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# **Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers**

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and published under his authority

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## Chapter 1

# INTRODUCTION

1.1 The term "unruly" or "disruptive" passengers refers to passengers who fail to respect the rules of conduct on board aircraft or to follow the instructions of crew members and thereby disturb the good order and discipline on board aircraft. In recent years, there has been an increase in the reported incidents involving such passengers. According to a survey conducted by the International Air Transport Association (IATA) to which 62 airlines responded, representing approximately 23% of the IATA member airlines worldwide, there were 1 132 reported cases of unruly passengers in 1994, 2 036 cases in 1995, 3 512 cases in 1996 and 5 416 cases in 1997. In 2000, ICAO conducted a survey through a questionnaire, to which 62 Contracting States replied, representing some 80% of the total number of passengers carried worldwide in 1999 on scheduled services by the airlines of ICAO Contracting States. While many States have not yet established a reporting system, approximately 67% of the States replying to the questionnaire indicated that in recent years they had experienced an increase in the number of unruly passengers. Due to the lack of a uniform reporting system, it is not possible to provide complete and comprehensive data.

1.2 The incidents involved various types of offences and reprehensible acts, including assault on crew members or passengers; fights among intoxicated passengers; child molestation, sexual harassment and assault; illegal consumption of drugs on board; refusal to stop smoking or consuming alcohol; ransacking and sometimes vandalizing of airline seats and cabin interior; unauthorized use of electronic devices; destruction of safety equipment on board; and other disorderly or riotous conduct. It has been noted that "what happens generally in the street is now happening on board aircraft". Reports of these incidents are not restricted to a particular airline, country, customer, class of service, or length or type of flight. In a number of cases, the acts and offences directly threatened the safety of the aircraft. In some cases, the aircraft commander had to make an unscheduled stopover to disembark the unruly passengers for safety reasons. These are the occurrences which particularly cause international concern.

1.3 Although the identity of unruly passengers and the relevant evidence can usually be established, there are many cases in which unruly passengers have to be released without being submitted to judicial proceedings due to the lack of jurisdiction of the State where the aircraft lands. Under most domestic laws, States other than the State of registry of the aircraft normally do not have jurisdiction over offences committed on board the aircraft (outside their respective territory) except for certain offences covered by international treaties or international customary law, such as hijacking, sabotage, and hostage taking. Under international law, while international conventions relating to aviation security have proven to be an effective tool in combatting terrorism including hijacking, sabotage and similar forms of unlawful interference against civil aircraft, these conventions are not specifically designed to deal with other, less serious types of offences committed by unruly passengers. Under the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, offenders cannot be held in restraint beyond the first stopover; by the time the aircraft has returned to the State of registry, the offenders, as well as the witnesses, will be long gone. Many offenders have taken advantage of this situation to avoid prosecution.

1.4 In view of the increasing number and significance of these offences, the ICAO Council decided in 1996 to include the subject of unruly passengers in the General Work Programme of the Legal Committee and in 1997 to establish a Secretariat Study Group on Unruly Passengers.

1.5 The Study Group considered that more effective measures on the part of governments are necessary to deal with the problem. For this reason, where action has not yet been taken, appropriate measures, including legal measures, should be developed without delay.

1.6 The Study Group identified three major areas for action, namely, the drafting of a list of specific offences for inclusion in national law, the extension of jurisdiction over such offences, and the appropriate mechanisms for addressing these offences.

1.7 The Group noted that certain States, such as Australia, Canada, the United Kingdom and the United States, have decided to extend their domestic jurisdiction to certain offences committed on board foreign aircraft subsequently landing in their respective territories. The relevant legislative provisions of these States have been studied by ICAO. It is considered that in parallel with measures of a practical nature, such as staff training and airline programmes, the amendment of national legislation should at this stage serve as the primary and immediate mechanism for dealing with the unruly passenger problem.

