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English and Spanish only[1]

INTERNATIONAL CONFERENCE ON AIR LAW

(Montréal, 26 March to 4 April 2014)

DIPLOMATIC CONFERENCE TO ADOPT THE PROPOSED DRAFT TEXT OF THE PROTOCOL TO THE TOKYO CONVENTION OF 1963

(Presented by Argentina)

1. INTRODUCTION

1.1 During the 35th Session of the ICAO Legal Committee, held between 6 and 15 May 2013 in the city of Montreal (Canada), the matter of the proposal to modernize the "Convention on offences and certain other acts committed on board aircraft" signed in the city of Tokyo in the year 1963 (hereinafter, the "Convention") was analyzed. As a result of this work, the text of the Draft Protocol that will be discussed during the Diplomatic Conference convened to that end was drafted.

2. SPECIFIC CONSIDERATIONS

2.1 The following topics were analyzed:

a) Redefinition of the term "*in flight*";

b) Addition of new jurisdictions;

c) Inclusion of reference to IFSOs[2];

d) Determination of responsibility for measures adopted under the Convention;

e) Inclusion of Article 15 *bis* (list of offences); and

f) Inclusion of Article 18 *bis* (on the damages due to the operator by passengers disembarked or delivered under the Convention).

3. REDEFINITION OF THE TERM "IN FLIGHT"

3.1 Article 1, paragraph 3, of the Convention shall be replaced by Article II of the Draft Protocol. Sub-paragraph a) of said drafts establishes that, for the purposes of the 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 for the aircraft and for persons and property on board.*

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[1] English and Spanish versions provided by Argentina.
[2] In-flight security officers

3.2 The proposed definition adopts the broader term already contained in Article 5, paragraph 2, of the Convention, which coincides with the definition adopted in the Hague Convention 1970 – *Convention for the Suppression of Unlawful Seizure of Aircraft* (Article 3 (1)) –, providing for the possibility of including as acts or events punishable by the Convention those that take place while the aircraft is still on land awaiting the take-off order or, once landed, while no doors have been opened for disembarkation.

3.3 The proposed amendment was considered appropriate; therefore its adoption is encouraged.

4. ADDITION OF NEW JURISDICTIONS

4.1 The Draft Protocol includes two new mandatory jurisdictions: the State of landing and the State of the operator.

4.2 It is clear that the aim of the expansion of the jurisdictional base is no other than to reduce to the minimum the possibility of acts or offences under the Convention *remaining unpunished or without judgment*.

4.3 The inclusion of the mandatory jurisdiction of the State of landing can be a valuable mechanism to ensure that as many offences as possible are prosecuted. If said jurisdiction were optional, the *status quo* would not be altered, taking into consideration the domestic laws of many States. It should be noted that less than a decade after the adoption of the Convention, the mandatory jurisdiction of the State of landing was included in other similar international treaties such as the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague, 1970), and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, 1971), which have been ratified by the Argentine Republic.

4.4 The inclusion of the jurisdiction of the State of landing can be a valuable contribution, since it could strengthen the universal effectiveness of the Convention and bring concrete benefits to neutralize the problems resulting from the transient condition of the offender, as well as easy and quick access to existing evidence and its protection.

4.5 With respect to the jurisdiction of the State of the operator, the draft text merely updates the text of the Convention in order to include the principles already adopted in the field by the abovementioned international instruments.

4.6 With the addition of the jurisdictions of the State of landing and the State of the operator, State Parties will not only have jurisdiction based on their domestic law, but also under the international commitment undertaken, which increases the possibilities for a State Party to act under the circumstances established in the Convention, in order to cover the possible legal gaps present in the legal systems of said States.

4.7 In addition, it is worth noting that Argentina – jointly with many other countries in the Latin American Region – has rejected the inclusion of a mandatory criminal jurisdiction based on the nationality of the offender (or the victim) in previous opportunities, such as in the Beijing Diplomatic Conference (2010). Nevertheless, jurisdiction based on the nationality of the offender or the victim is included in the draft Protocol with an optional nature, as stated in the new Article 3.2 *ter* of the Tokyo Convention, proposed in Article III of the draft Protocol under analysis, which reads as follows: "*2 ter. Each Contracting State may also take such measures as may be necessary to establish its jurisdiction over offences [and acts] committed on board aircraft when an offence [or act] is committed on board an aircraft by or against a national of that State].*"

4.8 In this respect, Argentina considers it convenient to maintain the current text of the transcribed sub-paragraph, in order for jurisdiction based on the nationality of the offender or the victim to remain optional.

4.9 This position is based on the fact that several States establish their jurisdictional competence based on territory (that is, the place where the offence was committed), and therefore cannot undertake to accept jurisdiction based on the mere reason that an offence was committed by a national of such State. Consequently, it is believed that maintaining the optional nature of the criterion based on the nationality of the offender (or the victim) could facilitate a broader and faster acceptance of the Protocol.

