



INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

DRAFT PROTOCOL TO AMEND THE TOKYO CONVENTION OF 1963— AUTHORITY AND PROTECTIONS FOR IN-FLIGHT SECURITY OFFICERS

(Presented by the United States)

1. INTRODUCTION

1.1 Since the Tokyo Convention entered into force, the threats to international civil aviation from both terrorism and unruly and disruptive passengers have increased dramatically. The Tokyo Convention pre-dates the widespread adoption and continuing growth of specialized In-Flight Security Officer (IFSO) programs that have been developed specifically to deal with these same threats. The role of IFSOs is therefore a critical issue in modernization of the Tokyo Convention.

1.2 To be successful, it is not sufficient for the amended Convention merely to reference IFSOs as one of several categories of actors; it must also grant them a status appropriate to their role and function and extend to them appropriate legal protections. Option 1 of Article 6 as presented in the draft protocol achieves this result – by separately authorizing IFSOs, in certain circumstances, to take reasonable measures that are necessary (1) to protect the safety of the aircraft and persons or property on board or (2) to maintain good order and discipline on board – while option 2 does not.

1.3 This paper describes the status of IFSOs in contemporary aviation, their status under the Tokyo Convention, and their proposed treatment in the draft protocol to amend the Tokyo Convention under consideration by the Conference.

2. IFSO STATUS IN CONTEMPORARY AVIATION

2.1 Threats to international civil aviation have grown and evolved in ways the drafters of the Tokyo Convention could not foresee in the 1960s. Terrorists see international civil aviation as an attractive and vulnerable target. They have attacked with increasing sophistication, innovation, and lethality. These attacks, both successful and unsuccessful, have had enormous economic and symbolic consequences. At the same time, the problem of unruly and disruptive behavior on the part of passengers has continued to grow.

2.2 States have responded by greatly strengthening their national aviation security measures, improving international aviation security cooperation, and working to make the international legal framework more responsive to current realities. The expanded use of IFSOs is one key development. IFSOs are government personnel who are specially trained and selected and deployed on aircraft with the purpose of protecting that aircraft and its occupants.

2.3 More than 40 States have IFSOs. ICAO has recognized their role and functions with a Standard (Para 4.7) in Annex 17 (Security) to the Chicago Convention and in guidance publications.

2.4 Although IFSOs work in cooperation with the crew, they do not and should not require authorization of the aircraft commander to carry out their duties. At the same time, the IFSO's responsibilities do not detract from or infringe upon the aircraft commander's final authority and responsibility for operation and safety of the aircraft. The aircraft commander always maintains operational control of the aircraft. The aircraft commander's sole responsibility for the safety of the aircraft (and full authority for the conduct of the flight) would not be affected by the draft protocol. Additionally, only the aircraft commander has authority to disembark or deliver offenders to the authorities of the State of landing. It is important to recognize in this context, however, that current security procedures require the aircraft commander to stay inside the secure cockpit in case of threats to safety or good order, while the IFSOs are uniquely situated to respond to threats in the passenger cabin. As a practical matter, IFSOs must operate in close cooperation and coordination with the aircraft commander and crew.

2.5 IFSOs only operate pursuant to arrangements between the State of Registration (or of the Operator) and the State of intended landing, which, among other things, set out the IFSOs' authorities. This requirement would not be affected by the draft protocol.

3. CURRENT TREATMENT OF IFSOs IN THE TOKYO CONVENTION

3.1 **Tokyo Convention authorities and protections for aircraft commander, crew, and passengers**

3.1.1 The Tokyo Convention authorizes the aircraft commander and others on board an aircraft to respond to unlawful and unruly behavior in certain circumstances.

3.1.1.1 *Authorities of the Aircraft Commander:* The Tokyo Convention authorizes the aircraft commander, when he or she has reasonable grounds to believe that a person has committed or is about to commit on board the aircraft an offense or act contemplated in Article 1, paragraph 1 of the Tokyo Convention, to take reasonable measures that are necessary (1) to protect the safety of the aircraft or of persons or property on board, (2) to maintain good order and discipline on board, or (3) to enable the aircraft commander to disembark or deliver such person to the competent authorities. (Art. 6)

3.1.1.2 The Tokyo Convention further empowers the aircraft commander to (1) require and authorize the assistance of other crew members and (2) request and authorize the assistance of passengers to restrain any person "whom he is entitled to restrain". (Art. 6)

3.1.1.3 *Crew and Passengers:* Crew members and passengers may also take "reasonable preventive measures" without authorization when they have reasonable grounds to believe the measures are "immediately necessary" to protect the safety of the aircraft or of persons or property on board. (Art. 6)

3.1.2 *Protections:* The Tokyo Convention provides certain legal protections to the aircraft commander and others for measures taken consistently with the Convention. Article 10 of the Convention provides that "neither the aircraft commander, 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" for actions that were undertaken in accordance with the Convention.