1.8 As a result of the work of the Study Group, the 33rd Session of the ICAO Assembly adopted Resolution A33-4, setting forth model legislation as developed by the Group. The Resolution urges all Contracting States to enact as soon as possible national law and regulations to deal effectively with the problem of unruly or disruptive passengers, incorporating so far as practical the model legislation set out in the Appendix to the Resolution.

1.9 This guidance material is designed to address the issues relating to the three major areas for action (1.6 refers). It is addressed to the Contracting States of ICAO for their information and recommended action. It should be noted that the material principally covers the legal aspects of the unruly passenger problem. Other measures, such as the training of relevant airline staff, establishing or updating airline policy, and increasing the awareness of airport police and other law enforcement authorities, are also necessary and are therefore strongly encouraged. In this respect, reference is made to the efforts both within and outside ICAO to develop guidelines and other material containing preventive measures against unruly passengers, in particular, the ICAO training package material developed by the Aviation Security Section (ASTP 123/Airline), as well as relevant airline programmes and other relevant documentation.

## Chapter 2

# THE LIST OF OFFENCES

### 2.1 THE PURPOSE OF THE LIST

2.1.1 A uniform list of offences is considered desirable for two reasons: firstly, in order to provide a common denominator for offences as a basis for national prosecution; and, secondly, in order to offer uniform criteria for States to extend their respective jurisdiction.

2.1.2 The movement of aircraft across national borders means that they will be subject to the laws and regulations of different jurisdictions. Due to the diversity of laws and regulations, an act or omission which is regarded as an offence in one jurisdiction may not be so regarded in another jurisdiction. When suspected offenders are to be prosecuted in a State where a foreign aircraft has landed, the question may arise whether their acts or omissions constitute offences not only in the State of landing but also in the State of registry of the aircraft and in the State where the acts or omissions occurred. Accordingly, it was considered useful by the Study Group to establish a list of offences that would be regarded as a common denominator. Such a uniform list will be instrumental for the purpose of incorporating the relevant offences into States' respective national laws or regulations allowing prosecution and application of sanctions.

2.1.3 Since the jurisdiction over unruly passengers will sometimes involve extraterritorial elements, the State of landing may encounter certain difficulties in ascertaining the scope of its jurisdiction. A uniform list of offences will therefore assist the relevant States, particularly the State where an aircraft lands with the suspected offender on board, in determining its basis for jurisdiction.

### 2.2 THE CONTENT OF THE LIST

2.2.1 The Appendix to this circular contains draft model legislation on certain offences committed on board civil aircraft. The list of offences set out in Sections 1 to 3 was developed by the Study Group for inclusion into national law or regulations. Section 1, *Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft*, provides that any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- "(1) assault, intimidation or threat, whether physical or verbal, against a crew member, if such act interferes with the performance of the duties of the crew member or lessens the ability of the crew member to perform those duties;
- "(2) refusal to follow a lawful instruction given by the aircraft commander, or on behalf of the aircraft commander by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on board or for the purpose of maintaining good order and discipline on board."

2.2.2 Section 2, Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft, addresses offences other than those specifically against a crew member. These offences include those against passengers. The first paragraph of Section 2 provides that any person who commits on board a civil aircraft an act of physical violence against a person, sexual assault or child molestation commits an offence. The second paragraph provides that any person who commits on board a civil aircraft any of the following acts commits an offence, if such act is likely to endanger the safety of the aircraft or of any person on board or if such act jeopardizes the good order and discipline on board the aircraft:

- “(a) assault, intimidation or threat, whether physical or verbal, against another person;
- “(b) intentionally causing damage to, or destruction of, property;
- “(c) consuming alcoholic beverages or drugs resulting in intoxication.”

2.2.3 Section 3, Other Offences Committed on Board a Civil Aircraft, covers other offences that do not fall into the first two categories. It provides that any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

- “(1) smoking in a lavatory, or smoking elsewhere in a manner likely to endanger the safety of the aircraft;
- “(2) tampering with a smoke detector or any other safety-related device on board the aircraft;
- “(3) operating a portable electronic device when such act is prohibited.”