4.10 In this context, in order to maintain coherence in the text, we consider it necessary to amend Article 3.1.bis of the Tokyo Convention, as proposed by Article III of the draft Protocol, with a view to establishing the optional nature of competence to exercise jurisdiction based on nationality as well. Therefore, we suggest that paragraph (c) of Article 3.1 *bis* — which, between square brackets, reads as follows "[when the offence or act is committed by or against a national of that State] – be removed and replaced with a new paragraph ("1. ter") stating that "*A State may also be competent to exercise jurisdiction over offences and acts committed on board by or against a national of that State.*"

5. THE CONCEPT OF IFSOs (IN-FLIGHT SECURITY OFFICERS)

5.1 Article VI of the Draft Protocol provides for the replacement of Article 6(2) and refers to the concept of in-flight security officers.

5.2 In view of the controversy caused by this issue, it should be noted that the current situation is exactly the opposite of that existing on the date when the Convention was adopted. Currently, approximately 40 States – which together represent a significant majority of international civil air traffic – have in-flight security officers.

5.3 In order for the process for modernizing the Convention to be successful, that is, in order for it to contribute to the goal of preventing and punishing any offences or acts that may endanger the safety of the aircraft and the persons or property on board, the new realities and problems affecting the safe and orderly development of civil aviation must necessarily be addressed. Otherwise, the modernization of the Convention would be flawed from the beginning, as it would leave out an element that has great importance, in view of the interest generated by this matter.

5.4 As a result of the failure to reach an agreement on this issue, a text including two options was prepared.

5.5 Option 1 does not seem to be the most convenient, as it provides that the aircraft commander and the in-flight security officer may decide to restrain a passenger and, for such purpose, they may also require or authorize the assistance of other crew members and may request or authorize (but not require) the assistance of passengers. In other words, it grants in-flight security officers the same powers as aircraft commanders.

5.6 This situation could have significant legal consequences if both individuals made opposite decisions in relation to the same fact, act or offence. In such a case, which decision should be adopted? Or, otherwise, which of the proposed decisions would take precedence over the other?

5.7 In this context, the main reasons for rejecting option 1 are: 1) the authority of the aircraft commander is final and should not be shared with anyone else, as this could lead to a reduction of the commander's authority, as well as to conflicts and uncertainty, which might have an adverse impact on safety; 2) the aircraft commander has more knowledge about the general situation regarding the safety of the aircraft and c) the aircraft commander has certain powers and responsibilities, including responsibilities as regards safety delegated by the operator, who is ultimately responsible for the safety of the aircraft, while the in-flight security officer usually has other responsibilities delegated by another entity (in general, the State) and is not directly responsible for the safety of the flight.

5.8 On the contrary, Option 2 limits the scope of action of in-flight security officers, without the commander's authorization, to exceptional circumstances, as it establishes that *"Any crew member, in-flight security officer or passenger may also take reasonable preventive measures …"* when those measures are immediately necessary. In this Option, unlike the previous one, the decision lies exclusively with the commander and, only in exceptional cases, for reasons of urgency, the other individuals mentioned are also granted the power to act. Therefore, option 2 is considered to be viable.

5.9 On the other hand, it should be noted that, although the main characteristics regarding the scope of action of in-flight security officers are determined by the provisions of bilateral agreements, under certain circumstances those agreements may be insufficient in relation to the attribution of responsibility in accordance with local legislation.

5.10 Furthermore, since those agreements are effective only between the contracting parties, cases involving a third State (such as landings in unexpected places —a normal situation in case of unruly passengers) would be outside their scope. Hence, we consider it appropriate to include in the Protocol a reference to in-flight security officers among the individuals of Article 6(2) of the Convention, since that would entail regulating an event that reflects a quite frequent reality.

5.11 However, we consider that the Protocol must include a rule binding the contracting States to coordinate any matters relating to IFSOs through specific agreements or within the framework of bilateral traffic agreements.

6. DETERMINATION OF RESPONSIBLITY FOR MEASURES ADOPTED UNDER THE CONVENTION

6.1 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 name 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.

6.2 As a result of the reference to *IFSOs* contained in the Draft Protocol, the replacement of Article 10 of the Convention was suggested in order to include them in the list of persons protected from the potential consequences of the measures adopted against the offender.

6.3 In this respect, it is important to clarify that this provision does not intend to grant them *immunity* –as was interpreted sometime during the discussions of the Legal Committee-. Likewise, neither the aircraft commander nor the other persons covered by Article 10 of the Convention possess it. Just as in their case, the intention is to determine the extent of their responsibility for the measures taken within the framework of the Convention. For this reason, instead of the term *immunity,* the notion of *attribution of responsibility* should be used.

