

***"DISRUPTIVE/UNRULY AIR PASSENGERS: COULD THE
TOKYO CONVENTION OF 1963, BE SAVED?"***

**AN EXAMINATION OF WHETHER AMENDMENTS MADE TO THE TOKYO
CONVENTION, 1963, DURING THE INTERNATIONAL CIVIL AVIATION (ICAO)
CONFERENCE HELD DURING APRIL 2014, ARE SUFFICIENT TO ADDRESS THE
LEGAL SHORTCOMINGS THEREOF**

by

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Abstract

"ICAO DIPLOMATIC CONFERENCE DELIVERS NEW PROTOCOL ADDRESSING DISRUPTIVE PASSENGERS"

MONTRÉAL, 7 April 2014 – The International Civil Aviation Organization (ICAO) announced today that a Diplomatic Conference, featuring the participation of 100 ICAO Member States and nine international organizations and institutions, has officially adopted a Protocol to amend the 1963 Tokyo Convention on offenses committed on aircraft.

The culmination of a four-year effort to modernize the Tokyo instrument, the new Protocol will address what had become recognized in recent years as a troubling escalation in the frequency of incidents involving disruptive and unruly passengers on scheduled commercial flight¹.

ICAO Council President, Dr. Olumuyiwa Benard Aliu, 07 April 2014, Montreal, Canada."

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo, 14 September 1963 (hereinafter referred to as the "*Tokyo Convention, 1963*"), was the first and most important international agreement to establish an international standard for the control of criminal acts on board aircraft² in the interest of aviation safety.³

However, during the past 50 years the Tokyo Convention was found to be defective in certain areas. It therefore became necessary for the international community to take remedial action. This was done during the above Diplomatic Conference held during April 2014 in Montréal, Canada, that resulted in the adoption of the Protocol⁴ (hereinafter referred to as the "*Montréal Protocol*"), to amend the Tokyo Convention, as well as a Resolution regarding a list of offences.⁵ The Montréal Protocol requires ratification by a minimum of 22 contracting States before it enters into force.⁶

One of the main objectives of the Diplomatic Conference was to address the issue

¹ International Civil Aviation Organization (ICAO). Press Release dated 07 April 2014.

² Swerdlow. *Modern Approaches to the Powers of the Aircraft Commander Under Article 6 of the Tokyo Convention* 105.

³ See <http://www.iata.org/policy/pages/tokyo-convention.asp>.

⁴ Final Act of the International Conference on Air Law to Consider Amending the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963) held under the auspices of the International Civil Aviation Organization at Montréal 26 March to 4 April 2014. See p 7 for Resolution adopted regarding ICAO Circular 288 – *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*.

⁵ *Supra* n 4 7.

⁶ Protocol Article XVIII.

of disruptive/unruly passengers in more detail. According to recent statistics provided by the International Civil Aviation Organization (ICAO)⁷ and the International Airlines Transport Association (IATA),⁸ disruptive/unruly passenger incidents worldwide have been showing an alarming increase over the years. These incidents include violence against crew and other passengers, harassment and failure to follow safety instructions.⁹

In view of the above, it is necessary to critically examine whether the amendments to the Tokyo Convention, 1963, as adopted by the Diplomatic Conference by means of the Montréal Protocol, and Resolution, are deemed sufficient to address the legal shortcomings of the Tokyo Convention, 1963.

⁷ Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers. Report. Montréal, 22 to 25 May 2012. 2-1.

⁸ Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers. Second Meeting. Montréal, 03 to 07 December 2012. 2 to 3; 9.

⁹ *Supra* n 8 2.

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1. BACKGROUND

"With visions of rum punch, sandy beaches, and a week of relaxation ahead, your mind and body are beginning to transform into vacation mode. Imagine embarking on an airplane looking forward to a well-earned holiday at a warm Caribbean resort destination. As the aircraft flies along at 36,000 feet, your daydream begins. All of a sudden, your daydream is immediately interrupted by a group of rowdy, drunken passengers singing noisy songs, screaming obscenities, and throwing objects at the flight crew."

Disruptive/unruly passenger behaviour. The above extract describes what most people would imagine is a scene from a Hollywood movie. Instead, this scenario occurred on an international flight from London, England, to Montego Bay, Jamaica.¹⁰ Scenes like these and in some cases even worse, are on the increase during domestic and international flights worldwide. In-flight disturbances differ in degree and character, which could range from physical fights or confrontations, sexual assaults, verbal harassment by and between passengers, or passengers and flight crew members, intoxicated behaviour, etc.¹¹ In extreme cases, these incidents have also resulted in some unruly passengers having been involved in acts of terrorism, or that some have been killed in flight while efforts were made to contain them.¹²

Tokyo Convention, 1963. The Tokyo Convention, 1963, which was adopted in 1963, came into operation in 1969 and was intended to govern offences and other unlawful acts that occur on board aircraft in-flight, including disruptive/unruly passenger behaviour.¹³ These types of behaviour compromise aviation safety and security and could also have a financial impact on airlines, for example, if disruptive/unruly passengers have to be disembarked at unplanned destinations due to their unlawful behaviour on board the aircraft.

Inadequacy of Tokyo Convention, 1963. The increase in incidents of disruptive/unruly passenger behaviour during the past few years caused

¹⁰ Fogg. *Air Rage: Is It A Global Problem? What Proactive Measures Can Be Taken and Whether the Tokyo Convention Should be Amended to Ensure Prosecution of Air Rage Offenders?* ILSA Journal of International & Comparative Law Vol 7. 2001 512.

¹¹ McGill University. Faculty of Law. Institute of Air and Space Law. Private International Air Law. Cases and Materials, Vol. 1. 81 to 82.

¹² See case of Jonathan Burton who was killed by fellow passengers due to extremely disruptive behaviour as referred to by Schwab. *Air Rage: Screaming For International Uniformity.* 2001. 402 to 403.

¹³ IATA Position Paper – Reform of The Tokyo Convention 1963. November 2013. 1.

international concern. According to figures compiled by IATA,¹⁴ the number and type of disruptive/unruly passenger incidents on commercial flights have increased steadily. IATA began collecting data in 2007 and in a four year period from 2008 to 2011, over 15,000 unruly passenger behaviour incidents were reported, which constitute a 54% increase in incidents on a year-to-year basis during that period. IATA claims that in 2010, there was 1 unruly passenger incident for every 1359 flights, which increased to 1 unruly passenger incident for every 1200 flights in 2011.¹⁵

Despite the success of the Tokyo Convention, 1963, for almost the past 50 years, international concern has been mounting on whether the Convention was still able to meet the legal demands and challenges of modern day aviation.

International efforts to address the legal inadequacies of the Tokyo Convention, 1963, culminated in the Diplomatic Conference held in Montréal during April 2014, during which the Montréal Protocol and Resolution were adopted that intended to address the perceived legal shortcomings of the Tokyo Convention, 1963.

2. PHILOSOPHY OF AVIATION SAFETY AND HISTORY OF THE TOKYO CONVENTION, 1963

Before the history of the Tokyo Convention, 1963, is discussed in more detail, it is firstly necessary to analyze the philosophy underlying aviation safety since it has informed the creation of many international aviation instruments.

Philosophy of aviation safety. Abeyratne¹⁶ mentions that during the drafting of the *Convention on International Civil Aviation* of 07 December 1944, (hereinafter referred to as the "Chicago Convention"), in Chicago in 1944, although no explicit mention was made of the security of international civil aviation, since acts that threatened international aviation safety were unknown at that time, several States made reference to the significance of the Chicago Convention to security and safety of air travel,¹⁷ in particular the Preamble, which reads as follows:

¹⁴ *Supra* n 8 2.

¹⁵ *Supra* n 8 2.

¹⁶ Abeyratne. *Safety in the Air: Air Carriers' Rights and Responsibilities at National and International Law*. 2003. 293.

¹⁷ *Supra* n 16 293.

"WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end."

Furthermore, Article 25 of the Chicago Convention, which deals with assistance to aircraft in distress by Contracting States, also clearly indicates that the safety of civil aviation is one of its main objectives.¹⁸ Although the term '*Aircraft in distress*' is not defined in the Chicago Convention, the obligation by contracting States to provide measures of assistance to such an aircraft, provides some sense of security for international civil aviation.¹⁹

Article 4 of the Chicago Convention provides that "*Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention*". In essence this Article prohibits the abuse of civil aviation.²⁰ This would of course include allowing disruptive/unruly behaviour of passengers aboard aircraft without taking any prohibitive or enforcement measures.

Abeyratne also importantly mentions²¹ that although the United Nations Charter does not contain any specific provision which deals directly with the security of civil aviation since it is implied in the Preamble to the Charter, which stipulates that the citizens of member states of the United Nations will practice tolerance and live together in peace with one another as good neighbours. The notion of security is

¹⁸ *Supra* n 16 293 to 294.

¹⁹ *Supra* n 16 294.

²⁰ *Supra* n 16 294.

²¹ *Supra* n 16 295 to 296.

embodied in several Articles of the Charter, for example, Article 1(2) provides that the purpose of the United Nations is to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.²²

As civil aircraft are by definition used to transport civilians, the principles of the Chicago Convention should ensure the protection of civilians and their property from dangers affecting civil aircraft in flight. The United Nations Charter can therefore be interpreted as placing a legal duty on the international community to protect the human being and its property even in relation to civil aviation flights.²³

History of the Tokyo Convention, 1963. According to Kane,²⁴ some hold the view that the Tokyo Convention originated in a bottle of rum. This bottle of rum was apparently given to Senor *Diego Cordova* by his friends before he boarded an American aircraft in Havana in 1947, for a flight to Miami. However, during the flight, *Cordova* got into an altercation with a fellow passenger and used his bottle of rum to assault him. On arrival in the US, he was charged and tried for an offence, but was acquitted.²⁵ The reason was that the crime had been committed over the high seas and the Court held that the criminal jurisdiction of the US did not extend behind its territorial limits. This case received widespread attention and caused the focus on the legal status of aircraft and how to deal with offences committed on board such aircraft.

According to Abeyratne,²⁶ the issue of disruptive/unruly passengers is closely linked to the broader issue of aviation safety. In this regard the differentiation between a potential terrorist and a potential disruptive/unruly passenger is non-existent, as both categories are viewed as capable of endangering persons on board a flight.

Global efforts at ensuring aviation security go back at a time when a series of unlawful acts against civil aviation were committed in the 1960s and 1970s.²⁷ This created an urgent need by the international aviation community to establish

²² *Supra* n 16 295. Abeyratne also refers to, for example, Article 55 of the Charter that provides that the United Nations “shall promote respect for, and observance of, human rights and fundamental freedoms”; Article 13, “That the Assembly shall make recommendations for the purpose of assisting in the realization of human rights and freedoms.”, etc.

²³ *Supra* n 16 295.

²⁴ Kane. *Is it Time to Put Teeth Into Tokyo?* 1994. 187 to 188.

²⁵ *United States v Diego Cordova* 89 (E.D.N.Y. 1950).

²⁶ *Supra* n 15 283 to 284.

²⁷ *Supra* n 16 285.

uniform international legal norms to deal with these types of incidents. Under the auspices of ICAO, three international Conventions were adopted to combat these serious offences.²⁸ The first was the Tokyo Convention, 1963, dealing with offences and certain other acts committed on board aircraft; the second the Hague Convention, 1970, criminalizing the act of any person who, whilst on board an aircraft in flight, unlawfully by force or threat by any other form of intimidation, seizes what takes control of such aircraft, or any attempt to do so. The third was the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 1970, which further expands on offences as contained in the Hague Convention. The latest development constitutes the adoption of the *Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation*,²⁹ in Beijing, China, on September 2010. This Convention aimed to, *inter alia*, strengthen the legal framework for international cooperation in preventing and suppressing unlawful acts against civil aviation. At the same Conference, the *2010 the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*³⁰ was adopted to supplement the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 1970, as referred to above.

In 1963, delegates from 61 States participated in a three week Diplomatic Conference held in Tokyo, Japan, to draft the Tokyo Convention, 1963. At the end of the Diplomatic Conference, 16 States signed the Tokyo Convention on 14 September 1963, which entered into force in December 1969.³¹ The Tokyo Convention, 1963, is one of the most widely ratified international instruments ever developed under the auspices of the International Civil Aviation Organization (ICAO).³² As at December 2013, 185 States have ratified the Tokyo Convention, 1963.³³

Purpose of the Tokyo Convention, 1963. The Tokyo Convention, 1963, governs offences and other acts that occur on board aircraft in flight. Since domestic laws of States differ with regard to the extra-territorial application of jurisdiction over crimes committed on board aircraft, the drafters of the said Convention intended to establish some form of uniformity internationally with respect to the rules applicable

²⁸ *Supra* n 16 285 to 287.

