



INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)
 ORGANIZACIÓN DE AVIACIÓN CIVIL INTERNACIONAL (OACI)

COMISIÓN LATINOAMERICANA DE AVIACIÓN CIVIL (CLAC)
 LATIN AMERICAN CIVIL AVIATION COMMISSION (LACAC)



**THIRD MEETING OF THE AVIATION SECURITY AND FACILITATION REGIONAL GROUP
 (AVSEC/FAL/RG/3)**

Lima, Peru, 19 to 21 June 2013

AVSEC/FAL/RG/3 — WP/24
 30/05/13

Agenda Item 9: Other business

9.2 35th Session of the ICAO Legal Committee

(Proposal of amendment to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963)*)

Subject: Inclusion of reference to security officers on board aircraft in the Protocol to Amend the Tokyo Convention.

:

(Presented by the LACAC Secretariat)

SUMMARY	
Position of the experts of the Region regarding the proposal to amend the Tokyo Convention (1963) to include a reference to in-flight security officers (IFSOs)	
References:	
<ul style="list-style-type: none"> • Legal Committee - 35th Session, Appendix to working paper LC/35-WP/2-1 and Appendix F to the Draft Report (LC_35_YCR_WP 7-13) 	
Strategic Objective	<i>This working paper is related to ICAO Strategic Objective B.</i>

1. Background

1.1 On 3 June 1996, at the sixth meeting of its 148th Session, the ICAO Council decided to include in the General Work Programme of the Legal Committee an item entitled: “*Acts or offences of concern to the international aviation community and not covered by existing air law instruments*”. On 6 June 1997, at the sixth meeting of its 151st Session, the Council also decided that a Secretariat study group should be established on this matter. The group, designated as the Secretariat Study Group on Unruly Passengers, held several meetings and, as a result of its work, the 33rd Session of the ICAO Assembly (25 September – 5 October 2001) adopted Resolution A33-4: “*Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)*”, which established a model legislation drafted by the study group. Furthermore, the study group prepared guidelines on legal aspects related to unruly or disruptive passengers, published as ICAO *Circular 288*.

- 1.2 In September 2009, the 34th Session of the Legal Committee endorsed the establishment of a study group to address the issue of unruly passengers. Accordingly, in early 2011, the Secretariat Study Group on Unruly Passengers was reactivated based on the decision of the Council adopted at the sixth meeting of its 188th Session (October 2009). The reactivated Secretariat study group held two meetings in 2011.
- 1.3 On 15 November 2011, at the fifth meeting of its 194th Session, and based on the recommendation of the study group, the Council decided to request the president of the Legal Committee to establish a special sub-committee of the Legal Committee to review the *Convention on offences and certain other acts committed on board aircraft* (Tokyo, 1963), with special emphasis on the issue of unruly passengers, which was established on 20 December 2011. The Sub-committee met twice in 2012.
- 1.4 The Sub-committee did very extensive work, at the end of which it was felt that the results of such work should be delivered to the Legal Committee for a more in-depth analysis.
- 1.5 Finally, on 20 February 2013, at the second meeting of its 198th Session, the Council decided to convene the 35th Session of the Legal Committee from 6 to 15 May 2013, and gave instructions for the meeting to be held as a special session.

2. Meeting of the Legal Committee

- 2.1 The 35th Session of the ICAO Legal Committee was held from 6 to 15 May 2013 in Montreal, with the main purpose of furthering the proposal of amendment to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963). This activity concluded with a recommendation to convene the next Diplomatic Conference to that effect.
- 2.2 One of the issues more extensively discussed was the possibility of including in the amendment a reference to in-flight security officers (IFSOs).
- 2.3 The issue had been addressed at various preparatory meetings, and was included in the final document produced by the Legal Sub-Committee entitled “*Main Operative Clauses for the Draft Protocol to Amend the Tokyo Convention, presented by the Legal Sub-Committee*” (hereinafter: “Draft Protocol to Amend”), in its Articles IV and V, each with two drafting proposals and, in both cases, with the whole text in brackets. As expected, the Legal Committee largely reproduced the discussions that the Sub-Committee had had on this issue.
- 2.4 In this regard, it should be noted that the position of most of the delegates of the Latin American countries participating at the meeting (shared by some other delegations of other regions) was against the inclusion of any reference to the IFSOs in the Draft Protocol to Amend.
- 2.5 The position was based on the following arguments:
 - a) First, it was noted that this was not a matter to be addressed in the Tokyo Convention. The reason given was that IFSOs were agents of their respective governments, whose mission was to intervene to contain acts of unlawful interference. Therefore, the amended Tokyo Convention should not become a Convention on IFSOs.

