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UNRULY PASSENGERS ON BOARD AIRCRAFT

NEPRISPÔSOBIVÍ CESTUJÚCI NA PALUBE LIETADLA

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Abstract

Unruly behaviour on board aircraft can cause a minor inconvenience to the other passengers, or else, it can escalate to such a degree where the passengers' safety is jeopardised. Over the last three decades, the number of unruly passenger incidents has increased dramatically. The frequency and severity of such incidents had become a growing concern of the international community and aviation industry itself. Consequently, different preventive and countermeasures have been implemented to cope and deter such behaviour. The primary aim of this paper is to focus on the legal aspect of trying and prosecuting the offenders who have committed an offence or act that jeopardises the safety of aircraft or good order on board. This was accomplished by analysing the international legal framework governing unruly behaviour, namely the Tokyo Convention of 1963 and its amending Montreal Protocol from 2014. The main factor that was observed is the way how these legal instruments addressed the provisions for trying the alleged offenders and their effectiveness in the deterrence of unruly behaviour. In this paper, formal legal and case-study methods, along with comparative reasoning, were used to analyse the legal instruments. The findings showed that the Tokyo Convention had made a valuable contribution to establishing an international security legal framework. However, considerable deficiencies of this treaty have hindered the global legal uniformity and effective enforcement mechanism. Those shortcomings were to be eliminated by the Montreal Protocol. Nevertheless, the analysis revealed that, while it succeeded to eliminate the most triggering shortcoming of jurisdiction, it failed to address the lack of strong enforcement and has even constrained the powers of in-flight security officers. Regrettably, that proves to impede the achievement of the Montreal Protocol's objectives, and it sees only a small added value. Hence, further improvements are needed to ensure that it is effective in the realities faced by modern aviation.

Keywords

Unruly passengers, offences on board aircraft, international aviation law, Tokyo Convention 1963, Montreal Protocol 2014

1. Introduction

Over the past few decades, air transport has become more and more approachable to the general public. The competitiveness of the aviation environment has increased worldwide connectivity and reduced airfares; so, flying was no longer an adventure or a novelty. It became a necessity. With aircraft becoming bigger and faster, the passenger traffic has been increasing each year significantly. While the advances in aviation have been outstanding, the industry was facing a constant threat from unruly passengers.

Such threat has forced the international community and particularly international organisations to undertake political and strategic measures to prevent incidents on board aircraft. The increasing frequency and severity of such incidents is alarming, and the aviation industry has been calling for robust measures for decades.

The phenomenon of unruly passengers on board aircraft is a real challenge and ongoing concern for airlines worldwide. Unruly passenger incidents range from the least significant acts to more serious ones, such as refusal to comply with lawful commands or instructions, harassment, verbal abuse, and others. Despite the fact that such acts are committed by a minority of passengers, they have a disproportionate impact. They cause inconvenience, affect the passengers' well-being, endanger the health and safety of crew and passengers, and lead to significant operational disruption and additional expenses for airlines.

This article will focus on the legal aspect of prosecuting unruly passengers who have committed an offence or act that jeopardises safety on board aircraft. For that reason, it will provide an analysis of the provisions in the Tokyo Convention of 1963 and its amending Montreal Protocol of 2014. The further intention of the article is to analyse the shortcomings and legal gaps of the treaties and propose a list of potential amendments and solutions that should be considered as possible improvements in the future.

2. Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963

The era of the 1960s was marked by an upsurge of onboard violence, which coincided with a significant increase in unlawful aircraft seizures [1]. Upon facing the lack of a globally recognised mechanism to exercise national jurisdiction over unruly passengers, the political representatives around the world were compelled to pursue an aim to find universally applicable solutions under the auspices of the newly founded ICAO. Subsequently, the ICAO Legal Committee prepared a draft of the Convention on Offences and Certain Other Acts Committed on

Board Aircraft that was concluded in Tokyo on September 14, 1963—hence commonly referred to as Tokyo Convention [2].

The Convention has contributed considerably to the establishing of more explicit rules of jurisdiction over offences committed on board aircraft. First and foremost, it identified unruly behaviour on board aircraft as:

"acts which, whether or not they are offences [against penal law]*, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board* [3]*."*

Furthermore, it implemented four main clauses that represented a breakthrough in aviation security law:

1. The State of aircraft registration was given the authority to exercise jurisdiction over offences committed on board the aircraft while in-flight, regardless of where the aircraft might be.
2. The aircraft commander was given the power to deliver or disembark a passenger who has committed or is about to commit an offence or an act that jeopardises the flight's safety. Furthermore, the aircrew and appointed passengers were not supposed to be held responsible in any legal proceedings resulting from the treatment against the offender.
3. Duties and powers of the Contracting States were identified in respect to delivered unruly passengers.
4. The Convention defined the crime of unlawful aircraft seizure.