²⁹ Convention not yet in force.

³⁰ Convention not yet in force.

³¹ *Supra* n 7 A4-4.

³² *Supra* n 7 A4-4.

³³ See http://en.wikipedia.org/wiki/Tokyo_Convention.

to the prosecution of offences committed on board aircraft.³⁴ The *raison d'être* of the Tokyo Convention, 1963,³⁵ was to:

- grant the State of Registration jurisdiction over acts occurring aboard the aircraft;
- allow the aircraft commander certain prerogatives to handle passengers in those situations who may have already committed, or are about to commit, an offence or an act that may jeopardize the safety of the aircraft;
- set forth the responsibilities of the State of Landing where the alleged offender may be disembarked or delivered; and
- to some extent, address the crime of hijacking - although the Convention was originally not conceived as an instrument to deal with acts of unlawful interference with aircraft.

The Tokyo Convention, 1963, for the first time in the history of international aviation law, recognized certain powers and immunities of the aircraft commander, aircrew and passengers, who on international flights, may restrain any person(s) if he or she has reasonable cause to believe a passenger is committing, or is about to commit an offence likely to interfere with the safety of persons or property on board, or who is jeopardising good order and discipline.³⁶

Events leading up to the review of the Tokyo Convention, 1963. The Tokyo Convention, 1963, came into force in 1969 and had a positive effect on aviation safety. However, during the past 50 years the Tokyo Convention, 1963, had been found to be defective in certain areas, which deficiencies were addressed by the international community through ICAO.

ICAO started discussions on disruptive/unruly passenger issues back in 1995.³⁷ On 3 June 1996, the ICAO Council decided to include in the work programme of the Legal Committee the issue of "*Acts or Offences of Concern to the International Aviation Community and not Covered by Existing Air Law Instruments.*" On 6 June 1997, the Council established a Study Group to examine this issue.

³⁴ *Supra* n 7 A4-4.

³⁵ *Supra* n 7 A4-4 to A4-5.

³⁶ *Supra* n 7 A4-6.

³⁷ *Supra* n 7 A4-17.

The Study Group developed Circular 288 - *Guidance Material on Legal Aspects of Unruly/Disruptive Passengers*. The main purpose of the Circular was to set out a model law on certain offences committed on board civil aircraft to be transposed into national legislation by ICAO Member States.³⁸

The 33rd Session of the ICAO Assembly, held in Montreal during 2000, unanimously adopted Resolution A33-4, which called upon Member 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 Circular's model legislation. The Circular proposed the following 3 categories of offences to be implemented by Member States:

- Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft (such as assault, threat and intimidation of crew, refusal to follow instructions);³⁹
- Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft (such as assault or intimidation of fellow passengers, damage or destruction of property, consuming alcoholic beverages or drugs resulting in intoxication);⁴⁰ and
- Other Offences Committed on Board a Civil Aircraft (such as smoking in lavatory, tampering with a smoke detector, operating an electronic portable advice).⁴¹

This list was considered desirable "to provide a common denominator for offences" and to "offer uniform criteria for States to extend their respective jurisdiction."⁴² It is also noteworthy that the Circular introduced a model clause on jurisdiction, where the State of "next landing of the aircraft" may assert jurisdiction, irrespective of the State of Registration or the nationality of the offender.⁴³

³⁸ *Supra* n 7 A4-18.

³⁹ *Supra* n 38.

⁴⁰ *Supra* n 38.

⁴¹ *Supra* n 38.

⁴² *Supra* n 38.

⁴³ *Supra* n 38.

Unfortunately the Circular did not possess any legally binding status and it was left to the discretion of the Member States whether to incorporate it into their domestic law or not.

In 2003, the ICAO Secretariat confirmed that only 18 States had incorporated the Circular, in whole or in part, into their domestic legislation.⁴⁴ Thus, although a noteworthy legal document was created, it unfortunately found little practical application amongst Member States.

It became clear that in order to address the problem efficiently, an international legal instrument needed to be considered that found international acceptance amongst Member States.

During the 34th Session of the ICAO Legal Committee, which took place during September 2009, the International Air Transport Association (IATA) tabled a proposal to form a Secretariat Study Group (SSG) in order to undertake a study on unruly and disruptive behaviour on board aircraft,⁴⁵ which proposal was accepted. With the full endorsement of its plenary session, the Legal Committee recommended to the Council that ICAO should undertake further studies on the subject matter, whereafter the Council approved the formation of the SSG. Following meetings in Montreal and Paris during 2011, the SSG recommended that a Special Sub-Committee of the ICAO Legal Committee (LC-SC), be established to examine the feasibility of introducing amendments to the Tokyo Convention, 1963, with particular reference to the issue of disruptive/unruly passengers.⁴⁶

At the 5th meeting of its 194th Session held in November 2011, the Council considered the SSG's Report and decided to request the Chairman of the Legal Committee to establish the LC-SC in order to review the existing international regime on disruptive/unruly passengers, which lead to the appointment of Mr Alejandro Piera as Rapporteur of the LC-SC.⁴⁷

⁴⁴ *Supra* n 7 A4-19.

⁴⁵ *Supra* n 7 A4-1 to A4-2.

⁴⁶ *Supra* n 7 A4-1.

⁴⁷ *Supra* n 7 A4-2.

The Rapporteur consequently compiled a Report as a source document to facilitate the deliberations of the LC-SC at its first meeting in May 2012 in Montréal.⁴⁸ A second follow-up meeting of the LC-SC was held during December 2012 also in Montréal.⁴⁹

Because of the above, the next significant meeting was the Diplomatic Conference held during April 2014,⁵⁰ to consider amendments to the Tokyo Convention, 1963, which lead to the adoption of the Montréal Protocol and the Resolution.

3. CRITICAL RESEARCH QUESTIONS

The main research questions are:

- What are the legal shortcomings that have been identified in the Tokyo Convention, 1963, since its adoption?
- To what extent do the adopted Montréal Protocol and Resolution pertaining to ICAO Circular 288 - *Material on Legal Aspects of Unruly/Disruptive Passengers*, address the legal shortcomings of the Tokyo Convention, 1963?

4. RESEARCH AIMS

The thesis of this dissertation is to show that the Montréal Protocol, to a large extent, managed to successfully address most of the legal deficiencies that have been identified in the Tokyo Convention, 1963, since its adoption. The adoption of the Resolution regarding the issue of a list of offences and other acts pertaining to the Tokyo Convention, 1963, will show that these matters could not be successfully incorporated into the Tokyo Convention, 1963, during the Diplomatic Conference.

5. CHAPTER BREAKDOWN

The above-mentioned research questions and research aims will be addressed in the following chapters:

- Chapter 2: Definition of Disruptive/Unruly Passengers; Categories; and Examples. In order to contextualize the Tokyo Convention,

⁴⁸ *Supra* n 7.

⁴⁹ *Supra* n 8.

⁵⁰ *Supra* p 2.

1963, it is necessary to provide the information as outlined in this chapter. The definition of disruptive/unruly passengers will be provided, as well as some categories of disruptive/unruly passenger behaviour on board aircraft. The possible causes for disruptive/unruly passenger behaviour will also be provided, as well as some practical examples in illustration thereof.

- Chapter 3: Legal Shortcomings of the Tokyo Convention, 1963. The Tokyo Convention, 1963, has played a major role in the combating of disruptive/unruly passenger behaviour since its inception. However, it has not been without criticism by academics, scholars, and major aviation entities, such as ICAO and IATA. Disruptive/unruly passenger incidents behaviour has been showing a sharp increase especially during the last decade and appears to be rising. This caused the international aviation community to urgently address the legal shortcomings of the Tokyo Convention, 1963, in order to curb these incidents. Therefore this chapter will deal with the major legal shortcomings as identified by academics, scholars and legal practitioners, as well as ICAO and IATA. These include, for example issues such as jurisdiction, definitions/list of offences, prosecution, extradition, international cooperation, powers/duties of the aircraft commander, etc.
- Chapter 4: To What Extent Do the Adopted Montréal Protocol and Resolution Pertaining to ICAO Circular 288, Address the Legal Shortcomings of the Tokyo Convention, 1963? Following the legal deficiencies of the Tokyo Convention, 1963, as identified in Chapter 2, it is then necessary to analyze to what extent do the adopted Montréal Protocol and Resolution pertaining to ICAO Circular 288 – *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*,⁵¹ address the legal shortcomings of the Tokyo Convention, 1963. In this regard, the Preamble of the Montréal Protocol, the major amendments to the Tokyo Convention, 1963, as contained in the Montréal Protocol, as well as the Resolution, will be critically examined from a legal perspective

⁵¹ *Supra* n 4.

6. DELIMITATION OF STUDY AREA

This study will mainly focus on the content of the Tokyo Convention, 1963, as amended by the Montréal Protocol and the Resolution with regard to disruptive/unruly passengers. Although terrorist acts also fall within the ambit of disruptive/unruly passengers, it will not form part of this study since there are other international instruments that mainly deal with these incidents.⁵²

⁵² For example, the *Convention for the Suppression of Unlawful Seizure of Aircraft, December 1970* (The Hague Convention, 1970).

CHAPTER 2: DEFINITION OF DISRUPTIVE/UNRULY PASSENGERS; CATEGORIES; AND EXAMPLES

Synopsis. The main aim of the Tokyo Convention, 1963, is to address disruptive/unruly passenger behaviour in the interest of aviation safety. In order to contextualize disruptive/unruly passenger behaviour within the current text of the Tokyo Convention, 1963, it is necessary that certain definitions and concepts be understood to understand what the definition of a disruptive/unruly passenger entails; what constitute the main categories of such passenger behaviour; possible causes for such behaviour; and lastly, some practical examples of disruptive/unruly passenger incidents.

Introduction. This chapter focuses on the definition of a disruptive/unruly passenger, the main categories of such passenger behaviour; possible causes for this behaviour; and lastly, some practical examples of disruptive/unruly passenger incidents.

Definition of a disruptive/unruly passenger. Annex 17⁵³ to the Chicago Convention,⁵⁴ defines a disruptive passenger as follows:

"A passenger who fails to respect the rules of conduct at an airport or on board an aircraft or to follow the instructions of the airport staff or crew members and thereby disturbs the good order and discipline at an airport or on board the aircraft."

Categories of disruptive/unruly behaviour. IATA has compiled the following non-exhaustive list of examples of disruptive/unruly behaviour:⁵⁵

- Illegal consumption of narcotics;
- Refusal to comply with safety instructions, for example, ignoring cabin crew requests to fasten a seatbelt, not to smoke, turn off a portable electronic device, or disrupting the safety announcements;
- Verbal and/or physical confrontation with crew members and other passengers;

⁵³ *Safeguarding International Aviation Against Acts of Unlawful Interference*. Ninth Edition. March 2011. 1 to 2.

⁵⁴ *Supra* p 8.

⁵⁵ IATA. *Guidance On Unruly Passengers and Management*. December 2012 11.

- Uncooperative passengers, for example those interfering with the crew's duties, refusing to follow instructions to board or leave the aircraft, etc.;
- Making threats, whether direct it against a person, or intended to cause confusion and chaos, such as statements referring to a bomb threat, threatening behaviour that could affect the safety of the crew, passengers and aircraft;
- Sexual abuse/harassment; and
- Other type of riotous behaviour, such a screaming, causing a nuisance, kicking and banging heads on seatbacks/tray tables, etc.

Possible causes of disruptive/unruly passenger behaviour. IATA also compiled a list of possible causes for disruptive/unruly passenger behaviour on aircraft:⁵⁶

- Intoxication caused either by the use of alcohol, narcotics or medication;
- Irritation with other passengers' actions on board;
- Frustration linked with the passenger's journey, for example long haul flights, inability to smoke or use portable devices, dissatisfaction with customer service and poor service delivery at the airport or on board the aircraft, etc;
- Mental breakdowns/episodes or conditions;
- Personality or cultural differences amongst passengers, or between crew members and passengers;
- Emotions caused outside the flight;
- Lack of medication, or alcohol withdrawal symptoms;
- Environmental factors that are present during the act of flying, such as large crowds at airports, having to sit and travel in a confined space, fear of flying or height, media reports of possible terrorist events, etc.