3.2 Tokyo Convention authorities and protections for IFSOs

3.2.1 At present, IFSOs only have the status of “passengers” under the Tokyo Convention. Thus, they may only take reasonable preventive measures without authorization of the aircraft commander when there are “reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.” Only the protections afforded by Article 10 to passengers extend to IFSOs, and they only apply to a limited range of independent actions (those specified in Article 6). They do not protect IFSOs from liability, for example, for actions taken to maintain good order and discipline unless specifically authorized by the aircraft commander.

4. IFSO PROVISIONS IN THE DRAFT PROTOCOL—COMPETING OPTIONS

4.1 The draft protocol under consideration by the Conference includes two options in square brackets that address the status and authorities of IFSOs. Only option 1 would achieve the goals described above—to recognize the unique role of IFSOs and provide them with a status appropriate to their function.

4.1.1 IFSOs’ authority in Article VI, option 1

4.1.1.1 Option 1 would recognize IFSOs as a separate class of actor and give the aircraft commander and IFSOs separate authority to take reasonable measures that are necessary (1) to protect the safety of the aircraft and persons or property on board or (2) to maintain good order and discipline on board, when they have reasonable grounds to believe that a person has committed or is about to commit on board the aircraft an offense or act contemplated in Article 1, paragraph 1 of the Tokyo Convention.

4.1.1.2 The aircraft commander alone would continue to have authority to deliver or disembark persons in appropriate circumstances.

4.1.1.3 The other authorities in Article 6 of the Tokyo Convention are unchanged: namely, those that give to aircraft commanders authority to enlist the assistance of crew members and passengers and to crew members and passengers to take reasonable preventive measures unilaterally in certain circumstances.

4.1.2 IFSOs’ authority in Art. VI, option 2

4.1.2.1 Option 2 mentions IFSOs, but only in a minor amendment to paragraph 2 of Article 6 that lists IFSOs along with crew members and passengers as having authority to take reasonable measures that are immediately necessary to protect the safety of the aircraft or persons or property on board. This option would effectively give IFSOs no new authority. It does not give them their own authority to take necessary reasonable measures in appropriate circumstances to maintain good order and discipline. Indeed, it appears to decrease the IFSOs’ existing authority, because it is not clear from the text whether the aircraft commander would be able to request or authorize the assistance of IFSOs to restrain any person.

4.1.3 IFSO protections in the draft protocol

4.1.4 Regardless which option is adopted in Article 6, the draft protocol would amend Article 10 to include IFSOs in the list of those actors who would enjoy the legal protections of the Convention “[f]or actions taken in accordance with this Convention.” Under option 1, that would include for IFSOs the full range of measures permitted to protect the safety of the aircraft or of persons or property on board and to maintain good order and discipline. Under option 2, however, the protection

available to IFSOs would only be that which they already enjoy as “passengers”. The amended Tokyo Convention would therefore not fully protect IFSOs acting within the scope of the official duties assigned by their governments. Moreover, the amended Convention might discourage States that are newly establishing an IFSO program from authorizing them to assist in maintaining good order and discipline on board or to respond to an escalating situation in order to prevent a more serious event.

4.2 **Practical impact**

4.2.1 The differences between the two options in the draft protocol present more than a theoretical problem. A passenger who may present a mere nuisance one minute, may disrupt good order and discipline on board the next, and may ultimately endanger the safe operation of the aircraft. As any flight crew member can well attest, situations involving unruly and disruptive behavior by passengers can quickly escalate into serious threats to the safety of the aircraft, crew members, and passengers. This risk of rapid escalation is a significant concern, as ICAO has recognized in some of its publications, including the current ICAO Aviation Security Manual (Doc 8973/8, 2011 – RESTRICTED). Recognizing the fluid nature of incidents on board aircraft, it is fundamental that IFSOs be authorized to take action at the earliest stage of bad behavior instead of requiring them to wait until the situation has further deteriorated. Option 1 gives IFSOs, who are highly trained specialists in close quarters enforcement actions on board aircraft, the authority to act before a crisis occurs and protections for acting in accordance with that authority, and accordingly, would significantly reinforce one of the Convention's core functions of protecting air travelers.

4.2.2 Providing appropriate authority for IFSOs in the protocol affirms the operational status quo. It does not require States to employ IFSOs, but ensures that there are appropriate protections in place for those States that choose to employ them. It also makes clear that other States can use IFSOs to respond to threats to the safety of the aircraft and the lives of persons on board alone, or to both threats to safety and to good order and discipline, as they may determine.

5. **ACTION BY THE CONFERENCE**

5.1 Delegates are urged to support adoption of option 1 in Article 6 of the draft protocol.

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