These provisions have been of significant benefit to the international society since the addressing of offences committed on board had been ambiguous prior to the ratification of the Tokyo Convention.

2.1. Shortcomings and Legal Gaps of the Tokyo Convention

At the time of drafting the Convention, most of the States involved had been inauspiciously affected by World War II and the Cold War [1]. Concerned about the sovereignty and security of their airspaces, these countries have embraced a protectionist approach to some of the Convention's provisions.

Over the years, the States' reservations have proven to be unavailing, and the Tokyo Convention was considered to be not a very effective deterrent to unruly behaviour. Moreover, it actually could not keep up with the modern realities.

This statement was substantiated by a number of legal shortcomings and gaps in the Convention that allowed the offenders to escape justice and left the aircraft operators to bear the financial consequences of the unruly passenger incidents.

2.1.1. Scope

A substantial shortcoming of the Tokyo Convention lies in the definition of the scope. Article 1(1) stipulates that the Convention shall apply to the offences against the penal law and acts that jeopardise the safety of the aircraft, people or the good order and discipline on board [3]. However, the Convention does not describe what constitutes an "offence," leaving this matter to be determined by the penal law of each induvial State. Owing to the imperfection of the provision, the conduct that may constitute an offence in a State of boarding or aircraft registration may not be considered an offence in a State where an unruly passenger is delivered to the authorities [4].

2.1.2. Temporal Scope

Article 1(3) of the Convention states:

"For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of takeoff until the moment when the landing run ends [3]*."*

The choice of definition of aircraft being in flight has weakened scope application as it does not encompass the time of embarkation/disembarkation and taxiing. If an unruly passenger incident occurs during such time, the Convention will not apply to the incident.

That is at odds with Article 17 of the Warsaw Convention of 1929, which holds the aircraft operator liable for the wounding of a passenger caused by another passenger on board the aircraft and in the course of embarkation or disembarkation. Hence, an aircraft operator would be legally responsible under the Warsaw Convention, but the unruly passenger would not be liable under the Tokyo regime for committing an offence on board aircraft [4].

2.1.3. Jurisdiction

As already mentioned, the Convention granted jurisdiction to exercise power over the offences to the State of registration. However, this provision caused considerable difficulties in the legal prosecution of offenders. The reason is that in most cases, an unruly passenger who committed an offence on board the aircraft was handed over to the authorities of a foreign State with no legal power over the aircraft. The State of registration, which was in a position to enforce the law, was rarely able to do so because the alleged perpetrator was not physically present in its territory [4].

Cases where the offender is physically present in a State of landing but should be tried in the State of aircraft registration, are usually settled with extradition for prosecution [2]. It is important to note that the State of registration is unlikely to pursue extradition for minor offences, particularly if a high cost of extradition procedures outweighs the apparent severity of the conduct in question [4]. Nonetheless, because a specific act does not merit extradition does not necessarily mean that the conduct is undeserving of any sanction.

2.1.4. Leased Aircraft

Another legal issue arises when aircraft is registered in one country but operated by an aircraft operator based and legally present in another State. According to the Tokyo Convention, the State of registration should be the authority to exercise jurisdiction over the offender. This issue undertakes even greater importance in the context of legal proceedings, extradition, and procedures for the recourse. In cases when an

offender is required to be extradited, the State of registration may be reluctant to take any legal action, especially when no citizen or legal entity is aggrieved [5]. Under the circumstances, the State of registration will probably avoid the inconveniences and costs for extradition and prosecution.

In such cases, the State of operator would probably feel more competent to follow the legal actions against an alleged perpetrator. However, the Convention does not recognise the State of operator and its powers.

2.1.5. Jurisdiction Conflict

As mentioned earlier, the Tokyo Convention vested the right to exercise jurisdiction over offences on board aircraft to the State of registration. Nevertheless, this right is nonexclusive as the Convention identifies in Article 4 other authorities that may exert their powers over the foreign aircraft.