⁵⁶ *Supra* n 55 16 to 17.

Some other authors, such as Fogg,⁵⁷ mentions that disruptive/unruly behaviour is displayed by all sectors of the population: male, female, young, old, first class, business and economy.⁵⁸ She also identified some other causes related to disruptive/unruly passenger behaviour on aircraft, such as stuffy cabin air, blood sugar levels that cause stress, selfish behaviour, waiting at airports, sense of powerlessness associated with flying, lack of storage room,⁵⁹ etc.

Milde⁶⁰ mentions that gone are the years when an air passenger was "*special*" and could expect individual personalized attention, respect and courtesy that is currently not available even for premium class passengers. The passengers are now an anonymous part of the travelling mass and the social interaction within that mass is not immune from the typical social conflicts common in society in general. According to Milde, air travel creates an environment to cause behavioural social conflicts.⁶¹

Milde further mentions,⁶² that from the moment the passenger leaves home for the airport, he or she is exposed to some level of additional and unusual stress. Normal daily routine is upset and there is heightened concern to have preparatory work, luggage and documents in order, to reach the airport on time, cope with traffic congestion on the road, to find a parking place, etc. At the airport the passenger is often faced with long lines at the check-in counters, aggravating procedures at immigration and customs control, intrusive security checks, one of which adds to the more than usual level of daily stress. Further aggravating factors could be caused by flight delays, waiting in overcrowded departure lounges, undignified tussle during the boarding, finding that assigned seat and competing for adequate storage space for the hand luggage. That does not even take into account the fact how long passengers often have to wait in the aircraft before the aircraft eventually takes off!

Examples of disruptive/unruly passenger incidents. Incidents of disruptive/unruly passenger behaviour are regularly reported in the media. In many cases it also leads to prosecution of the passenger offender/s. The following serve as some examples of serious incidents of disruptive/unruly passenger incidents:

⁵⁷ *Supra* n 10 520 to 523.

⁵⁸ *Supra* n 10 520.

⁵⁹ *Supra* n 10 521 to 522.

⁶⁰ Milde. "*Unruly*" passengers and the law...". McGill Faculty of Law. Institute of Air and Space Law. Public International Air Law. (Vol. Two). 2002 259 to 260.

⁶¹ *Supra* n 60.

⁶² *Supra* n 60.

- During 2001, a passenger was on a British Airways flight from London to Nairobi, when he entered the cockpit and took full control over the aircraft controls causing the plane to nosedive. After a struggle, the pilots managed to regain control of the aircraft. It was with in only four seconds of crashing to the ground.⁶³
- A 39 year old man from Missouri was on the final leg of an Alaskan Airline flight enroute from Puerto Vallarta, Mexico. He became restless and started acting irrational. He took off his shirt, threatened to kill everyone on board, and even tried to open an exterior plane door. After walking through the cabin, the man broke into the cockpit and attacked the aircraft's co-pilot, who defended himself with a small axe. Six passengers answered the captain's call for assistance and restrained the man using plastic restraints. The man was taken into custody, appeared in federal court, and was charged with interference with the flight crew.⁶⁴
- On a flight to Florida from England, a British woman head-butted a flight attendant after she was asked to stop smoking in the bathroom. The woman was then detained in a cubicle but she broke loose and had to be controlled by passengers and the flight crew. The pilot had to abort landing the aircraft and went into a holding pattern until the woman calmed down. The flight attendant was treated later for a suspected broken nose.⁶⁵
- On a United Airlines flight from Buenos Aires, Argentina to New York City, a passenger was fined \$50,000 (clean-up fees) by the airline after he assaulted a flight attendant, and defecated on a first-class food cart.⁶⁶
- A female passenger grabbed a flight attendant's finger and bent it backward, saying that she did not like the way the attendant asked her to put her tray and seat upright before the aircraft landed.⁶⁷

⁶³ *Supra* n 10 513.

⁶⁴ *Supra* n 10 513.

⁶⁵ *Supra* n 10 514.

⁶⁶ *Supra* n 59.

⁶⁷ *Supra* n 59.

- A drunken passenger on a US Air flight assaulted a flight attendant because she refused to serve him another drink. The passenger threatened to open the door and throw the flight attendant out of the aircraft.⁶⁸
- There can also be tragic endings when fellow passengers assist in restraining out of control passengers. During a flight on board a Southwest Airlines plane to Salt Lake City, a 19 year old man tried to break into the cockpit and began hitting fellow passengers. He was restrained by some of the passengers on board. It was initially reported that the man died of a heart attack. However, an autopsy classified his death as a homicide confirming that the man died as a result of injuries inflicted by fellow passengers when they tried to restrain him.⁶⁹

Conclusion. Clear concepts exist regarding the definition of disruptive/unruly passenger behaviour, main categories and causes, as well as practical examples which will enable the reader to properly contextualize these concepts within the framework of the Tokyo Convention, 1963.

⁶⁸ Mann. *All The Air Rage: Legal Implications Surrounding Airline and Government Bans On Unruly Passengers In the Sky*. 2000. 860.

⁶⁹ *Supra* n 10 528.

CHAPTER 3: LEGAL SHORTCOMINGS OF THE TOKYO CONVENTION, 1963

Synopsis. The Tokyo Convention, 1963, has been in existence for almost 50 years and made a huge contribution towards aviation safety. However, it has not been left unscathed without the legal deficiencies having been criticised from several quarters over time. The unacceptable sharp increase in disruptive/unruly passenger incidents during the past few years has necessitated the international aviation community to re-assess the validity of the Tokyo Convention, 1963, against modern time aviation requirements and to address its shortcomings. These shortcomings will be dealt with in this chapter. The extent of the remedial actions taken by the international aviation community to address the legal shortcomings of the Tokyo Convention, 1963, will be dealt with in the next chapter.

Introduction. In order to understand the extent of the remedial actions taken by the international aviation community to address the legal deficiencies of the Tokyo Convention, 1963, it is necessary that these legal deficiencies be outlined. These shortcomings have been identified by academics, scholars, legal practitioners and major aviation entities, such as ICAO and IATA, over a number of years. It needs to be kept in mind that at the time of the inception of the Tokyo Convention, 1963, the aviation world in the 1960s appeared vastly different from today and it could not have been expected that the drafters of the Convention should reasonably have foreseen and predict the rapid development of civil aviation as what it would be today and all the challenges related thereto. In the 1960s flying was not what it is today – it was glamorous and stylish to fly and mostly limited to the privileged.⁷⁰ Today flying is just a commodity available to the masses and is little more than a driving experience on vacation by car. It was therefore to be expected that as time went by and changes to international civil aviation developed, the Tokyo Convention, 1963, would become insufficient in some areas.

The identified legal deficiencies of the Tokyo Convention, 1963, entail, for example, the issues of definitions, jurisdiction, list of offences, prosecution, extradition, international co-operation/powers and duties of States, powers and duties of the aircraft commander, lack of right to recourse against disruptive/unruly passengers, etc.

⁷⁰ *Air Travel on the 60s.* Available at http://www.retrowo.co.uk/transport/60s/air_travel/air_travel.60s.html 1.

Legal shortcomings identified by academics, scholars, legal practitioners and international entities. The following major shortcomings in the Tokyo Convention, 1963, have been identified over the years. Due to limited space, not all aspects could be reflected upon.

- Jurisdiction. The unsatisfactory jurisdictional scope of the Tokyo Convention, 1963, has been one of the most important aspects having been commented upon. The whole debate regarding the legal status of aircraft was basically sparked by the *Cordova* case as already referred to above.⁷¹ According to Kane,⁷² it was, and still is universally accepted that every State has complete and exclusive sovereignty over the airspace above its territory. This customary international law principle of complete and exclusive of States over the airspace above its territory was already state practice prior to the outbreak of World War I in 1914.⁷³ States *de facto* protected their air space, protested against its violations and used force to assert their rights.⁷⁴ However, the 1919 Paris Convention formally recognised the complete and exclusive sovereignty of Contracting States over the air space above its territory.⁷⁵ During the drafting of the Chicago Convention in 1944,⁷⁶ a concomitant provision was included in Article 1 thereof without any discussion by participating States.

However, over the years commentators have disagreed on which law had to be applied with regard to aircraft during international flights. On the one hand, there was the view that the territorial principle of international law needs to be applied, which means that only offences committed on board aircraft which were at the time within the territory of the State could be prosecuted.⁷⁷ The other view was that criminal law in general could have an extra-territorial effect.⁷⁸ However, a point of contention was how offences committed in aircraft above the high seas had to be handled.

At this stage, however, it is necessary to analyse some of the most pertinent categories of comments made on the legal deficiencies of the Tokyo

⁷¹ *Supra* p 10.

⁷² *Supra* n 24 188 to 189.

⁷³ Milde. *International Air Law and ICAO*. 2008. 9.

⁷⁴ *Supra* n 73.

⁷⁵ *Supra* n 73 11.

⁷⁶ *Supra* n 73 34.

⁷⁷ *Supra* n 73 188.

⁷⁸ *Supra* n 73 188.

Convention, 1963, regarding jurisdiction. The matters discussed hereunder in essence all relate to the issue of jurisdiction, which are the following:

- Lack of important definitions such as "offence",⁷⁹ "serious offence",⁸⁰ "good order"⁸¹ and "discipline".⁸² Unfortunately the Tokyo Convention, 1963, lacks certain important definitions related to certain terminology used in the text. Apart from that, related terminology, such as "offence"⁸³ and "serious offences"⁸⁴ is used without any definitions, which creates confusion in the interpretation thereof. This may lead to arbitrary interpretations thereof, which is undesirable. For example, Article 1(a) of the Tokyo Convention, 1963, mentions that the Convention shall apply in respect of "offences against penal law". Yet, in Article 9(1), provision is made that the aircraft commander may, on reasonable grounds deliver to the competent authorities of a Contracting State any disruptive/unruly passenger whom the aircraft commander believe has committed a "serious offence" on board the aircraft. This immediately begs the question whether the aircraft commander then is excluded from such action in the cases of other offences or acts committed by disruptive/unruly passengers where these acts do not constitute "serious offences"?

Commentators such as Fitzgerald,⁸⁵ criticizes the fact that the Tokyo Convention, 1963, does not define the term "serious offence" as used in Article 9(1) of the Convention. Swerdlow,⁸⁶ holds a similar view and is of the opinion that such failure may lead to divergent interpretations and fails to provide for a sufficient framework for prosecution of offenders.⁸⁷

The lack of definitions as mentioned above was also similarly raised by ICAO and IATA in the past. ICAO, in the Report of the

⁷⁹ Article 1 of Tokyo Convention, 1963.

⁸⁰ Article 9(1) of Tokyo Convention, 1963.

⁸¹ Articles 1(b) and 6 of Tokyo Convention, 1963.

⁸² *Supra* n 79.

⁸³ See for example Articles 1, 2, 3, 4, 5, 6, 9, 26, 17 of Tokyo Convention, 1963.

⁸⁴ *Supra* n 80.

⁸⁵ Fitzgerald. *The Development of International Rules Concerning Offenses and Certain Other Acts Committed on Board Aircraft*. 1963. 245.

⁸⁶ *Supra* n 2 132.

⁸⁷ *Supra* n 2 135.

Rapporteur,⁸⁸ affirms that the lack of definition of "Offence"⁸⁹ in that the Tokyo Convention, 1963, does not define what constitutes an "offence" under criminal laws, nor does it set forth the acts that may jeopardize good order and discipline on board aircraft. These are left to the discretion of each State Party. It has also been said that the fact that the Tokyo Convention, 1963, does not categorize "jeopardizing acts" as "serious crimes" is one of the instrument's main flaws.⁹⁰ IATA voiced the same concerns⁹¹ and advocated greater clarity for the benefit of passengers, airline and law enforcement agencies by, for example, the inclusion of a list of offences and/or specific aspects of behaviour that constitute offences.