### 2.3 COMMENTS ON THE OFFENCES SET OUT IN SECTIONS 1 TO 3 OF THE APPENDIX

2.3.1 The first category of offences included in the list covers offences involving acts of interference against a crew member on board a civil aircraft. Crew members need special protection, since they are responsible not only for maintaining good order and discipline on board but also for the safety of the aircraft. Their situation may, to a limited extent, be considered somewhat similar to the situation of police officers or peace officers on the ground. In fact, certain States have designated aircraft commanders as peace officers for the period when the aircraft under their control are in flight. In many national criminal codes, offences against an on-duty police officer or peace officer are subject to heavier penalty than offences against a member of the general public. In line with this general practice, Section 1 is designed to offer protection to crew members who enforce rules of conduct and maintain good order on board aircraft in the public interest. The term “lessens the ability of the crew member to perform those duties” in paragraph (1) of Section 1 is intended to cover certain situations that might not be covered by the term “interferes with the performance of the duties”, thereby offering better and wider protection to the crew. The term is not intended to cover minor side effects on a crew member, such as psychological side effects, if the act is directed against another crew member and does not actually lessen the ability of the crew member.

2.3.2 With respect to paragraph (2) of Section 1, it should be understood that the authority to give instructions ultimately rests with the aircraft commander. However, unless there is contrary evidence,

Instructions from a crew member are deemed to be given on behalf of the commander. Instructions are not limited to verbal instructions but may also include those given in writing and those given through illuminated signs on the aircraft, such as seat belt signs and non-smoking signs, when they are activated. The term "refusal" includes intentional and express conduct of non-compliance but does not include inadvertent conduct.

2.3.3 The second category of offences included in the list are those endangering safety or disturbing good order and discipline on board a civil aircraft. In paragraph (1) of Section 2, an act of physical violence against a person, sexual assault or child molestation is deemed to be, due to its gravity, an act endangering safety or jeopardizing good order and discipline on board a civil aircraft. In these cases, the public prosecutor does not have to prove the endangering or jeopardizing nature of the relevant act of the alleged offender. The term "physical violence against a person" is a close approximation to the term "battery" known in common law jurisdictions which requires physical contact but does not necessarily give rise to injury. The physical contact does not need to create bodily injury but must interfere with the health or comfort of the victim and must be more than merely transient or trifling in nature. The term "child molestation" is intended to offer specific protection to children, who are more vulnerable to these types of acts than adults. For the purpose of the application of the provision, an act listed in paragraph (2) of Section 2 will constitute an offence only if such an act has the consequence of endangering safety or disturbing good order and discipline on board the aircraft. The reason for adding this constitutive element for the offence is to limit jurisdiction. If a State where an aircraft lands is expected to exercise jurisdiction over any simple assault on board a foreign aircraft even if such act neither occurs in its territory nor affects its interest, it may be considered that the net is cast too wide from a jurisdictional point of view. Adding the above-mentioned element to the offence will have the effect of limiting the jurisdiction of the State of landing to fewer but more serious cases. For cases which fall squarely within territorial or flag jurisdiction, States remain free to treat, for example, a simple assault as a punishable offence whether or not such assault has the consequence of endangering safety or disturbing the good order and discipline on board aircraft.

2.3.4 In this connection, it should be recalled that Article 1, paragraph 1 (a), of the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (signed at Montreal on 23 September 1971) declares it an offence for any person to perform "an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft". Therefore, if an assault has reached such gravity as to endanger the safety of the aircraft, the Montreal Convention will normally apply. On the other hand, the Montreal Convention does not cover other acts that only jeopardize good order on board. In most cases involving unruly passengers, it is this latter aspect that has caused public concern regarding the efficiency and regularity of air transportation and, indirectly, the safety of civil aviation. Accordingly, the list should be used to supplement the Montreal Convention. It should be noted, however, that Section 2 is intended to deal with unruly behaviour that undermines the safety or good order and discipline on board a civil aircraft, but not to cover every minor breach of such good order and discipline.