This provision allows for a potential conflict of jurisdictions since many States may feel entitled to claim their jurisdiction. The Tokyo Convention omits a system of priorities or concurrency governing the order in which the several possible criminal jurisdictions should be exercised [6]. Though it indicates a priority to the State of registration, that does not always imply that such a State would be the first to exert its jurisdiction.

2.1.6. Omission of Acts Jeopardising Safety

As outlined in subchapter 1.1.1, the Convention's scope distinguishes offences against penal law and acts that may jeopardise the safety of the aircraft or people on board or which may jeopardise the good order and discipline on board.

Nevertheless, several substantial provisions have omitted the jeopardising acts and focused solely on the offences against the penal law. Those are the provision that defines the powers of the State of aircraft registration and other States under Article 4, which are allowed to interfere with the foreign aircraft. The provision's wording supports the interpretation that the Contracting States are not required to extend their jurisdiction over the jeopardising acts. Hence, the intended jurisdiction system under which at least one State—the State of registration, has the power over offences and acts on board is flawed.

2.1.7. Lack of Strong Enforcement

The absence of a robust enforcement mechanism is considered as another significant shortcoming of the Tokyo Convention. That is especially applicable to the concept of *"either extradite or prosecute,"* which means that a State with physical control over the alleged offender should either extradite that person or exercise power and bring him/her to justice.

The Convention does not mandate an obligatory jurisdiction, which accounted for States' lack of willingness and motivation to proceed with legal actions against the offender.

Furthermore, the Convention explicitly delineates in Article 16(2) that it does not establish an obligation upon the Contracting States to grant extradition. Since the Convention lacks a legal scheme of obligatory extradition, the States are left to seek extradition of the offenders, if at all, on the grounds of the extradition treaties.

2.1.8. Other Shortcomings

1. *Double jeopardy*: The text adopted in Tokyo is silent on the issue of double jeopardy or *ne bis in idem* [7, 8]. Overall, it is undoubtedly preferable to have such a clause included in a treaty with a global implication rather than not.

2. *Right of Recourse:* The unscheduled landing to deliver an unruly passenger to the authorities may considerably increase the carrier's operating costs [4]. Unfortunately, the Convention does not grant a right of recourse to the aggrieved aircraft operators. Those are left to bear the financial consequences of the incidents themselves or seek to recover incurred costs through civil proceedings or reparations orders in the criminal proceedings.

3. *Cooperation of Contracting States:* The Convention does not encourage the Contracting States to cooperate, coordinate actions or share necessary information about the incidents.

4. *Aircraft Commander:* The Convention uses the term "aircraft commander," which on its own does not constitute an issue. However, "pilot in command" would be a more appropriate term, as the powers of the captain could be transferred to the second pilot in case of captain's incapacitation or neurotic behaviour, as was the case of the JetBlue Flight 191 and its disruptive captain [9].

3. Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 2014

Notwithstanding the fact that the Tokyo Convention is one of the most widely adopted conventions in ICAO history, modern realities have shown that its effectiveness is limited and does not reflect the commercial transformation of the industry. The Tokyo Convention, in particular, failed to address the question of leased aircraft, which at the time of drafting seemed insignificant. Nowadays, it became a compelling issue. In 2014, the international society concluded Protocol to Amend Tokyo Convention under the auspices of the ICAO. This Protocol aimed to amend the shortcomings that the Convention omitted.

The Protocol managed to address the Jurisdiction issue by vesting the State of operator a power over leased aircraft. The State of landing was identified with power over the foreign aircraft. Furthermore, the drafters incorporated provisions on double jeopardy, due process, and a right of recourse.

3.1. Shortcomings and Legal Gaps of the Montreal Protocol

Regrettably, as the following pages will demonstrate, the provisions intended to amend the inadequate clauses of the Convention were eventually left out of the Final Act. Some of the revised provisions have created new gaps and caused new shortcomings to emerge. Others even discouraged certain delegations from signing the concluded Protocol.

3.1.1. Scope

The industry has been calling for a precise specification of what constitutes the "offence" and "acts that jeopardise the safety". However, even though the drafters proposed such a list of offences to be incorporated into the scope of the Protocol. The

delegates refused the notion and left the scope in its original shape.

Given the decision made, some delegates have expressed concern over particular behaviour towards air crew, which should not be tolerated in any circumstances. To heighten the crew's protection, the Protocol has incorporated Article 15 *bis* that "encourages" States to initiate the legal proceedings in the events of offences involving physical assault or threat to the crew members and in cases where the passengers refuse to follow the instructions of the crew.