Article 1 and 6 of the Tokyo Convention, 1963, provide *inter alia* that the Convention applies to acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein, or which jeopardize good order and discipline (own emphasis) on board. Article 6 empowers the aircraft commander to take reasonable measures against disruptive/unruly passengers on board aircraft to, *inter alia*, "maintain good order and discipline on board". IATA also voiced concern that the terms "good order" and "discipline" may be regarded as imprecise and may be subject to conflicting judicial interpretation.⁹²

The lack of definitions of the terminology as outlined above may, once again, lead to subjective interpretational problems. This situation may particularly be relevant due to the multi-diversity of passengers with different cultural and socio-economic backgrounds. What may constitute a breach of good order and discipline in one culture may not be viewed the same in another.

- Limitation of definition of "in flight".⁹³ Article 1(3) of the Tokyo Convention, 1963, provides that "For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power

⁸⁸ *Supra* n 7 A4-1.

⁸⁹ *Supra* n 7 A4-10 to A4-11.

⁹⁰ *Supra* n 7 A4-10.

⁹¹ *Supra* n 13 1.

⁹² *Supra* n 7 A4-12.

⁹³ Article 1(2) and (3); Article 5(2) of Tokyo Convention, 1963.

is applied for the purpose of takeoff until the moment when the landing run ends.” This definition deals with the fact when the application of the Tokyo Convention commences and when it ceases. On the reading of this definition, it is clear that it is too limited in its application and does not provide for wider scenarios, for example, what would happen if a drunk and disorderly passenger embarks whilst the aircraft is still stationary and commits an offence or any other act that could compromise aviation safety? At that stage the aircraft would not yet have applied power for takeoff.

Several commentators have also criticized this deficiency, for example Kane.⁹⁴ ICAO⁹⁵ also considered this deficiency as being limiting regarding the handling of offences committed outside the scope of this specific definition as contained in the Convention. ICAO holds the view that the aircraft commander is authorized to exercise his or her discretion,⁹⁶ for example, if the offence is committed once the aircraft doors are closed, but before power is applied for the purpose of take-off, presumably national laws would apply. To avoid this dual regime, ICAO decided to depart from this approach in the *Convention for the Suppression of Unlawful Seizure of Aircraft of 1970* and the *Convention of the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971*.⁹⁷ Similarly, the *Convention on Compensation for Damage Caused by Aircraft to Third Parties*, and the *Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft* define in-flight as commencing “from the moment when all [the aircraft’s] external doors are closed following embarkation or loading until the moment when any such door is opened for disembarkation or unloading.”⁹⁸ Most recently, the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation of 2010*,⁹⁹ employs a very similar definition. For this instrument, “an aircraft is considered to be in-flight at any time from the moment when all its

⁹⁴ *Supra* n 24 195.

⁹⁵ *Supra* n 7 A4-11 to A4-12.

⁹⁶ *Supra* n 7 A4-11.

⁹⁷ *Supra* n 96.

⁹⁸ *Supra* n 96.

⁹⁹ *Supra* n 96.

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.” Strangely though, the Tokyo Convention, 1963, does not apply the extended scope of the definition of “*in-flight*” as contained in the Conventions as referred to above, which could result in confusion.¹⁰⁰ IATA held the same view as ICAO in this regard.¹⁰¹

- Lack of list of offences. The Tokyo Convention, 1963, does not contain a list of offences or other acts that may endanger aviation safety on board aircraft. Contracting States are responsible to criminalise these acts in their domestic law. Since this is the situation, it is inevitable that there will be differences and inconsistencies between the legal systems of Contracting States. This may be extremely relevant when the aircraft commander wants to disembark a disruptive/unruly passenger due to the commission of a serious offence according to the penal law of the State of Registration in terms of Article 9 of the Tokyo Convention, 1963. Article 9 of the Convention pre-supposes some knowledge by the aircraft commander of the criminal legal system of the State of Registration relating to aviation offences. Many aircraft commanders do not have such level of knowledge at their disposal.

Mendelsohn,¹⁰² mentions that in the early drafts of the Tokyo Convention, 1963, prior to the acceptance thereof, a specific affirmative list of situations evolved in which the Convention was to apply. However, seemingly this proposition was not accepted since the final adopted version of the Tokyo Convention, 1963, did not contain any list of offences or acts that may endanger aviation safety on board.

¹⁰⁰ *Supra* n 7 A4-12.

¹⁰¹ *Supra* n 100.

¹⁰² Mendelsohn. *In-flight Crime: The International and Domestic Picture Under the Tokyo Convention*. Virginia Law Review. April 1967. Volume 3. 528.

In order to attain some level of standardisation, ICAO adopted Circular 288 - *Guidance Material on Legal Aspects of Unruly/Disruptive Passengers* in 2000,¹⁰³ which contained model legislation on certain offences committed on board aircraft. ICAO called on Contracting States to incorporate the model legislation into their domestic legislation, but unfortunately only a few did.¹⁰⁴

- The exercise of jurisdiction predominantly restricted to the State of Registration.¹⁰⁵ One of the main contentious points of the Tokyo Convention, 1963, is that the exercise of criminal jurisdiction regarding offences and other acts endangering aviation safety on board aircraft, is mainly limited to the State of Registration of the aircraft in terms of Article 3(1) and (2) of the Tokyo Convention, 1963.¹⁰⁶ This limitation is untenable in modern times since the increase in unlawful passenger behaviour necessitates that jurisdictional powers also need to be exercised by other Contracting States, for example, the State of the Operator, State of Landing, etc. This expansion would allow the international community to act more effectively and in a coordinated fashion with unlawful passenger behaviour by means of, for example, prosecution.

Many commentators have expressed themselves on this issue. Kane voices concern about the fact that the application of the Convention does not also extend to the State of the Operator, instead of only the State of Registration.¹⁰⁷ Swerdlow¹⁰⁸ is also of the view that Article 3 of the Tokyo Convention that confines the State of Registration to exercise jurisdiction over offenders is a limiting factor. There is no obligation under the Convention to establish jurisdiction over crimes committed on board foreign aircraft, and the language of the Convention itself to establish this.¹⁰⁹ Milde¹¹⁰ concedes that although the most logical option appears to be that the State of Registration

¹⁰³ *Supra* p 12.

¹⁰⁴ *Supra* p 13.

¹⁰⁵ Article 3(1) and (2); Article 4; Article 9(1) and (3); Article 13(5); Article 16(1) of Tokyo Convention, 1963.

¹⁰⁶ Also see Articles 9(1) and (3); 13(5) and (16(1) of Tokyo Convention, 1963.

¹⁰⁷ *Supra* n 24 194.

¹⁰⁸ *Supra* n 2 135.

¹⁰⁹ *Supra* n 2 137.

¹¹⁰ *Supra* n 73 214.

has jurisdiction over offences since it has the closest relation to that aircraft,¹¹¹ modern day realities are that aircraft are nowadays very often registered in one State, but owned by an operator in another State. The State of Registration may therefore be so detached from the operation of the aircraft, that it will have little interest in exercising criminal jurisdiction. Milde is furthermore of the opinion that the Tokyo Convention is deficient by limiting jurisdiction only to the State of Registration and by not recognizing that safety of civil aviation against criminal acts is a matter of a global concern and deserves universal jurisdiction.¹¹² This may be a controversial statement to elevate all aviation related criminal acts to the exercising of universal jurisdiction, since the exercise of universal criminal jurisdiction usually applies only in the case of crimes under customary international law, i.e. piracy, slave-trading, war crimes, crimes against humanity, genocide and torture.¹¹³

Although some commentators, for example, Milde,¹¹⁴ also expressed concern that the Tokyo Convention, 1963, does not also extend jurisdiction to the State of Landing. ICAO also recognised this jurisdictional deficiency which could sometimes lead to absurd results by not allowing the State of Landing, for example, to exercise jurisdiction, except in very limited circumstances.¹¹⁵ In the Report of the Rapporteur,¹¹⁶ ICAO mentions that the State of Landing to exercise jurisdiction presents a number of advantages. As has been wisely noted by Mendelsohn, "*when the aircraft lands, all the passengers, ergo, all potential witnesses to the offence, are present.*" In addition to closing the jurisdictional gap, it also discourages the occurrence of criminal acts on board aircraft. A contrary argument suggests that the disadvantage of the State of Landing relates to the fact that such State may lack interest in exercising jurisdiction when most of the elements are foreigners to its legal system (i.e. aircraft registered in another State, offender from another State, victim from another State).

¹¹¹ *Supra* n 110.

¹¹² *Supra* n 73 220.

¹¹³ Dugard. *International Law. A South African Perspective*. Fourth Edition. 154.

¹¹⁴ *Supra* n 112.

¹¹⁵ *Supra* n 7 A-14.

¹¹⁶ *Supra* n 7 A4-12 to A4-14.

IATA had expressed the same concern as ICAO¹¹⁷ and held the view that many offenders are left unpunished when, for example, the aircraft lands in the State of Landing to disembark a disruptive/unruly passenger, when such State does not have jurisdiction to prosecute.

- The lack of mandatory exercise of jurisdiction by the State of Registration and exercise of jurisdiction only limited to "offences"¹¹⁸ and not other acts committed on board by disruptive/unruly passengers that may jeopardise aviation safety. As already alluded to above,¹¹⁹ the State of Registration is the primary entity to exercise criminal jurisdiction in terms of Article 3(1) and (2) of the Tokyo Convention, 1963. One question is whether this legal authority constitutes a legal obligation by the State of Registration to exercise criminal jurisdiction. A further question is what is the scope of exercising such legal authority?

The weight of authority¹²⁰ seems firstly to indicate that there is no legal obligation on the State of Registration to actually exercise criminal jurisdiction. Article 3(2) only obliges the State of Registration to take such measures as may be necessary to establish its jurisdiction over offences (own emphasis) committed on board aircraft registered in such State. The establishment of jurisdiction by means of domestic law versus a legal obligation to exercise jurisdiction are two divergent issues. A further difficulty lies in the different wording of Article 3(1) of the Tokyo Convention, 1963, which empowers the State of Registration to exercise "*jurisdiction over offences and acts committed on board*" (own emphasis), whereas these words as underlined above do not appear in Article 3(2). This raises the question whether the State of Registration then has the legal authority to exercise jurisdiction over acts committed by disruptive/unruly passengers which are not criminal offences, but which endanger aviation safety.

¹¹⁷ *Supra* n 13 1.

¹¹⁸ Article 3(1) of Tokyo Convention, 1963.

¹¹⁹ *Supra* p 29.

¹²⁰ See for example Milde *supra* n 65); Giesecke *Unruly Passengers: The Existing Legal System and Proposed Improvements* 46, 53, 26 *Annals of Air & Space Law* (2001) 26, 46, 53; Swerdlow *supra* n 2 135; Report of ICAO Rapporteur *supra* n 7 A4-12.

- No obligation to prosecute. It speaks for itself that the effective implementation of the Tokyo Convention, 1963, is predominantly dependant that successful prosecutions be instituted against disruptive/unruly passengers. Fogg¹²¹ mentions that the Convention does not oblige a Contracting State of Landing, after disembarkation of the offending passenger, to punish such a passenger who committed an offence whilst on board the aircraft. Should the State of Landing refuse to prosecute, the passenger must be set free and be allowed to continue to his or her destination. Swerdlow¹²² has also opined that there is no obligation in terms of the Tokyo Convention, 1963, to establish jurisdiction over crimes committed on foreign aircraft.

According to Schwab,¹²³ current aviation Conventions, which include the Tokyo Convention, 1963, neither ensure prosecution of an offender, nor specify adequate punitive measures. Furthermore, minor offences may go unpunished.

Swerdlow¹²⁴ is rightly concerned about the fact that if prosecution does not follow, repeat offenders may contribute to increased violence on board aircraft, or that a commander may be less likely to act, i.e. to disembark a disruptive/unruly passenger, because of concern that a State will not prosecute an individual who poses a threat to the safety of the aircraft.

- Exclusion of the Tokyo Convention, 1963, to aircraft used in military, customs or police services. Article 1(4) of the Tokyo Convention, 1963, excludes the applicability thereof to aircraft used in military, customs or police services. This exclusion is in line with the exclusion found in Article 3(a) and (b) of the Chicago Convention,¹²⁵ which excludes these aircraft from the said Convention.¹²⁶ However, this exclusion doesn't really make sense and could even lead to absurdities. Nowadays many State aircraft are also civilian registered

¹²¹ *Supra* n 10 532 to 533.

¹²² *Supra* n 2 137.

¹²³ *Supra* n 12 420.

¹²⁴ *Supra* n 2 134 to 135.

¹²⁵ *Supra* p 8.

