



LEGAL COMMITTEE – 36TH SESSION

(Montréal, 30 November to 3 December 2015)

Agenda Item 8: Any other business

RECOMMENDATIONS MH17-FINAL REPORT

(Presented by the Netherlands)

1. INTRODUCTION

1.1 Following the downing of flight Malaysia Airlines Flight MH17 on 17 July 2014, the Ukraine authorities initiated an investigation into the causes of the crash of this flight¹ in accordance with Annex 13 to the Chicago Treaty. Subsequently the Ukraine authorities requested the Netherlands to take over the investigation and thereupon the Dutch Safety Board was tasked to conduct the investigation. On 13 October 2015 the Dutch Safety Board released its Final Report on the investigation into the severe accident (hereinafter: MH17-Final Report).

1.2 The MH17-Final Report presents, inter alia, clear, substantiated conclusions and recommendations aimed at preventing tragedies such as the MH17-crash. A significant part of the report focuses on the use of airspace over conflict zones resulting in important observations on the current system of responsibilities for safeguarding civil aviation flying over conflict areas.

1.3 This working paper invites the Legal Committee to take note of the recommendations of the Safety Board with a particular focus on the recommendations, regarding airspace management in conflict zones and to consider possible further action.

2. RECOMMENDATIONS REGARDING AIRSPACE MANAGEMENT IN CONFLICT ZONES

2.1 The MH17-Final Report includes several recommendations² with varying legal consequences.

¹ www.onderzoeksraad.nl

² Appendix to this working paper

2.2 The recommendations are preceded by –inter alia- the main conclusion that the aviation parties involved did not adequately recognize the risks of the armed conflict in the eastern part of Ukraine to overflying civil aviation.

2.3 The first four recommendations regard the airspace management in conflict zones. These recommendations, and in particular Recommendation 4, could be of interest to the Legal Committee because of their potential effects on the ICAO legal framework and given the fact that the Legal Committee is responsible for advising the Council on matters relating to the interpretations and amendments of the Chicago Convention.

2.4 Recommendation 4, is directed towards ICAO Member States advising them to “*Ensure that States responsibilities related to the safety of their airspace are stricter defined in the Chicago Convention and the underlying Standards and Recommended Practices, so that it is clear in which cases the airspace should be closed*”.

2.5 The recommendations, are introduced with -inter alia- the following observations:

“The principle of sovereignty forms the basis of the Chicago Convention. This principle implies that each state is responsible for its own airspace and determines independently how and by whom that airspace is used. The safety of the airspace is included in this responsibility of States. However, when a state contends with an armed conflict in its territory, this state may experience difficulty in guaranteeing the safety of its airspace.”

2.6 In this respect the Safety Board states that the following topics require attention:

- “a) The timely closure or restriction of the use of the airspace;
- b) Providing information to third parties as quickly as possible in the event of an armed conflict with possible risks for civil aviation; and
- c) Such coordination between civil and military air navigation service providers during an armed conflict that the state can fulfill its responsibility for the safety of civil aviation.”

2.7 The Safety Board concludes that :“*This requires amendments to the Chicago Convention and in Standards and Recommended Practice*”.

3. SPECIAL GROUP TO REVIEW THE APPLICATION OF ICAO TREATIES RELATING TO CONFLICT ZONES

3.1 In response to the crash of flight MH17 a Task Force was established by ICAO, with the support of its industry partners. This Task Force adopted a work programme in order to dissolve aviation safety issues revealed by the crash.

3.2 One of the items listed on this work programme calls for a review of the application of the provisions relating to conflict zones in the Convention on International Civil Aviation and other ICAO treaties, with the aim of strengthening the awareness and observance of the obligations under these provisions. When necessary also relevant guidance material for these provisions should be updated.

3.3 A Special working Group was composed in order to review the application of ICAO treaties relating to conflict zones.

3.4 The Special Group convened in July 2015 and initially:

- a) recognized that at this stage, it has not identified any need to amend the Chicago Convention, in particular Articles 1, 3 bis, 9 and 89, or other treaties, while not excluding that such revisions might be necessary in the future; and
- b) understood that work is underway to review applicable Annexes to the Chicago Convention and relevant guidance material (such as Civil/Military Cooperation in Air Traffic Management (Circular 330) and the Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations (Doc 9554)) pursuant to the work programme identified by the Task Force, with a view to strengthening the framework in relation to risks to civil aviation arising from conflict zones. The Group encourages this work to continue and emphasizes the importance of coordinating all elements of the work programme and ensuring that interested parties are kept informed on progress. The Special Group recommended that the Secretary General identify the most appropriate method of achieving such coordination in accordance with normal ICAO practices and procedures.