With the formulation of Article 15 *bis* a question arises, whether the Article represents a sufficient development and brings the necessary change. The unfortunate—yet by same delegates desirable choice of the word "encouraged" basically makes any enforcement obligation nonbinding. That was a fairly unexpected outcome in the context of behaviour that, according to the delegates' polling, no State seems to have forgotten to criminalise [10].

3.1.2. Temporal Scope

Another flaw, which the Protocol attempted to address, is the temporal scope defined in Art. 1(3) of the Tokyo Convention. The scope of the revised article has been extended to include the period from the moment all aircraft doors are closed after embarkation until the moment those doors are opened for passengers to disembark.

The improvement in the scope applicability is appreciated; however, the amended definition does not align with the airline's liability under the Warsaw Convention.

Nonetheless, one may wonder why the Convention that addresses acts and offences committed on board aircraft, as definite in the title, has the scope of application limited to the phase when the aircraft is in flight.

3.1.3. Jurisdiction

The Tokyo Convention's jurisdictional deficiency was addressed in Article 3(1 *bis*), and the Protocol identified three authorities that are *"competent to exercise jurisdiction over offences and acts committed on board".* The first one is the authority of the State of aircraft registration. Another one is the State of landing and finally, the State of operator.

The article empowered the positions of the State of landing and allowed the State of operator to exercise jurisdiction over the leased aircraft. Furthermore, the provision specifically refers to both offences and acts.

However, one may ask how to comprehend a choice of words *"competent to exercise jurisdiction."* According to the Legal Information Institute, the term competent refers to *"the ability to act in the circumstances, including the ability to perform a job or occupation, or reason or make decisions* [11]*".*

Nevertheless, does the ability to exercise jurisdiction imply that it is mandatory or optional? The Legal Committed decided to improve the enforcement mechanism of the Convention and asked for mandatory jurisdiction provisions. However, the wording used in Article 3(1 *bis)* appears ambiguous and allows uncertainty of the obligation.

3.1.4. State of Landing and State of Operator Jurisdiction

The provision in Article 3(2*bis*)(b) lays down the obligation for the State of operator to establish jurisdiction over leased aircraft with permanent residence in such State. It does, however, address the offences while leaving out the jeopardising acts. The provision's wording suggests the interpretation that the State of Operator is not eligible to exercise jurisdiction over the acts that jeopardise the safety of aircraft, people, or good order on board.

Likewise, the State of landing shall establish jurisdiction as per Article 3(2 *bis*)(a) in these two cases: over the offences committed on board aircraft that has scheduled landing or takeoff in such State or over the offences that jeopardise the safety of aircraft, people, or good order on board. It is worth noting that Article 3(2 *bis*) omits an event of unscheduled landing. A diversion represents a significant operational disruption, and the pilots opt for this solution only as a last resort. However, unless the offence meets the safety jeopardising constrain, the State of landing would not be eligible to exercise jurisdiction under the amended Convention.

The delegates decided to exclude the diverted flights from the State of landing jurisdiction since they do not provide legal certainty. The offenders may not know under what jurisdiction they would be tried because the State of landing is determined based on the captain's decision. The drafters of the Protocol tried to avoid legal uncertainty by incorporating Art. 3(2 *ter*), which lays down the following: *"In exercising its jurisdiction as State of Landing, a State shall consider whether the offence or act in question is an offence in the State of operator* [emphasis added]*."*

The formulation does not guarantee unambiguous interpretation. It is not clear to what extent the State of landing should pay attention to the findings of whether the occurrence constitutes an offence in the State of operator. Does it mean that the State of landing cannot proceed with the legal actions if the State of operator does not consider the occurrence in question as an offence? Or can the State of landing still decide to carry on with the legal proceedings even though the State of operator does not deem the occurrence an offence? It appears that each Contracting State can decide to interpret the provision in its own way.

3.1.5. In-flight Security Officers (IFSO)

The need for universal legal recognition of the IFSOs' powers and immunities was fundamental for modernising the Tokyo Convention. The IFSO's status became the most time-consuming and challenging topic at the Diplomatic Conference, just as it was in the Legal Committee [12]. At the Conference, the delegates were offered two options of Article amending the powers of the IFSO to choose from [13].

The first option would have vested the aircraft commander and the IFSO same authority to impose measures on the passengers in accordance with the original Art. 6(1)(a) and (b). The same option would also highlight the existing chain of command where only the aircraft commander would have the authority to disembark or deliver the alleged offender [13].