2.3.5 Section 3 deals with the third category of offences, which covers acts not specifically mentioned in Sections 1 or 2. These offences have a direct, negative impact upon the safety of aircraft. For instance, tampering with a smoke detector could potentially increase the fire hazard on board the aircraft, and operating electronic devices may interfere with the electronic systems on board. It is therefore considered necessary to include these offences in the list.

2.3.6 The application of Sections 1 to 3 of the list should be without prejudice to the lawful exercise of the authority by or on behalf of the aircraft commander pursuant to the relevant international conventions or national law.

## 2.4 THE APPLICABILITY OF THE LIST

2.4.1 The list of offences in Sections 1 to 3, along with the jurisdiction clause in Section 4, is recommended for incorporation into national law or regulations. Notwithstanding individual legislative drafting styles and techniques of different States, for the sake of international uniformity, States are encouraged to incorporate the list into their criminal code, or their aviation regulations, or both.

2.4.2 The list, as reflected above, is intended to apply to certain offences committed on board a civil aircraft. Although it has been suggested that incidents relating to unruly passengers should refer to those which take place not only on board aircraft but also on the ground, offences committed on the ground, e.g. on the premises of an airport, have not been included. It should be recalled that airports are normally within the exclusive jurisdiction of the State where they are located and are subject to the domestic laws of that State.

2.4.3 The model legislation does not address the issue of penalties for the offences listed in Sections 1 to 3. It is believed that this matter should be left to the discretion of sovereign States. As a general guideline and bearing in mind that such offences when committed on board aircraft may be considered more serious than when committed on the ground, the Study Group recommends that the applicable penalties should correspond to the relative gravity of the offences. In general, the Study Group is of the view that the offences listed in Section 1 and Section 2, paragraph (1), are considered more serious than the other offences listed in the model legislation. Furthermore, the offences listed in Section 2 are considered more serious than those listed in Section 3.



## Chapter 3

# JURISDICTION

3.1 As mentioned in Chapter 1, unruly passengers often have to be released without being submitted to judicial proceedings due to lack of jurisdiction of the State where the aircraft has landed. It has been pointed out that there is a jurisdictional gap in this respect.

3.2 Generally, a State will have jurisdiction over an offence when the offence is committed in its territory (territorial jurisdiction) or on board an aircraft on its registry (flag jurisdiction). A State may also exercise criminal jurisdiction over its nationals for certain offences committed by them, or committed against them, wherever the offence may have been committed (personal jurisdiction). The jurisdiction of a State may also extend to certain offences committed outside its territory but having effects on the governmental functions of such State (protective principle). For instance, a State may exercise its jurisdiction over foreigners outside its territory who engage in counterfeiting its currency or official documents. Furthermore, certain international crimes, such as piracy, slavery and aircraft hijacking, are, by international customary law or international conventions, subject to universal or quasi-universal jurisdiction.

3.3 In a number of cases involving unruly passengers, the State of landing, which has custody of the alleged offender delivered by an aircraft commander, does not have jurisdiction under any of the aforementioned principles. For instance, an offence may take place on board a foreign aircraft when such aircraft is outside the territorial airspace of the State where it subsequently lands. When the State of landing is requested to prosecute the offender who is not its national, it often finds itself having no jurisdiction, since the offence has taken place neither in its territory nor on board its aircraft and it is neither directed against it or its nationals, nor involving a crime of sufficient gravity to establish universal jurisdiction. For this reason, some States have, in their respective domestic legislation, extended their jurisdiction to cover offences committed on board foreign aircraft that next land in their respective territories. Based on this emerging practice, the Secretariat Study Group has prepared a jurisdictional clause, which is set out in Section 4 of the Appendix.