6.4 It must be considered that only the measures taken by any of the above mentioned persons will receive legal protection provided they adequately comply with an essential requirement: that such measures are *reasonable* and *proportional*.

6.5 In this regard, in order to receive legal protection, the measures must comply with the following requirements:

a) The measure must be taken *"in accordance with this Convention"* (pursuant to Article 10 of the Convention);

b) The measure must be taken solely for the purpose of protecting the safety of the aircraft, the persons and the property therein in emergency cases (pursuant to Article 6 of the Convention); and

c) There must be "*reasonable grounds*" (justifications) to consider that the intervention prevented or was intended to prevent any of the events contemplated by the Convention (pursuant to Article 6 of the Convention).

7. INCLUSION OF ARTICLE 15 *bis* RELATED TO THE LIST OF OFFENCES

7.1 Article VIII of the Draft Protocol adds Article 15 *bis* to the Convention. The text proposed by the Legal Drafting Committee contained a mandatory provision while the text finally included in the Draft Protocol[3] contains a recommendation for the States to take measures against the events or acts covered by the Convention and, in particular, against physical assault or a threat to commit such assault against a crew member and against refusal to follow lawful instructions given by the aircraft commander with the aim of protecting the safety of the aircraft or the persons or property on board.

7.2 The proposed wording *"*each Contracting State *is encouraged*" is not appropriate for this type of treaty. Therefore, the text should be modified so that it contains a mandatory provision.

7.3 The draft for Article 15 *bis* incorporates some of the acts described in Circular 288 of the ICAO – those related to the crew and those already contemplated by the Convention- and avoids the acts which could contribute -although imperfectly given that the types of acts which may affect order and discipline on board are countless- to solving the situations that arise most frequently.

7.4 With respect to whether it is relevant or not to include a list of offences, it must be considered that the concern motivating the modernization of the Convention is the considerable increase in incidents involving insubordinate passengers[4]. The aim is to guarantee –by identifying certain behaviours- the safety of the aircraft and of the persons and property on board. On account of this, behaviours must be assessed in relation to this goal, which means that determining which behaviours may affect it is not a matter of opinion or subjective assessment.

7.5 Therefore, Article 15 *bis* may be included but its text needs to be modified so that it contains a

[3] Art. 15 *bis* proposed by the Drafting Committee: "Each Contracting Party *shall ensure* that the following acts are punishable…"

Art. 15 *bis* proposed by the Group (FC): "Each Contracting State *is encouraged to take such measures … to initiate criminal or administrative proceedings…*"

[4] V. Doc 10014-LC/35, pág. 2, punto 2.2.

mandatory provision for the Contracting States. Besides, it is important to provide support for the adoption of a resolution by the Conference whereby the ICAO is urged to update Circular 288 to include a list of acts of insubordination which are frequent on board.

8. INCLUSION OF ARTICLE 18 *bis* RELATED TO COMPENSATION TO THE OPERATOR.

8.1 Article X of the Draft Protocol provides for the incorporation to the Convention of Article 18 *bis*, stating that when the aircraft commander disembarks or delivers a person pursuant to the provisions of Articles 8 or 9 respectively, *the operator of the aircraft shall not be precluded from recovering from such a person any damages incurred* as a result of such disembarkation or delivery.

8.2 Although the proposed provision does not bear close relation to the aim of the Convention, it cannot be denied that it is a logic consequence of its application, given that it clearly states the damage caused by the disembarkation or delivery of the insubordinate passenger to the operator.

8.3 In this regard, it is worth mentioning that the operator of the aircraft is not the only person who suffers damage as a result of the insubordinate passenger's behaviour or his/her disembarkation or delivery. Hence, such restriction could only be considered accurate if the proposed right to compensation implied subrogation -by the operator- to the rights of the passengers whose damage had already been redressed. Bearing this clarification in mind, the inclusion of this article is considered appropriate.

8.4 Given that during the 35th session of the Legal Committee some delegations objected to the inclusion of this article as they considered that the Convention should not contain provisions on civil law matters, it is worth mentioning that such argument is inaccurate since the ICAO has favoured, both at the outset of its legal activity[5] as well as in recent times[6], the adoption of treaties wholly devoted to regulating relations pertaining to civil law.

9. MEASURES PROPOSED TO THE CONFERENCE

9.1 The Conference is encouraged to consider the points of view of the Argentine Delegation on the matters analyzed in this Working Paper.

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[5] Convention on damage caused by foreign aircraft to third parties on the surface (Rome, 1952).

[6] Convention for the unification of certain rules for international carriage by air (Montreal, 1999) and Convention on compensation for damage to third parties (Montreal, 2009).