¹²⁶ *Supra* p 8.

with civilian call signs. However, when they are functionally used for military, customs or police services they usually fly under a military call sign and their status becomes state aircraft, which then means that these aircraft are excluded from the applicability of the Chicago Convention. One could find, for example, that the passengers, when on board these state aircraft, are excluded from the provisions of the Tokyo Convention, 1963, during the duration of these flights. However, should these passengers, during the same journey and in order to reach their final destinations have to disembark and connect by means of commercial civilian flights, they would then, during the further duration of those flights, be subject to the Tokyo 1963, and the legal regime, as applicable! This exclusion from the Tokyo Convention, 1963, means that States will have to have separate domestic legislation in place to deal with passenger aviation offences committed on board state aircraft, which is an unnecessary duplication. Although it does not form part of this study, it would be interesting to embark on a comparative legal exercise to determine which States do have such legislation in place. It is doubted if it could be that many.

- Limited powers of aircraft commander to deliver disruptive/unruly passengers only in cases of "serious offences"¹²⁷ and the fact that the subjective interpretation is left to the aircraft commander to determine what constitutes "serious offences". One of the most important provisions of the Tokyo Convention, 1963, is Article 9(1), which allows the aircraft commander to disembark a disruptive/unruly passenger to the competent authorities of any Contracting State, if the aircraft commander has reasonable grounds to believe that a serious offence (own emphasis) has been committed in terms of the penal law of the State of Registration. In contrast, Article 6 of the Tokyo Convention allows the aircraft commander to take reasonable intervention measures against a disruptive/unruly passenger during flight if such commander has reasonable grounds that an offence or act that endangers aviation safety (own emphasis), has been committed, or is about to be committed. On the reading of Articles 6

¹²⁷ Article 9(1) of Tokyo Convention.

and 9, it is clear that Article 9 is much more restrictive on the decision-making powers of the aircraft commander, since disembarkation is limited to the commission of "*serious offences*" of the State of Registration.

The obvious difficulty with Article 9 is that the action of the aircraft commander is linked to pre-supposed knowledge of the domestic aviation criminal law regime of the State of Registration and in particular, what constitutes "*serious offences*" in terms thereof.

Some commentators, for example Fitzgerald¹²⁸ and Swerdlow¹²⁹ have also expressed their concern in this regard. According to Kane,¹³⁰ further problems could also arise in respect of "*dry*" leases, that is, where the aircraft is leased without crew. In these circumstances, aircraft commanders can easily and excusably be totally ignorant of the laws of the State of Registration. Yet the aircraft commander may be required to determine whether a certain action on this aircraft does in fact constitute a crime, and more particularly, a serious crime, under these laws. The most that can reasonably be expected is that a commander will have some familiarity with the laws of the State of the Operator. Milde¹³¹ holds a similar view and also raises the issue of jurisdiction over aircraft operated on the basis of lease or other financial arrangements and the aircraft remains registered in the country of the lessor or creditor. He states that the State of Registration may also feel too "*remote*" from the act to exercise its jurisdiction.

Both ICAO¹³² and IATA¹³³ have also expressed valid concerns about the issue of "*serious offences*" not being defined in the Tokyo Convention. ICAO further opined¹³⁴ that in terms of the current wording of Article 9, the aircraft commander may not even turn over a person who has committed a minor offence that may have endangered the safety of the aircraft, such as using a prohibited

¹²⁸ *Supra* p 24.

¹²⁹ *Supra* p 24.

¹³⁰ *Supra* n 24 194.

¹³¹ *Supra* n 73 260.

¹³² *Supra* n 7 A4-10.

¹³³ *Supra* n 129.

¹³⁴ *Supra* n 121 A4-5 footnote 40.

electronic device. ICAO was also of the view that there may also be instances where a disruptive/unruly passenger is disembarked under the erroneous impression of the aircraft commander that the State of Registration's criminal domestic law criminalised a certain serious offence, only to find that it had not. In such cases, the disembarked passenger/s would have to be set free.

- Inconsistent immunity standards applied to aircrew members. This important issue has also been raised by, *inter alia* ICAO¹³⁵ and IATA.¹³⁶ This relates to, *inter alia*, immunity granted to the aircraft commander, any passenger, owner or operator of the aircraft, or a person on whose behalf the flight was performed,¹³⁷ for any actions taken under the Tokyo Convention, 1963. In this regard, Articles 6 and 9 of the Tokyo Convention, 1963, may be of specific relevance to what are the standards to be applied with regard to immunity granted as referred to therein. In certain circumstances, the Convention grants immunity from legal proceedings to the airline, pilot and crew in respect of reasonable measures taken to deal with a disruptive/unruly passenger incident.

In a fairly recent US Supreme Court case of *Alaska Airlines Inc., v Azza Et Al*,¹³⁸ the Court overturned the judgement of the US Court of Appeals for the Ninth Circuit,¹³⁹ which found that the commander of an aircraft must independently investigate the existence and scope of a disruption in the cabin in order to get immunity under the Tokyo Convention, 1963. The US Supreme Court ruled¹⁴⁰ that the decision of the Ninth Circuit is at odds with the historical context of the Tokyo Convention, 1963. If allowed to stand, it threatens to undermine the Convention's efforts to enhance aviation security, by discouraging aircraft commanders from making critical, split-second decisions on the basis received from the cabin crew. This judgement is unconditionally concurred with.

¹³⁵ *Supra* n 8 5 to 6.

¹³⁶ *Supra* n 13 2.

¹³⁷ Article 10 Tokyo Convention, 1963,

¹³⁸ US Supreme Court Case No. 10-962, February 28, 2011.

¹³⁹ *Azza Eid Et Al v Alaska Airlines*, Case No. 06-16457, 30 July 2010.

¹⁴⁰ *Supra* n 135 2.

IATA¹⁴¹ considers that the pilot should be given a wide degree of subjective deference in any review of his or her decisions after the fact, particularly given the special constraints involved in judging a factual situation from behind a cockpit door. Although this concern is valid, the *Alaska Airlines Inc.* judgement¹⁴² by the US Supreme Court should alleviate the concerns of IATA in this regard.

- Lack of a mandatory extradition provision in the Tokyo Convention, 1963. Articles 13(2), 15(1) and (2), 16(1) and (2) deal with the issue of extradition. The Tokyo Convention, 1963, creates no positive legal obligation upon Contracting States to extradite disruptive/unruly passengers. In fact, Article 16(2) states that "*...nothing in this Convention shall be deemed to create an obligation to grant extradition.*"

However, the abovementioned is not the only problems relating to extradition. Fogg¹⁴³ mentions that many "*jeopardizing*" acts in terms of the Tokyo Convention, 1963,¹⁴⁴ are not likely to be accepted as a reason for extradition. This view is also shared by Kane.¹⁴⁵ The Convention created and defined "*jeopardizing*" acts, however it did not require states to treat them as "*serious crimes.*" The Convention's procedures for delivery and extradition are applicable only to serious crimes.¹⁴⁶ Furthermore, Swerdlow mentions¹⁴⁷ that the contracting States are only able to extradite offenders under provisions of alternative bi-lateral or multilateral agreements between them. Should these agreements exist, they may cause confusion and delay in extradition. The ICAO Rapporteur's Report also discussed the issue of extradition¹⁴⁸ and confirmed that in terms of the Tokyo Convention, 1963, Contracting States are under no obligation to extradite an alleged offender and that the Convention does not offer much guidance at all.

¹⁴¹ *Supra* n 13 2.

¹⁴² *Supra* p 34.

¹⁴³ *Supra* n 10 533.

¹⁴⁴ Article 1(1) of Tokyo Convention, 1963.

¹⁴⁵ *Supra* n 24 195.

¹⁴⁶ *Supra* n 142.

¹⁴⁷ *Supra* n 2 136.

¹⁴⁸ *Supra* n 7 A4-16.

- Additional critique raised against the Tokyo Convention, 1963. Apart from the jurisdictional issues raised above, the following additional inefficiencies of the Tokyo Convention, 1963, have been raised:
 - Insufficient Encouragement for International Cooperation.¹⁴⁹ During the SSG's first meeting, IATA raised that the Tokyo Convention, 1963, does not sufficiently encourage cooperation amongst State Parties. As a matter of fact, it is silent on this issue. Fostering international cooperation is critical in order to prevent disruptive/unruly passenger behaviour from happening on board aircraft. It was also suggested that cooperation should be strengthened in order to harmonize enforcement procedures amongst Contracting States. It is an obvious principle that the more States rectify the Tokyo Convention, 1963, and implement it by means of domestic law, the more effective it would be to enforce between Contracting States.¹⁵⁰ Klimek¹⁵¹ opined that since the Tokyo Convention, 1963, is an international agreement, it relies on the continued goodwill of the States bound by it for any lasting effectiveness. All of the abovementioned is true since international co-operation between Contracting States is an important pre-requisite to curb disruptive/unruly passenger incidents. Effective and co-ordinated law enforcement measures by Contracting States are the only ways to reduce unacceptable threats to aviation safety.
 - Lack of recourse by airlines against disruptive/unruly passengers who had to be unexpectedly disembarked due to their unlawful behaviour. The disembarkment of a disruptive/unruly passenger is usually unplanned and unforeseen, which sometimes requires the aircraft commander to deviate substantially from the original flight plan to the nearest suitable airport. This results in inconvenience suffered by the aircrew and passengers, and the deviation is also very costly and usually usurped by the particular airline. IATA has strongly advanced the argument that the Tokyo Convention, 1963, should make

¹⁴⁹ *Supra* n 7 A4-17.

¹⁵⁰ *Supra* n 146.

¹⁵¹ Klimek. *Comments: International Law-Convention on Offenses of Certain Other Acts Committed On Board Aircraft-The Tokyo Convention.* 507.

provision that the carrier has a right of recourse against a disruptive/unruly passenger due to his or her unlawful behaviour.¹⁵²

- Lack of sufficient procedural guidelines provided to authorities regarding disruptive/unruly passengers who have been removed from the aircraft and handed over to such authorities. Although the Tokyo Convention, 1963, addresses issues relating to disembarkation and delivery of persons to competent authorities on the ground, it does not provide guidance on what to do or what procedures should be in place with regard to an alleged offender once he or she is removed from the aircraft.¹⁵³
- Lack of guidance regarding the offloading of disruptive/unruly passengers in non-signatory States. The Tokyo Convention, 1963, also failed to provide guidance with what should happen to disruptive/unruly passengers when disembarked in the territory of non-signatory States.

Conclusion. The Tokyo Convention, 1963, although having made a huge contribution to aviation safety since its inception, has not been foolproof. It came under severe criticism due to its limited functionality in certain instances. Increasing incidents of disruptive/unruly passenger behaviour have necessitated the international aviation community to address the shortcomings thereof.

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¹⁵²Supra n 13 2.

¹⁵³Supra n 7 A4-15 to A4-16.

CHAPTER 4: TO WHAT EXTENT DO THE ADOPTED MONTRÉAL PROTOCOL AND RESOLUTION PERTAINING TO ICAO CIRCULAR 288, ADDRESS THE LEGAL SHORTCOMINGS OF THE TOKYO CONVENTION, 1963?

Synopsis. Chapter 3 of this study deals with the legal shortcomings of the Tokyo Convention, 1963. This chapter deals with the remedial actions taken during the Diplomatic Conference in Montréal in 2014, on how the legal shortcomings of the Tokyo Convention, 1963, were addressed by means of the adopted Protocol and Resolution relating to ICAO Circular 288 - *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*.

Introduction. It is important to analyse to what extent the Tokyo Convention, 1963, was amended to address some of the legal shortcomings as discussed in Chapter 3, in order to meet modern aviation security demands. This chapter will focus on the Montréal Protocol insofar it amended the Tokyo Convention, 1963. Aspects that will be considered are the Preamble, Scope of Convention, Jurisdiction, Powers of the Aircraft Commander, Powers and Duties of States, and Other Provisions.

Most important amendments to the Tokyo Convention, 1963. The undermentioned constitute the most important amendments to the Tokyo Convention, 1963, as per the Montréal Protocol, as well as the Resolution relating to ICAO Circular 288 - *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*,¹⁵⁴ which will be focused on. For purposes of brevity, the full content of all the amendments is not included. However, for ease of reference, a copy of the Montréal Protocol is attached as Appendix A.