3.4 Clause 1 in Section 4 is intended to fill the jurisdictional gap referred to above, while leaving the above-mentioned principles of jurisdiction unaffected. In addition to the restatement of the territorial jurisdiction and flag jurisdiction, the jurisdictional clause introduces two new elements. The first new element relates to the jurisdiction of the State of landing. Some States have introduced and exercised such jurisdiction, and so far no protest against the introduction or exercise of such jurisdiction has been filed nor other opposition to such jurisdiction has been recorded. On the other hand, there seems to be at present no clear rule under public international law as to what extent and under what conditions States may exercise jurisdiction over an offence committed on board foreign aircraft outside of their territory. Accordingly, in the absence of an international convention regulating this matter or until the practice of extending jurisdiction becomes a customary rule, a cautious attitude should be maintained regarding the extraterritorial element of such jurisdiction. On the basis of this consideration, the proposed jurisdictional clause subjects the jurisdiction of the State of landing to several restrictive conditions under paragraph 1 (4) of the clause, which limit the scope of jurisdiction. In this connection, it should be noted that in extending their jurisdiction as a State of landing, some States attached certain restrictive conditions to the exercise of such jurisdiction. For

instance, one State required that the aircraft must have its next scheduled destination or last place of departure in that State. Another State required that the act under the jurisdiction of the State of landing must constitute an offence in both the State of landing and the State of registry.

3.5 The second new element introduced in the jurisdictional clause relates to the State of the operator of the aircraft in long-term lease situations. In today's environment where many aircraft are leased, it might not be adequate to include only the State of registry, since the State of the operator may also have to be involved for purposes of jurisdiction. Under Article 5, paragraph 1 (d), of the Montreal Convention of 1971, when the offence is committed against or on board an aircraft leased without crew to a lessee, jurisdiction is established in the State where the lessee has its principal place of business or, if the lessee has no such place of business, the lessee's permanent residence. This provision already reflects the notion of the State of the operator. Under Article 83 *bis* of the *Convention on International Civil Aviation*, the State of registry may, by agreement with the State of the operator, transfer certain safety-related functions and duties to the latter. In view of this trend, the jurisdictional clause states in paragraph 1 (2) that a State shall have jurisdiction over any act constituting an offence under Sections 1, 2, or 3, if the act took place on board any civil aircraft leased with or without crew to an operator whose principal place of business is in that State or, if the operator does not have a principal place of business, whose permanent residence is in that State.

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## Chapter 4

# THE LEGAL MECHANISMS AVAILABLE FOR COMBATTING THE PROBLEM OF UNRULY PASSENGERS

### 4.1 GENERAL

4.1.1 In view of the subject matter in question and given the jurisdictional issues discussed in Chapter 3, the adoption of an international instrument, in the form of an international convention or amending protocol, may well be the preferable solution in the long term. However, the urgency of the problem is an important factor to be taken into consideration.

4.1.2 Until the international civil aviation community decides to adopt a new international instrument, the other legal mechanisms available at this moment for combating the problem of unruly passengers include the adoption of national laws, bilateral arrangements, and the interpretation and application of existing international conventions.

### 4.2 NATIONAL LAWS

4.2.1 The proposed model legislation is recommended for incorporation into national law. It is the objective that a sufficiently large number of States accept and implement this recommendation, so that a desirable degree of uniformity will be achieved internationally.

4.2.2 Incorporation of the model legislation into national law or regulations is recommended without modifications or amendments to the extent possible and appropriate, taking into account the existing national legislation, in order to achieve the greatest possible degree of uniformity. Whether the incorporated clauses should have the force of primary legislation (e.g. insertion into the national Aviation Act, or relevant provisions of the penal code, or both) or secondary legislation (e.g. by way of regulation adopted under the Act) remains a matter for each State to decide in light of its existing domestic legislation, the penalties it considers desirable to attach to the offences, and its legal structure.

### 4.3 BILATERAL/MULTILATERAL AGREEMENTS OR ARRANGEMENTS

4.3.1 Bilateral/multilateral agreements or arrangements have not been commonly used for dealing with the issue of unruly passengers. However, if such issues become serious on particular routes or between particular countries, bilateral/multilateral agreements or arrangements could be considered as a means to deal with certain issues relating to unruly passengers (e.g. collection of evidence, handling of offenders, and other

matters relating to judicial assistance). In addition, a possible gap in applicable offences or as regards jurisdiction could be filled through a bilateral/multilateral arrangement or through a relevant clause or clauses in bilateral/multilateral agreements. Furthermore, the relationship between the State of registry of aircraft and the State of the operator could be regulated through bilateral/multilateral agreements or arrangements.