3.5 The conclusions of the Special Group were presented to the Council at its 206th Session. The Council decided to refer these conclusions of the Special Group to the Legal Committee.

4. RECONSIDERATION

4.1 The first four recommendations of the MH17 Final Report and the work of the Special Group both regard the appropriateness of existing ICAO provisions relating to airspace management in conflict zones.

4.2 Consideration of particularly Recommendation 4 of the MH17 Final Report could result in reconsideration of the initial outcome of the Special Group, as the object of the task of the group coincides with this recommendation, while the recommendation seems to include broader legal consequences calling for stricter definitions in the Chicago Convention.

4.3 Nevertheless, the Netherlands requests the Legal Committee, as a pre-eminent legal consultative body of ICAO, to reconsider the conclusions of the Special Group, taking into account the fact that the Final Report of the Dutch Safety Board and its elaborate substantiations were only presented months after the Special Group conclusions were taken.

4.4 Incidentally, progress on the first three recommendations of the MH17 Final Report, should not be jeopardized by discussions about amending the Chicago Convention.

5. **CONCLUSION**

5.1 The Legal Committee is invited to take note of the Recommendations of the MH17 Final Report of the Dutch Safety Board.

5.2 The Legal committee is requested to take into consideration in their deliberations whether reconsideration of the conclusions of the Special Group to review the application of ICAO treaties relating to conflict zones is necessary.

APPENDIX

AIRSPACE MANAGEMENT IN CONFLICT ZONES

To ICAO:

1. Incorporate in Standards that states dealing with an armed conflict in their territory shall at an early stage publish information that is as specific as possible regarding the nature and extent of threats of that conflict and its consequences for civil aviation. Provide clear definitions of relevant terms, such as conflict zone and armed conflict.
2. Ask states dealing with an armed conflict for additional information if published aeronautical or other publications give cause to do so; offer assistance and consider issuing a State Letter if, in the opinion of ICAO, states do not sufficiently fulfill their responsibility for the safety of the airspace for civil aviation.
3. Update Standards and Recommended Practices related to the consequences of armed conflicts for civil aviation, and convert the relevant Recommended Practices into Standards as much as possible so that States will be able to take unambiguous measures if the safety of civil aviation may be at issue.

To ICAO Member States:

4. Ensure that States' responsibilities related to the safety of their airspace are stricter defined in the Chicago Convention and the underlying Standards and Recommended Practices, so that it is clear in which cases the airspace should be closed.

The states most closely involved in the investigation into the crash of flight MH17 could initiate this.

RISK ASSESSMENT

To ICAO and IATA:

5. Encourage states and operators who have relevant information about threats within a foreign airspace to make this available in a timely manner to others who have an interest in it in connection with aviation safety. Ensure that the relevant paragraphs in the ICAO Annexes concerned are extended and made more strict.

To ICAO:

6. Amend relevant Standards so that risk assessments shall also cover threats to civil aviation in the airspace at cruising level, especially when overflying conflict zones. Risk increasing and uncertain factors need to be included in these risk assessments in accordance with the proposals made by the ICAO Working Group on Threat and Risk.

To IATA:

7. Ensure that the Standards regarding risk assessment are also reflected in the IATA Operational Safety Audits (IOSA).

To states (State of Operator):

8. Ensure that operators are required through national regulations to make risk assessments of overflying conflict zones. Risk increasing and uncertain factors need to be included in these assessments in accordance with the proposals made by the ICAO Working Group on Threat and Risk.

To ICAO and IATA:

9. In addition to actions already taken, such as the website (ICAO Conflict Zone Information Repository) with notifications about conflict zones, a platform for exchanging experiences and good practices regarding assessing the risks related to the overflying of conflict zones

OPERATOR ACCOUNTABILITY

To IATA:

10. Ensure that IATA member airlines agree on how to publish clear information to potential passengers about flight routes over conflict zones and on making operators accountable for that information.

To Operators:

11. Provide public accountability for flight routes chosen, at least once a year.