- Preamble.¹⁵⁵ The Preamble recognizes the concerns that Contracting States have about the escalation of the severity and frequency of unruly behaviour on board aircraft that may jeopardize the safety of the aircraft, persons or property therein, or jeopardize good order and discipline on board.¹⁵⁶ Importantly, it also recognizes that co-operation, assistance and interaction between Contracting States are necessary in this regard. These are important factors, since the effective enforcement of the Tokyo Convention, 1963, is largely dependent upon the co-operation of Contracting

¹⁵⁴ *Supra* n 4.

¹⁵⁵ *Supra* n 4.

¹⁵⁶ *Supra* n 4.

States. The nature of the co-operation could vary, for example, assistance with the prosecution of offending disruptive/unruly passengers, conducting of criminal investigations, exchange of information, extradition proceedings, etc. One could even argue that in the desire expressed by Contracting States to assist each other, the assistance provided could also entail that the Contracting States ensure that their domestic aviation legislation is in place to duly enforce the Tokyo Convention, 1963, as amended. This includes the incorporation of ICAO Circular 288 - *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers*.¹⁵⁷

The wording of the Preamble constitutes an important recognition of the fact that there is international consensus and concern regarding escalation in disruptive/unruly passenger behaviour and that it had to be addressed by the international community. Although not specifically stated, it also implicitly recognises the fact that the current wording of the Tokyo Convention, 1963, has shortcomings and that it required certain amendments.

- Scope. The following amendments were made regarding the scope of the Tokyo Convention, 1963:
 - Replacement of Article 1(3) of the Tokyo Convention, 1963, by Article 1(3)(a).¹⁵⁸ Article 1(3) of the Tokyo Convention 1963, was amended by replacing the whole article by means of Article 1(3)(a). This amendment entails a more comprehensive description as from which moment the Tokyo Convention, 1963, applies to aircraft and when the application thereof ceases, i.e. "*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.*"¹⁵⁹

This wording represents the wording of the Beijing Convention,

¹⁵⁷ *Supra* n 4.

¹⁵⁸ *Supra* n 4.

¹⁵⁹ *Supra* n 4.

2010.¹⁶⁰ This is an amended expanded definition of the wording currently contained in Article 1(3) and does not restrict the applicability of the Tokyo Convention, 1963, from the moment when power is applied for the purpose of take-off until the moment when the landing run ends, as was previously the case. This amendment therefore effectively addresses the concerns raised in Chapter 3¹⁶¹ with regard to a more suitable and extended definition of "in flight".

- Replacement of Article 1(3) of the Tokyo Convention, 1963, by Article 1(3)(b).¹⁶² Article 1(3)(b) was also inserted as a new amendment by providing that "*when the State of the operator is not the same as the State of registration, the term "the State of registration", as used in Articles 4, 5 and 13 of the Convention shall be deemed to be the State of the operator.*"

Chapter 3 dealt extensively with critique that the Tokyo Convention, 1963, limited the exercise of jurisdiction primarily to the State of Registration.¹⁶³ Therein the overall review was expressed that this limitation was not in line with current aviation requirements and realities, for example that the State of Landing and the Operator were excluded in the Convention from exercising jurisdiction over disruptive/unruly passengers. This amendment would effectively enhance legal enforcement measures from a practical perspective since the scope is now expanded to allow the most suitable Contracting State under the circumstances, to exercise its criminal jurisdiction.

- Replacement of Article 2 of the Tokyo Convention.¹⁶⁴ This amendment expands the two unlawful discrimination criteria (racial or religious discrimination) that were in the original text of the Tokyo Convention, 1963. This amendment does not allow law enforcement in respect of the penal laws of a political nature or those based on discrimination on any ground, such as race, religion, nationality, ethnic origin, political opinion or gender, except if Article 4 of the

¹⁶⁰ *Supra* p 10.

¹⁶¹ *Supra* p 25 to 27.

¹⁶² *Supra* n 4 Article II.

¹⁶³ *Supra* p 28 to 30.

¹⁶⁴ *Supra* n 4 Article III.

Tokyo Convention, 1963, applies; or when the safety of the aircraft are of persons or property on board is prejudiced.

This is also a positive development since the expansion of the prohibited discriminatory categories are aligned with current human rights law. In addition, it also narrows down the categories of enforceable offences to those which are aviation related and does not widen the scope for these prohibited categories, unless the suspensive conditions as mentioned in the previous paragraph, apply. This makes sense, since it could become extremely problematic if the Contracting States were to provide for these offences from an aviation perspective under their domestic laws. Other parts of their domestic law must deal with these issues. The culture, history and social-economic background of each Contracting State also differ widely and it would undoubtedly result in divergent legal regimes, which could create confusion and inconsistencies. Interesting to note is that the author's research did not elicit any comments by commentators regarding the limited scope of these categories and that it had to be extended.

- Jurisdiction. The following amendments were made regarding the jurisdiction of the Tokyo Convention, 1963:
 - Amendment of Article (3) of Tokyo Convention, 1963,¹⁶⁵ and adding Article 3 *bis*.¹⁶⁶ This is also a very important amendment. Articles 3(1) and (2) remained the same as in the original text, but Article 3(1) *bis.*, Article 3(2) *bis.* and Article 3 *ter.*, were respectively included in Article 3 to also extend jurisdiction not only to the State of Registration as it currently reads in the Tokyo Convention, 1963, but also to the State of Landing and the State of the Operator. The latter also applies to aircraft leased without crew, under certain conditions.¹⁶⁷

Furthermore, Article 3 *bis* has been added after Article 3 of the Tokyo Convention, 1963, which basically obliges Contracting States to

¹⁶⁵ *Supra* n 4 Article IV.

¹⁶⁶ *Supra* n 4 Article V.

¹⁶⁷ *Supra* n 163.

consult and co-ordinate their efforts when exercising criminal jurisdiction.

All of the above amendments addressed the criticisms against the Tokyo Convention, 1963, as alluded to in Chapter 3,¹⁶⁸ regarding the limited exercise of criminal jurisdiction with regard to disruptive/unruly passenger behaviour, which was mainly to be exercised by the State of Registration, the issues of leased aircraft, as well as lack of international co-operation between Contracting States. The effect of these amendments is that it will allow more Contracting States to expand their jurisdictional authority regarding disruptive/unruly passengers, which may lead to more effective enforcement regarding unlawful passenger behaviour, provided of course, that their required domestic legislation is in place.

Adding to the above, the insertion of Article 3 *bis* is also a positive development since the use of the peremptory word “*shall*”, places a positive legal obligation on Contracting States to co-ordinate their legal enforcement measures. Since it is now obligatory, it excludes the exercise of discretionary powers and Contracting States are under a positive legal obligation to co-ordinate their efforts, especially in cases where there are concurrent jurisdiction. This would ensure that there is no duplication of effort, or that double jeopardy may occur from the same set of facts.

However, on the downside, it is interesting to note that the drafters did not amend Article 3(2) regarding the Contracting State’s responsibility as State of Registration, to take such measures as may be necessary to establish its jurisdiction over offences committed on board aircraft in such State to impose a legal obligation to exercise criminal jurisdiction. The inclusion of Article 2 *bis*. requires similar conduct from the States of Landing and Operator and also does not impose a positive legal obligation to exercise jurisdiction, as mentioned in Chapter 3.¹⁶⁹ It is assumed that the drafters still respected and honoured the sovereignty of each Contracting State to decide whether to exercise criminal jurisdiction or not and maybe it is

¹⁶⁸ *Supra* p 28 to 30; 33; 37 to 38.

¹⁶⁹ *Supra* p 28 to 29.

a wise decision, since the exercising of criminal jurisdiction frequently depends on various factors, such as availability of evidence, etc.

- Powers of aircraft commander. The following amendments were made regarding the powers of the aircraft commander in the Tokyo Convention, 1963:
 - Deletion of Article 5(2)¹⁷⁰ of Tokyo Convention, 1963; replacement of Articles 6¹⁷¹, 9¹⁷² and 10.¹⁷³ The deletion of Article 5(2) of the Tokyo Convention, 1963, was necessitated by the amendment of the definition of "in-flight" in Article 1(3)(a), as already discussed above. This was done merely for editorial purposes and no further comment thereon is required.
 - Although the whole of Article 6 of the Tokyo Convention had been replaced, it that most of the original wording was retained. The only insertions relate to the inclusion of in-flight security officers who may be deployed on aircraft pursuant to bi- or multilateral agreements between the Contracting States. These in-flight security officers may be requested or authorised (not required) by the aircraft commander to assist in the restraining of disruptive/unruly passengers.¹⁷⁴ Such in-flight security officers may act reasonably without authority when such action is deemed to be necessary in the interest of aviation safety.¹⁷⁵ An important provision is that Contracting States are not obliged to establish in-flight security programmes or to agree to bi- or multilateral agreements authorising in-flight security officers into their territory.

The use of in-flight security officers on civil aircraft was introduced after the 9/11 terrorist attack on the United States. In the Report of the Rapporteur,¹⁷⁶ mention was made that during discussions of the SSG, various delegates requested that the issue of in-flight security officers also had to be addressed when the review of the Tokyo

¹⁷⁰ *Supra* n 4 Article VI.

¹⁷¹ *Supra* n 4 Article VII.

¹⁷² *Supra* n 4 Article VIII.

¹⁷³ *Supra* n 4 Article IX.

¹⁷⁴ *Supra* n 167.

¹⁷⁵ *Supra* n 167.

¹⁷⁶ *Supra* n 7 A4-21.

Convention, 1963, was to be done.

The introduction of in-flight officers seems not to be customary practice amongst States/airlines. According to internet research conducted by the author, only Australia, Austria, Canada, India, Ireland, Singapore, the United Kingdom and the United States, in response to the 9/11 terrorist attacks, have introduced in-flight security officers (sky marshals).¹⁷⁷ Interesting to note is that the deployment of these in-flight security officers may only take place pursuant to bi- or multilateral agreements having been concluded between Contracting States. This pre-condition seems to suggest that the deployment of these in-flight security officers cannot simply take place as a matter of course and that it is subject to the prior conclusion of international agreements that would duly regulate such deployments.

States and/or airlines who introduce the deployment of in-flight security officers, could dramatically enhance aviation safety during flights to deal with, *inter alia*, disruptive/unruly passengers. It was therefore a positive step to include that the aircraft commander may require or authorise assistance from these officers if necessary, or that these officers could act without such authority in certain circumstances. However, in-flight security officer programmes are most probably very costly and there may also be other reasons why Contracting States may not choose to have these officers on board their aircraft or to establish the use of these officials. It could even go further than that. If no bi- or multilateral agreements were concluded before the deployment of these officers, Contracting States may exercise their legal authority to refuse such aircraft in their airspace, which is concomitant with the legal recognition of the sovereignty of the air space of each Contracting State in accordance with the principles of customary international law and/or the Chicago

¹⁷⁷ *Sky Marshal*. Available from http://en.Wikipedia.org/wiki/Sky_marshall as at 01 September 2014.

Convention.¹⁷⁸

The replacement of Article 9 of the Tokyo Convention, 1963, is also significant.¹⁷⁹ Although only the words "...according to the penal law of the registration of the aircraft." were removed from Article 9(1),¹⁸⁰ the rest of Article 9 remained intact. The deletion of these words is significant in that the aircraft commander now only has to believe on reasonable grounds that a serious act has been committed on board the aircraft and is not linked anymore to the penal law of the State of Registration as was previously the case. It is neither also linked to either the penal law of the State of Landing or State of the Operator. This actually widens the discretionary powers of the aircraft commander in that it is not linked to any specific penal code. The amendment certainly addresses the concerns especially expressed by IATA,¹⁸¹ that it could not reasonably be expected from an aircraft commander to have knowledge about the different penal codes of the various Contracting States.

Interesting to note is that the words "*serious offence*" were retained without defining it in the Convention, as many have advocated.¹⁸² Furthermore the drafters also did not heed to calls to also include other "*jeopardising acts*" for which disruptive/unruly passengers could be disembarked that may endanger aviation safety.

Article 10 of the Tokyo Convention, 1963, was also replaced *in toto*,¹⁸³ despite the fact that there was just one minor amendment thereto. The words "*any in-flight security officer*" were included to also extend immunity from any proceedings to these officials for acts performed under Article 9 of the amended Tokyo Convention, 1963.¹⁸⁴

- Powers and Duties of States. The following amendments were made regarding the jurisdiction of the Tokyo Convention, 1963:

¹⁷⁸ *Supra* p 8.