#### 4.4 EXISTING INTERNATIONAL CONVENTIONS

4.4.1 The existing international conventions applicable to offences committed on board civil aircraft include the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, Tokyo, 14 September 1963; the *Convention for the Suppression of Unlawful Seizure of Aircraft*, The Hague, 16 December 1970; and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Montreal, 23 September 1971. The provisions of these conventions could be applied with a view to making the fullest possible use of these instruments in order to deal with unruly passengers. For example, if an act of assault on board an aircraft in flight is likely to endanger the safety of aircraft, the Montreal Convention of 1971, by virtue of its Article 1, paragraph 1 (a), may be applicable.

4.4.2 The Tokyo Convention of 1963 applies in respect of offences against penal law and acts that may or do jeopardize the safety of the aircraft or of persons or property therein or that jeopardize good order and discipline on board. This term is broad enough to include most, if perhaps not all, offences or acts relating to unruly passengers. However, under Articles 9 and 13 of the Tokyo Convention, the authorities of the State where the aircraft makes a landing are obliged to accept only the delivery of persons who, in the opinion of the aircraft commander, have committed a serious offence under the penal law of the State of registry of the aircraft. For persons who have committed less serious offences or other reprehensible acts, the commander may disembark them under Article 8, but the State where the aircraft has landed is under no obligation to take custody or other measures against them (Article 13, para. 2). In order to assist aircraft commanders in exercising their powers under Article 9 of the Tokyo Convention, it may be desirable to arrive at a common understanding as to what constitutes a serious offence. The Secretariat Study Group was of the view that due to the need to offer enhanced legal protection for the crew and the type of the risks involved as well as their potential consequences, the offences covered by Section 1 of the model legislation, namely, assault and other acts of interference against a crew member on board a civil aircraft, should be considered as serious offences within the meaning of Article 9 of Tokyo Convention of 1963.

4.4.3 Furthermore, Article 9 distinguishes "delivery" from "disembarkation" of persons in Article 8 and specifies that such delivery must be accompanied by "evidence and information" lawfully in the possession of the aircraft commander. These provisions appear to permit the conclusion that the State of landing has an obligation to do more than just accept the delivery of the person, namely, to investigate and, if sufficient evidence is furnished, to consider prosecution.

4.4.4 On the basis of the foregoing consideration and in relation to the Tokyo Convention of 1963, it is recommended to States that the offences against crew members as set out in Section 1 of the model legislation be considered as serious offences within the meaning of Article 9 of the Convention and that when a State accepts the delivery of a person pursuant to Article 9 of the Convention, it will bring the person to appropriate legal process, including prosecution if the situation so warrants. If this recommendation is uniformly accepted by States, the existing mechanism under the Tokyo Convention may be used to resolve important issues relating to unruly passengers.

4.4.5 In addition, it has been mentioned that Article 1, paragraph 1 (a), of the Montreal Convention of 1971 is applicable to "an act of violence against a person on board an aircraft in flight if that act is likely to

endanger the safety of that aircraft". This provision may also be applied in cases involving unruly passengers where such passengers commit acts of violence on board which are likely to endanger the safety of the aircraft. However, the Montreal Convention of 1971 will not apply if acts committed by unruly passengers jeopardize the good order and discipline on board, without being likely to endanger the safety of the aircraft. This shows the limitation of the application of the Montreal Convention of 1971 in unruly passenger cases. It would appear preferable to resolve these cases through the inclusion of relevant offences under national law, as discussed above.

4.4.6 In addition and in the longer term, the advisability of an appropriate international legal instrument (e.g. a protocol to the Tokyo Convention of 1963) specifically for these purposes as an effective mechanism to deal with the problem relating to unruly passengers should be considered.

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