- b) As a solution, it was proposed that they be considered as a “special passenger category”. Thus, their activities would be construed as already covered by the “immunities” foreseen in the Tokyo Convention for passengers acting in compliance with the Convention (Art. 10).
- c) It was also explained that these security officers already had their own “immunity” under the respective bilateral agreements whereby States accepted their presence on board aircraft.
- d) Finally, some delegates expressed the view that, although they did not favour the inclusion of such figure (since it was a political matter), if it had to be included because of a decision by the majority, it should be done with caution, respecting the existing definition of such an officer (Annex 17 to the Chicago Convention), and making sure their powers were not in conflict with those of the commander of the aircraft.

2.6 These were the opinions of most Latin American delegations.

2.7 Notwithstanding the above, the prevailing opinion in the plenary was that the reference to the IFSOs should be maintained, as suggested in the Draft Protocol to Amend, although better defining the figure, its scope, and responsibilities. This due to the fact that the existence of such officers in some flights today was an undeniable and well-known reality. It was also noted that the current absence of any mention to this matter in the Tokyo Convention was undoubtedly due to the fact that this situation was not present in the bygone time when this legal instrument was drafted.

2.8 In this regard, the arguments given were as follows.

- a) First, their inclusion in any of the categories listed in Art. 10 of the Tokyo Convention did not duly reflect the reality of these officers, since they were special agents with a very specific training that neither the commander of the aircraft or the rest of the crew had. Thus, the more reason not to include them in the concept of “passengers”.
- b) Secondly, it was clear that IFSOs were present and acted only on those flights covered by a bilateral agreement. Consequently, a reference to them in the amended Tokyo Convention would not damage those States that did not have this programme, but would rather provide more legal assurance.
- c) Likewise, any reference to the IFSOs should not be construed as an authorisation to conduct any repressive activity on board, since their mission is very specific: to act in cases of unlawful interference, which is the reason for their existence and their actions, and only in very specific, secondary cases would they be forced to act in case of an unruly passenger. These extremely rare cases would be those in which the actions of an unruly passenger escalated so much in virulence that they would exceed the ability of the crew to act, and would endanger the whole aircraft, reaching the level of unlawful interference. It should not be forgotten that, in the post September 11 scenario, the commander and the pilot are locked in the cockpit, with no physical contact with the rest of the aircraft, which complicates the task of the crew in this sense.
- d) An amendment that did not make reference to the IFSOs would not be accomplishing the mission of updating the Tokyo Convention. In this regard, it should be noted that the

inclusion of any reference to the IFSOs does not imply that they should necessarily be present in all flights; it only recognises a current reality and provides a legal framework for their actions.

- e) It is true that the definition of IFSOs provided in Annex 17 describes them as acting in cases of unlawful interference. However, that is a general definition, and the true boundaries of their activities are defined in the respective bilateral agreements between the States that authorise their presence and actions. Likewise, in view of the increasing number of events involving unruly passengers, sometimes the threat to safety can escalate and become a threat to security, since there is a grey area in which the distinction between the two becomes blurred. Moreover, the definition of unlawful interference provided in the same ICAO Annex is, in fact, a mere description of behaviours, which also include elements of threat to safety.
- f) Finally, it was highlighted that no mention should be made of the “immunities” of the IFSOs (or of the commander or the rest of the crew), since the word created confusion (and to a large extent was responsible for the existence of such opposing positions), and seemed like extending a letter of immunity to its addressees. In fact, the provisions of the Tokyo Convention (Articles 6 and 10) clearly established that any agent (and this would also cover IFSOs, if they were included) was exempt of any responsibility if the following three conditions concurred:
- the measures taken are in accordance with Convention provisions.
 - there are legitimate grounds to fear the existence of actions that the Convention tries to contain (Art. 1).
 - measures are reasonable.

2.9 As a result of such conflicting positions, the Committee agreed to create a small *ad hoc* study group, which formulated a series of recommendations. Once the report was submitted to the plenary and after further discussions on the subject, the Committee agreed to keep the proposals in brackets for subsequent clarification at a possible Diplomatic Conference.

2.10 It should be noted that the delegations of the participating Latin American States were not only active but also highly doctrinaire and their coordinated positions were praised by other delegations. Likewise, a delegate of our region¹ was elected third Vice-President for the next Session of the Legal Committee.

2.11 For all these reasons, it seems advisable for the legal experts of our region to continue analysing this very special and relevant matter in order to develop guidelines for the benefit of the delegates of our States who may attend future Diplomatic Conference.

3. Suggested action

The AVSEC/FAL Regional Group is invited to take note of the information contained in this paper and make comments, if applicable, so that the LACAC Secretariat may submit them to GEPEJTA and the Executive Committee at their next meeting.

¹ El Dr. Norberto E. Luongo, de la República Argentina.