¹⁷⁹ *Supra* n 4 Article VIII.

¹⁸⁰ *Supra* n 176.

¹⁸¹ *Supra* p 33 to 34.

¹⁸² *Supra* p 24 to 25.

¹⁸³ *Supra* n 4 Article IX.

¹⁸⁴ *Supra* n 4 Article VIII.

- Insertion of Article 15 *bis* in Tokyo Convention, 1963.¹⁸⁵ This is a new insertion in the Tokyo Convention, 1963.¹⁸⁶ Article 15 *bis*(1) encourages Contracting States to take such measures as may be necessary to initiate appropriate criminal, administrative or any other forms of legal proceedings against disruptive/unruly passengers who commit an offence or act referred to in Article 1(1). It further specifically criminalizes in sub-Articles 15 *bis*(1) and (2) physical assaults, or threats to commit such assaults, against crew members; or refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purpose of protecting the safety of the aircraft or of persons or property therein. The categories of offences and acts specified above are to a great extent based on draft model legislation contained in the Rapporteur's Report.¹⁸⁷

Article 15 *bis*(2) provides that notwithstanding the provisions of the Convention, Contracting States have the right to, in their domestic laws, provide for appropriate measures to punish disruptive/unruly acts committed on board aircraft.

The abovementioned inclusion is also significant in that it extends the powers of Contracting States to initiate appropriate administrative or any other forms of legal proceedings against disruptive/unruly passengers. Contracting States are only "*encouraged*" to do so and no legal obligation has been created for Contracting States in this regard. Interesting to note is the inclusion of the word "*administrative*". Does this mean, for example, that Contracting States could take legal administrative steps against, for example, disruptive/unruly passengers without them having been convicted? It seems to be the case because it is not stated that the taking of administrative steps may follow upon a conviction. This could then entail the possible banning by airlines of disruptive/unruly passengers from future flying, but in order to ensure the legitimacy of the process, it will have to involve due process, i.e. there must be sufficient substance/merits for such decision and the *audi alteram partem* principle will also have to be applied. This notion is supported by the newly inserted Article

¹⁸⁵ *Supra* n 4 Article X.

¹⁸⁶ *Supra* n 182.

¹⁸⁷ *Supra* n 7 A4-33.

17(2)¹⁸⁸ of the Tokyo Convention, 1963, which actually obliges Contracting States, to "...when fulfilling its obligations, or exercising a permitted discretion under this Convention, shall act in accordance with the obligations and responsibilities of States under international law. In this respect, each Contracting State shall have regard for the principles of due process and fair treatment."

- Other Provisions. The following amendments were made under the heading "OTHER PROVISIONS" of the Tokyo Convention, 1963:
 - Replacement of Article 16(1) of the Tokyo Convention, 1963.¹⁸⁹ This amendment deals *inter alia* with extradition and aligns the expansion of jurisdiction with amended Article 3 of the Tokyo Convention, 1963, to also the State of Landing and State of the Operator.

In this regard most of the content of the original Article 16 of the Tokyo Convention, 1963, has been retained. Jurisdiction has however, been expanded as mentioned above. With regard to extradition, a few comments need to be made. The wording of the new Article 16 still refers to "*Offences committed on board aircraft shall be treated, for the purpose of extradition between the Contracting States...*" In this sense it seems whether any offences committed on board are extraditable offences, and not, for example, only "*serious offences*" as contemplated in Article 9. Furthermore it is noted that this wording does not include other "*jeopardizing acts*" which are not "*offences*". Does this then mean that disruptive/unruly passengers are then not extraditable for committing "*jeopardizing acts*"?

However, it is may also be necessary to make a few comments about extradition. In practice, extradition is usually a cumbersome and drawn out process. Furthermore, it is firstly dependent on the domestic law of a Contracting State to provide for extraditions, and secondly, the existence of bi-, or multilateral agreements between the relevant Contracting States for such extraditions to take place. Thirdly, even if all of these are in place, it may still not guarantee

¹⁸⁸ See p 49.

¹⁸⁹ *Supra* n 4 Article XI.

extradition. In some States, extradition may still not be executable if the extraditions would be contrary to the constitutional and/or human rights obligations of such States as provided for in their domestic law. For example, the Contracting State may have a Bill of Rights which prohibits, for example, the imposition of the death penalty; being subjected to cruel and degrading punishment, etc. Even if the offending passenger is not a national of the Contracting State, but is under the custody and control of such a State, the offending passenger would still be eligible to enjoy, amongst others, the human rights legal protection under the legal regime of the Contracting State.

The above would, for example, be in the case the offending passenger is extradited to a Contracting State which has the death penalty, or has a proven track record of gross human rights abuses, and there is a real possibility that the death penalty could be imposed on the offending passenger, or that the offending passenger could be subjected to gross human rights violations. Under these circumstances the extraditing State would be legally obliged, in terms of its own laws, not to effect the extradition. As an example, this potentially problematic issue came to the fore in the South African Constitutional Court case of *Minister of Home Affairs & Others v Tsebe & Others*,¹⁹⁰ where the Court disallowed the extradition of a Botswana citizen who, after having committed murder in Botswana, fled to South Africa and was taken into custody by the South African authorities. The relevant South African government Departments were prohibited from extraditing or handing the suspect over to Botswana for trial, since Botswana could impose the death penalty in terms of their domestic law, whilst the South African Constitution, 1996, protects the right to life.¹⁹¹

Another practical consideration is whether Contracting States would really be willing to go through the trouble of a whole extradition process to enforce the Tokyo Convention, 1963, if, for example, the offence committed on board the aircraft only amounted to illegal smoking in the lavatory, provided that it constitutes an "offence"

¹⁹⁰ Case CCT 110/11, [2012] ZACC 16.

¹⁹¹ Constitution of the Republic of South Africa, 1996. Article 11.

under the domestic law of the Contracting State?? Most probably extradition would rather be reserved for the most serious offences committed by offending passengers on aircraft, such as murder, sexual assaults, etc. The effect of this may be that many passenger offenders could walk free on less serious offences or acts.

- Replacement of Article 17 of the Tokyo Convention, 1963.¹⁹² Although the wording of Article 17(1) remained the same, Article 17 (2) was added. It obliges Contracting States, when fulfilling its obligations, or exercising a permitted discretion under the Convention, shall act in accordance with the obligations and responsibilities of States under international law, each Contracting State shall have regard for the principles of due process and fair treatment. During the research of this study, this particular subject matter was not found to be raised by commentators and is therefore something new.

Part of this Article has already been discussed above.¹⁹³ It could additionally be added that the insertion of Article 17(2) is also an important addition to the Tokyo Convention, 1963, since it places a positive legal duty on Contracting States to act in accordance with international law when executing the Tokyo Convention, 1963, when exercising a permitted discretion under the Convention, especially with regard to certain human rights principles, such as adherence to due process and fair treatment. This is important since offending passengers could be left in the lurch and could be subjected to inhumane treatment in a foreign country when they are apprehended for disruptive/unruly behaviour on board the aircraft. This insertion at least provides for a minimum level of humane treatment and due process and reinforces the possibility of State Responsibility¹⁹⁴ being incurred by a Contracting State should these minimum requirements not be met.

¹⁹² *Supra* n 4 Article XII.

¹⁹³ See page p 46 to 47.

¹⁹⁴ See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*. 2001.

- Insertion of Article 18 bis to Tokyo Convention, 1963.¹⁹⁵ This insertion allows the recovery, under national law, of damages incurred from a person disembarked or delivered in terms of Article 8 or 9 of the Tokyo Convention, 1963. This inclusion satisfies the need expressed by particularly IATA,¹⁹⁶ that airlines should have the right of legal recourse against such passengers, since such unplanned disembarkations have a huge impact on operational costs. However, the amendment does not provide for which categories of persons are eligible to such legal recourse. The recovery is therefore not only at the disposal of airlines, but could be wider. It is foreseen that it could also include, for example, damages or losses sustained by other passengers as a result of delays caused due to the unforeseen disembarkation of disruptive/unruly passengers. Therefore the damages claims will be adjudicated in accordance with the national laws of the particular State in whose jurisdiction legal action is instituted.

ICAO CIRCULAR 288 - GUIDANCE MATERIAL ON LEGAL ASPECTS OF UNRULY/DISRUPTIVE PASSENGERS

- It is lastly necessary to reflect on the adoption by the Diplomatic Conference of the abovementioned Resolution.¹⁹⁷ The first part of the Resolution appears to be the "*Preamble*", although it does not have a heading as such. It refers, *inter alia*, that the Conference has adopted the Montréal Protocol, and that the Conference is mindful that "*existing international law as well as the national laws and regulations in many States may not be fully adequate to deal effectively with less serious types of offences and other acts committed by unruly or disruptive passengers on board civil aircraft.*"

The "*Preamble*" further provides that the Conference decided "*not to include a list of offences and other acts, in a document other than the Protocol, but recommended that ICAO Circular 288 – Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers published in 2002 be updated;*". It further recognises "*the need to have an updated list of offences and other acts, in a document other than the Protocol, to serve as a guide for the*

¹⁹⁵ *Supra* n 4 Article XIII.

¹⁹⁶ *Supra* p 36 to 37.

¹⁹⁷ *Supra* n 4.

purpose of facilitating States to deal with offences and other acts constituting unruly or disruptive behaviour on board civil aircraft;”.

The Conference finally resolved *”TO URGE the Council of ICAO to request the Secretary General to update ICAO Circular 288 – Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers to include a more detailed list of offences and other acts, as well as to make consequential changes to ICAO Circular 288 arising from the adoption of the Protocol to amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft.”*

The Resolution further requested ICAO to disseminate the updated Circular to States and *”TO INVITE all Member States to include in their national laws and regulations, so far as practical, the elements of the updated Circular.”*

Following the above, it is important to note that the Resolution, *inter alia*, recognises the inconsistent and inadequate domestic legal regimes of some Contracting States to deal with less serious offences and other acts committed on board civil aircraft. The Conference purposely decided not to include a list of offences and other acts in the Protocol, but rather opted that it should be dealt with in ICAO Circular 288. This pragmatic approach is maybe the best option, since if a list of offences and other acts were to be included in the Protocol, it would presumably have constituted an exhaustive list, which would allow less flexibility by Contracting States to decide what to include in their domestic legislation. The other practical problem that may arise with such a list is that it could be found defective at a later stage, which may result in the Protocol having to be amended again. Considering that the Protocol is an international Convention, it is a cumbersome and tedious process for States to adopt and ratify international Conventions.

The difficulty with having decided to refer ICAO Circular 288 to the ICAO Council for the actions as mentioned above, is that there is no guarantee that Contracting States will incorporate Circular 288 into their domestic law. Requests by ICAO to Contracting States to that effect in the past have not yielded positive results, since only a few Contracting States complied therewith. However, since the Protocol recognised international concern by Contracting States regarding disruptive/unruly passenger incidents and that it had to be addressed, as well as the fact that the Montréal Protocol obliges Contracting States to provide for the criminalisation of

these incidents in their domestic law, it may lead to a positive response by Contracting States. By doing so, Contracting States will also meet the legal obligation imposed on them by the Montréal Protocol to assist and co-operate with each other on the issue of disruptive/unruly passengers, which, as already argued above,¹⁹⁸ may also entail ensuring that their domestic laws deal adequately and efficiently therewith.

CONCLUSION

- The Diplomatic Conference held in Montréal during April 2014 was recognition of the fact by the international aviation community that the legal shortcomings of the Tokyo Convention, 1963, was of serious concern and that it had to be addressed. The adoption of the Montréal Protocol could be considered as a huge milestone in efforts to amend and update the Tokyo Convention, 1963, for the use of future generations in order to curb disruptive/unruly passenger behaviour. The Diplomatic Conference certainly took note of criticisms raised from various quarters over time against the Tokyo Convention, 1963, including those from ICAO itself and IATA, most of which had been addressed. Apart from addressing those, there are also new "*fresh*" provisions included in the Montréal Protocol.

