim or the alleged offender is reflected in Article III in square brackets.

2.3 With respect to offences, the Committee accepted the recommendation of the Sub-Committee that no list of offences would be developed. Instead, Article VIII was introduced to propose an amendment in the form of Article 15 *bis* to encourage States to take measures to initiate appropriate criminal or administrative proceedings against any person who commits on board an aircraft any offence or punishable act covered by the Convention, in particular the act of assault against a crew member and the act of refusal to follow a lawful instruction given by or on behalf of the aircraft commander. The provisions still remain in square brackets for further consideration. In this context, the Legal Committee recommended that the Diplomatic Conference should adopt a resolution calling upon ICAO to update Circular 288 mentioned in paragraph 1.1 above.

2.4 With respect to IFSOs, while there was no consensus, the Committee was able to put into the final drafts two options relating to the functions of IFSOs and some provisions relating to their immunity. All these provisions are in square brackets in Articles VI and VII.

2.5 With respect to other miscellaneous items, the Committee dealt with a general provision about amendment in Article I, definitions in Article II and a consequential amendment in Article V, concurrent jurisdictions in Article IV, consequential amendments from jurisdiction in Article IX, and recourse actions from airlines in Article X. Some of these provisions require further study and deliberation.

2.6 Article I and the underlined parts throughout the text are the changes proposed by the Committee to the Sub-Committee text. By consensus, the Committee agreed that the text was sufficiently mature and concluded that the text was ready for transmittal to the Council as a final draft for presentation to States and, ultimately, to a Diplomatic Conference. While the basic framework of the draft protocol has been prepared by the Committee, it was evident that not all the issues could be resolved at its level. Certain policy matters could only be decided at a Diplomatic Conference.

2.7 The Report of the 35h Session of the Legal Committee (Report-LC/35) may be found at the ICAO website: <http://www.icao.int/Meetings/AirLaw/Pages/default.aspx>.

3. ACTION BY THE COUNCIL AND BY THE 38TH SESSION OF THE ASSEMBLY

3.1 The Council considered the report on the 35th Session of the Legal Committee on 14 June 2013 at the eleventh meeting of its 199th Session and decided to convene a Diplomatic Conference to amend the Tokyo Convention from 26 March to 4 April 2014. The Council agreed that the views of the Air Navigation Bureau (ANB) be solicited regarding the potential impacts of the recognition in the draft Protocol of IFSOs on the safety of aircraft and passengers on board, as well as on the provisions of Annex 6 – *Operation of Aircraft, Part I – International Commercial Air Transport – Aeroplanes* relating to the duties and responsibilities of the pilot-in-command. The view of ANB is set out in DCTC Doc No.5.

3.2 At the twelfth meeting of the same Session, the Council suggested that the future Diplomatic Conference should consider a uniform reference to the term “his” or “her” throughout the text of the proposed protocol.

3.3 The 38th Session of the Assembly considered a progress report on this subject, which was substantially similar to this paper, and called upon Member States to participate in this Diplomatic Conference.

4. ACTION BY THE DIPLOMATIC CONFERENCE

4.1 The Conference is invited:

- a) to note this paper;
- b) to consider the Draft Text of the Protocol to the Tokyo Convention of 1963 Proposed by the Legal Committee as set forth DCTC Doc No. 3; and
- c) to consider the recommendation of the Legal Committee concerning Circular 288 as referred to in subparagraphs 2.1.2.