The second option would allow for the absolute authority of the aircraft commander, and the IFSO would only be given the

power to take preventive measures to immediately protect the safety of the aircraft and people on board [13].

The delegates endorsed the second option with minor alterations, whereas the first option was only supported by five delegations [12]. The delegates decided to limit the powers of the IFSO in order to uphold the *status quo* and preserve control over the aircraft in the hands of the aircraft commander. It should be noted that the pilot's decision on the safety concern in the cabin is dependent on the information given to him by the cabin crew while he remains locked in the cockpit. The IFSO, conversely, can assess the situation right away and apply necessary measures.

Note that the States that opposed the full authority for the IFSOs could still decide not to allow a foreign IFSO in their airspaces under Article 6(4). However, by limiting their powers, they have discouraged States—deploying the IFSOs from ratifying the Protocol. Unfortunately, that was a case of the United States and several other States [14, 15].

4. Conclusion

Notwithstanding the shortcomings mentioned above, the provisions concerning the in-flight security officers turn out to be a stumbling stone that has divided the Diplomatic Conference. The majority of States opposed the proposal to grant full authority to in-flight security officers. As expected, those were the States that did not deploy officers on their aircraft nor allowed foreign officers in their territory. Unfortunately, the deficient authority of in-flight security officers has become a significant deterrent for ratifying the amended Convention. The States affected by the limitation concluded that they would not support the Protocol. Only 24 of the 86 states presented signed the Final Act. The States of the European Union or North America were not among them. The paucity of signatures suggests that the Protocol did not meet the Conference's objectives and left many flaws unresolved.

In conclusion, the effective way to discourage future offences is through preventive measures at the airport, which do not achieve the same level of deterrence that could exist under a uniform international legal system. However, neither Tokyo Convention nor Montreal Protocol does provide a strong legal framework. The success of the Tokyo Convention does not lie in its substance but, instead, in the willingness of States to implement it. The prospects for Montreal Protocol ratification, on the other hand, are not likely to achieve similar widespread acceptance. The rationale is that the State of operator and State of landing jurisdiction may not provide a necessary counterweight to the disadvantages of the IFSO provisions and other shortcomings.

Finally, in a few words, the Montreal Protocol missed the opportunity to improve the somewhat deficient Tokyo Convention while only offering small benefits. However, the number of unresolved shortcomings demonstrates the States' indifference in recognising the importance of creating a strong legal framework governing the offences and acts committed on board. Until there is a general desire for such a framework, which may take another decade or two, the States should pursue their initiatives and amend national laws with the following provisions:

1. Implementing a list of offences: Enumerated offences and acts can secure the uniform interpretation of the Protocol's scope. Wherever such offence would occur, the Contracting State would commence legal actions against the alleged offender.
2. Improving formulation of mandatory jurisdiction: The formulation of mandatory jurisdiction now allows for ambiguity, which may deteriorate the obligatory requirement.
3. Extending the definition of aircraft in flight: Currently, the Protocol does not align the liability of the aircraft operator under the Warsaw Convention of 1929 and Montreal Convention of 1999 with the scope application of the Protocol. The Protocol should address all incidents that occur on board and not only when the aircraft is in flight.
4. Extending the jurisdiction of the State of landing and State of operator: The State of landing and State of operator should be eligible to exercise jurisdiction over both offences and acts that jeopardise the safety or good order on board. Furthermore, the State of landing should be able to exercise its jurisdiction over the alleged offender on board the diverted aircraft.
5. Improving the legal certainty: The Landing State should be, in case of diverted flight, eligible to exercise its jurisdiction only if the act in question constitutes an offence in the State of landing. Currently, Article 3(2 *ter*) uses ambiguous formulation.
6. Extending the powers of in-flight security officer: The in-flight security officer should be granted the power to act preventively in every safety-related occurrence on board. Furthermore, it would improve the overall efficiency if the in-flight security officer could act without prior authorisation from the aircraft commander.
7. Incorporating the principle of "*either extradite or prosecute*": In the context of enumerated offences and jeopardising acts, the Protocol should require the Contracting States to initiate the legal proceedings against the alleged offender or to extradite such person to the State, which shows the legitimate interest. This amendment should not affect the sovereign right of every State to grant political asylum to the offender.
8. Changing the term aircraft commander to pilot in command: A slight change of term may allow transferring the powers of the aircraft commander to the first officer in the event of the captain's incapacitation.

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