The Diplomatic Conference seemingly took a pragmatic approach not to "*re-invent the wheel*" regarding the Tokyo Convention, 1963, and to focus on the rectification of the major shortcomings. The improvement of the jurisdictional issues is a major milestone in that now either the State of Landing (including leased aircraft), or State of the Operator, instead of mainly the State of Registration, could potentially exercise criminal jurisdiction over disruptive/unruly passenger conduct in terms of their domestic legislation. The description of "*in-flight*" was also rectified to expand the time frames of applicability of the Tokyo Convention, 1963, which will also, for example, cover disruptive/unruly passenger related offences during embarkation. A welcome expansion is that Contracting States are allowed to initiate appropriate criminal, administrative or any other form of legal proceedings against disruptive/unruly passengers, provided that it is consistent with their obligations and responsibilities under internal law and also human rights requirements of due process and fair treatment. Failure of a Contracting State to meet these threshold requirements may result in State liability being incurred by such Contracting State.

¹⁹⁸ *Supra* p 38 to 39.

International co-operation between Contracting States regarding disruptive/unruly passenger incidents is also now obligatory and the argument could be made that such international co-operation also includes the obligation upon Contracting States to ensure proper and effective domestic laws to exercise jurisdiction. The provision for recovery of losses and damages sustained by affected persons or entities as a result of the disembarkation of a disruptive/unruly passenger is welcomed. Whether such passenger may have the financial means to pay such compensation remains to be seen! The provisions for in-flight security officers were seemingly included to accommodate certain Contracting States who wish to make use of them. The necessary extension of immunity to these officers for the execution of lawful actions is also justifiable. The limitations on the use of in-flight security officers are also welcomed, since it is dependant on the conclusion of prior bi- or multilateral agreements between Contracting States and also the fact that the use of such officers does not create a legally binding obligation on other Contracting States to do the same.

However, there are also some issues that remained unresolved. The issue of applicability of State aircraft to the Tokyo Convention, 1963, was not addressed in the Montréal Protocol, which may be understandable purely from a legalistic point of view, since State aircraft are also excluded from the Chicago Convention, 1944. Clearly the drafters of the Montréal Protocol did not want to cross the divide regarding the legal status of civil and State aircraft, although from a practical perspective, it would have avoided duplication of laws on the same subject matter of the Contracting States.

The drafters also chose, by adopting the Resolution, not to include possible definitions of, for example "offences", "serious offences", or include a list of offences, but to rather refer ICAO Circular 288 – *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers Guidance Material*", to the ICAO Council for updating, circulation thereof to Contracting States and a request to incorporate it in their domestic law. ICAO followed the same route in the past with Circular 288 by requesting Contracting States to incorporate it into their domestic law. Unfortunately only a few did. There is no guarantee that it will be more successful this time around, but one could argue that once Contracting States have ratified the Montréal Protocol and it enters into force, Contracting States would have little excuse for not incorporating ICAO Circular 288 into their domestic law.

However, the author is of the view that it could overall be concluded that the steps taken by the international aviation community by the adoption of the Montreal Protocol to address the shortcomings of the Tokyo Convention, 1963, is a major achievement and will contribute substantially to promote and ensure aviation safety for future generations. That is, of course, if Contracting State take the matter seriously and ratify the Montréal Protocol as soon as possible, and thereafter incorporate ICAO Circular 288 in their domestic law when so called upon by ICAO (again).

Lastly it could therefore safely be concluded that the Tokyo Convention, 1963, had successfully been saved for future generations by the Montreal Protocol!

There is a saying that goes that "*The hardest thing about flying is the ground.*"¹⁹⁹ The international aviation community, which we are all part of, simply cannot allow aircraft to hit the ground because of unlawful disruptive/unruly passenger behaviour on board. The time to act is now! The Tokyo Convention, 1963, as

¹⁹⁹ Sir Charles Kingsford Smith, early Australian aviation pioneer.

amended by the Montréal Protocol, would hopefully go a long way to avert this from happening in future.

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PROTOCOL

To Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft

Done at Montréal on 4 April 2014

PROTOCOLE

portant amendement de la Convention relative aux infractions et à certains autres actes survenant à bord des aéronefs

Fait à Montréal le 4 avril 2014

PROTOCOLO

que modifica el Convenio sobre las infracciones y ciertos otros actos cometidos a bordo de las aeronaves

Hecho en Montreal el 4 de abril de 2014

ПРОТОКОЛ,

изменяющий Конвенцию о преступлениях и некоторых других актах, совершаемых на борту воздушных судов

Совершено в Монреале 4 апреля 2014 года

关于修订《关于在航空器内的犯罪和犯有某些其它行为的公约》的议定书

2014年4月4日订于蒙特利尔

بروتوكول

تعديل الاتفاقية بشأن الجرائم وبعض الأفعال الأخرى التي تُرتكب على متن الطائرات

حُرر في مونتريال في ٤ أبريل/نيسان ٢٠١٤



MONTRÉAL
4 AVRIL 2014

МОНРЕАЛЬ
4 АПРЕЛЯ 2014 ГОДА

MONTRÉAL
4 AVRIL 2014

蒙特利尔
2014年4月4日

MONTREAL
4 DE ABRIL DE 2014

مونتريال
٤ أبريل ٢٠١٤

PROTOCOL

TO AMEND THE CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT

THE CONTRACTING STATES TO THIS PROTOCOL,

NOTING that States have expressed their concern about the escalation of the severity and frequency of unruly behaviour on board aircraft that may jeopardize the safety of the aircraft or of persons or property therein or jeopardize good order and discipline on board;

RECOGNIZING the desire of many States to assist each other in curbing unruly behaviour and restoring good order and discipline on board aircraft;

BELIEVING that in order to address these concerns, it is necessary to adopt provisions to amend those of the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* signed at Tokyo on 14 September 1963;

HAVE AGREED AS FOLLOWS:

Article I

This Protocol amends the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963 (hereinafter referred to as "the Convention").

Article II

Article 1, paragraph 3, of the Convention shall be replaced by the following:

"Article 1

3. For the purposes of this Convention:
 - a) 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; and
 - b) when the State of the operator is not the same as the State of registration, the term "the State of registration", as used in Articles 4, 5 and 13 of the Convention shall be deemed to be the State of the operator."

Article III

Article 2 of the Convention shall be replaced by the following:

“Article 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on discrimination on any ground such as race, religion, nationality, ethnic origin, political opinion or gender.”

Article IV

Article 3 of the Convention shall be replaced by the following:

“Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.
- 1 *bis*. A State is also competent to exercise jurisdiction over offences and acts committed on board:
 - a) as the State of landing, when the aircraft on board which the offence or act is committed lands in its territory with the alleged offender still on board; and
 - b) as the State of the operator, when the offence or act is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence, is in that State.
2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.
- 2 *bis*. Each Contracting State shall also take such measures as may be necessary to establish its jurisdiction over offences committed on board aircraft in the following cases:
 - a) as the State of landing, when:
 - i) the aircraft on board which the offence is committed has its last point of take-off or next point of intended landing within its territory, and the aircraft subsequently lands in its territory with the alleged offender still on board; and

- ii) the safety of the aircraft or of persons or property therein, or good order and discipline on board, is jeopardized;
 - b) as the State of the operator, when the offence is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence, is in that State.
- 2 *ter*. In exercising its jurisdiction as the State of landing, a State shall consider whether the offence in question is an offence in the State of the operator.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.”

Article V

The following shall be added as Article 3 *bis* of the Convention:

“Article 3 *bis*

If a Contracting State, exercising its jurisdiction under Article 3, has been notified or has otherwise learned that one or more other Contracting States are conducting an investigation, prosecution or judicial proceeding in respect of the same offences or acts, that Contracting State shall, as appropriate, consult those other Contracting States with a view to coordinating their actions. The obligations in this Article are without prejudice to the obligations of a Contracting State under Article 13.”

Article VI

Article 5, paragraph 2, of the Convention shall be deleted.

Article VII

Article 6 of the Convention shall be replaced by the following:

“Article 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:
 - a) to protect the safety of the aircraft, or of persons or property therein; or
 - b) to maintain good order and discipline on board; or

- c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.
2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.
3. An in-flight security officer deployed pursuant to a bilateral or multilateral agreement or arrangement between the relevant Contracting States may take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft or persons therein from an act of unlawful interference, and, if the agreement or arrangement so allows, from the commission of serious offences.
4. Nothing in this Convention shall be deemed to create an obligation for a Contracting State to establish an in-flight security officer programme or to agree to a bilateral or multilateral agreement or arrangement authorizing foreign in-flight security officers to operate in its territory.”

Article VIII

Article 9 of the Convention shall be replaced by the following:

“Article 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offence.
2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such State of his intention to deliver such person and the reasons therefor.
3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this Article with evidence and information which are lawfully in his possession.”

Article IX

Article 10 of the Convention shall be replaced by the following:

“Article 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, any in-flight security officer, the owner or operator of the aircraft, nor the person on whose behalf 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.”

Article X

The following shall be added as Article 15 *bis* of the Convention:

“Article 15 *bis*

1. Each Contracting State is encouraged to take such measures as may be necessary to initiate appropriate criminal, administrative or any other forms of legal proceedings against any person who commits on board an aircraft an offence or act referred to in Article 1, paragraph 1, in particular:
 - a) physical assault or a threat to commit such assault against a crew member;
or
 - b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purpose of protecting the safety of the aircraft or of persons or property therein.
2. Nothing in this Convention shall affect the right of each Contracting State to introduce or maintain in its national legislation appropriate measures in order to punish unruly and disruptive acts committed on board.”

Article XI

Article 16, paragraph 1, of the Convention shall be replaced by the following:

“Article 16

1. Offences committed on board aircraft shall be treated, for the purpose of extradition between the Contracting States, as if they had been committed not only in the place in which they occurred but also in the territories of the Contracting States required to establish their jurisdiction in accordance with paragraphs 2 and 2 *bis* of Article 3.”

Article XII

Article 17 of the Convention shall be replaced by the following:

“Article 17

1. In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft, the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.
2. Each Contracting State, when fulfilling its obligations, or exercising a permitted discretion under this Convention, shall act in accordance with the obligations and responsibilities of States under international law. In this respect, each Contracting State shall have regard for the principles of due process and fair treatment.”

Article XIII

The following shall be added as Article 18 *bis* of the Convention:

“Article 18 *bis*

Nothing in this Convention shall preclude any right to seek the recovery, under national law, of damages incurred, from a person disembarked or delivered pursuant to Article 8 or 9 respectively.”

Article XIV

The texts of the Convention in the Arabic, Chinese and Russian languages annexed to this Protocol shall, together with the texts of the Convention in the English, French, and Spanish languages, constitute texts equally authentic in the six languages.

Article XV

As between the Contracting States to this Protocol, the Convention and this Protocol shall be read and interpreted together as one single instrument and shall be known as the Tokyo Convention as amended by the Montréal Protocol, 2014.

Article XVI

This Protocol shall be open for signature in Montréal on 4 April 2014 by States participating in the International Air Law Conference held at Montréal from 26 March to 4 April 2014. After 4 April 2014, this Protocol shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montréal until it enters into force in accordance with Article XVIII.

Article XVII

1. This Protocol is subject to ratification, acceptance or approval by the signatory States. The instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the International Civil Aviation Organization, who is hereby designated as the Depositary.
2. Any State which does not ratify, accept or approve this Protocol in accordance with paragraph 1 of this Article may accede to it at any time. The instruments of accession shall be deposited with the Depositary.
3. Ratification, acceptance, approval or accession to this Protocol by any State which is not a Contracting State to the Convention shall have the effect of ratification, acceptance, approval or accession to the Tokyo Convention as amended by the Montréal Protocol, 2014.

Article XVIII

1. This Protocol shall enter into force on the first day of the second month following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Depositary.
2. For each State ratifying, accepting, approving or acceding to this Protocol after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, this Protocol shall enter into force on the first day of the second month following the date of the deposit by such State of its instrument of ratification, acceptance, approval or accession.
3. As soon as this Protocol enters into force, it shall be registered with the United Nations by the Depositary.

Article XIX

1. Any Contracting State may denounce this Protocol by written notification to the Depositary.
2. Denunciation shall take effect one year following the date on which notification is received by the Depositary.

Article XX

The Depositary shall promptly notify all signatory and Contracting States to this Protocol of the date of each signature, the date of deposit of each instrument of ratification, acceptance, approval or accession, the date of coming into force of this Protocol, and other relevant information.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Protocol.

DONE at Montréal on the fourth day of April of the year Two Thousand and Fourteen in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic, such authenticity to take effect upon verification by the Secretariat of the Conference under the authority of the President of the Conference within ninety days hereof as to the conformity of the texts with one another. This Protocol shall be deposited with the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all Contracting States to this Protocol.