

THE NEED FOR A NEW CONVENTION TO DEAL WITH AVIATION RELATED CRIMES¹

Abstract

In legal regime governing crimes on board aircraft, three international Conventions are very relevant and indispensable. They are Tokyo Convention (1963), Hague Convention (1970), and Montreal Convention (1971) together with their protocols. These instruments though have been very useful in dealing with crimes relating to aviation; yet they have been found to be inadequate in the face of current challenges of terrorism and global security needs. The challenge of security in the modern times relating to aviation is of a serious concern. This paper examines the three mentioned Conventions and points out the weakness of the Conventions as at today and therefore canvasses the need for a new Convention to address modern security challenges.

Key words: *Aviation, Crimes, Convention, International Law*

1. Introduction

The event of 9/11 is still fresh in our memories. The terrorist act remains undoubtedly the most devastating criminal attack on airlines in modern history. Prior to the events of 9/11 there have been various unlawful acts in aviation history. There has been effort at using the instrument of the law to stop these acts. The recent air disaster in Egypt involving Russian Airliner has once more raised the need for the world to converge for a Convention to deal with Aviation related crimes. We are therefore going to look into the most significant Conventions that deal with offences relating to aviation. This paper argues that the existing international instruments are in dire need of a supporting instrument or an entirely new instrument to take care of the emerging trends of crime in Aviation.

2. Tokyo Convention

The application of the Tokyo Convention is restricted by the Convention itself. It applies to offences against penal law² and any act that may or do jeopardise safety of property or persons; or jeopardise good order or discipline on board³. The fact that the offences must be committed on board means that only one aircraft is involved.⁴ It also applies to acts done by a person on board any aircraft registered in a contracting state, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.⁵ An aircraft is considered to be in flight from the moment when power is applied for the purposes of take off until the moment when the landing run ends⁶. Just like Montreal and Warsaw Conventions the Convention is not to apply to aircraft used in military, customs or police services⁷. The offences in this Convention are strict liability offences. From the definition above, it is clear that the prosecution does not need to prove the mental element.

Jurisdiction

The state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board⁸. Each contracting state shall take measures to establish its jurisdiction

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² The Convention on Offences and Certain Other Acts Committed on Board Aircraft, Signed at Tokyo on September 14, 1963 (Tokyo Convention) 704 UNTS 219 art 1(a)

³ Tokyo Convention art 1(b)

⁴ A. F. Lowenfield, *Aviation Law Cases and Materials* (1981) 325 cited in I. H. P. Diedricks-Verschoor, *An Introduction to Air Law*, 211

⁵ *Ibid.*, art 2

⁶ *Ibid.*, art 1 (4)

⁷ *Ibid.*, art 1(5)

⁸ *Ibid.*, art 3(1)

as the state of registration over offences committed on board aircraft registered in such state⁹. The Convention does not however exclude any criminal jurisdiction exercised in accordance with national law¹⁰. This Convention applies both to international and domestic flight. The Convention went further to list conditions upon which contracting states which are not the state of registration may interfere with an aircraft in flight in order to exercise its criminal jurisdiction:

- a. The offence has effect on the territory of the state.
- b. The offence has been committed by or against a national or permanent resident of such a state.
- c. The offence is against the security of such a state
- d. The offence consists of a breach of any rules or regulations relating to the flight or manoeuvre or aircraft in force in such a state.
- e. The exercise of jurisdiction is necessary to ensure the observances of any obligation of such State under a multilateral international agreement¹¹.

It is note worthy that the Convention made a saving provision which prohibits exercise of the powers enumerated above in respects of offences against penal laws of political nature or those based on racial or religious discrimination¹². This saving provision turns out to be the Achilles heel of the Convention.

Powers of the Aircraft Commander

The aircraft commander is given enormous power of arresting and authorising or requiring his crew members to arrest and detain an offender. He cannot however authorise a passenger although a passenger may decide to assist to keep a misbehaving passenger in check¹³. Abdulmuttalab(the underwear bomber)was accosted by a fellow passenger before the intervention of the crew members. Any crew member on his own may take a reasonable step to protect the safety of the aircraft and that includes arresting and stopping any passenger misbehaving¹⁴. The aircraft commander is however to be guided by his duties:

- a) To protect the safety of the aircraft or of persons or property therein
- b) To maintain good order and discipline or board
- c) To enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of the Convention¹⁵

It is expected that any person placed on constraint on board be handed over as soon as the flight lands to the competent authorities¹⁶. However, there are exceptions to this requirement.

- a) Where in the territory of a non-contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with article 6¹⁷ in order to enable his delivery to competent authorities;

⁹ Ibid.,art 3(2)

¹⁰ Ibid.,art 3(3)

¹¹ Ibid.,art 4

¹² Ibid.,art 2

¹³ Ibid.,Art 5

¹⁴ Ibid.,Art 6

¹⁵ Tokyo Convention Art 6

¹⁶ Ibid.,Art 7

¹⁷ Article 6 provides for arrest of an offender on board.

- b) The aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or
- c) That person agrees to onward carriage under restraint¹⁸.

The aircraft commander however is to notify the authorities of a state of the fact that somebody is under restraint before landing and as soon as practicable¹⁹ The aircraft commander may deliver to competent authorities any person in his opinion that has committed offence on board which is a serious offence according to the penal law of the state of registration.²⁰ He is also expected to furnish the authorities with any evidence and information relevant to the matter and the person.²¹ The aircraft commander, any other member of the crew, any passenger, the owner or the operator of the aircraft nor the person on whose behalf the flight is performed are absolved from any liability resulting from the treatment undergone by the offender²².

Unlawful seizure of Aircraft

States are enjoined to use any reasonable means to restore aircraft to its lawful commander in a case of seizure by unlawful persons or to preserve his control.²³ The contracting states are expected to permit the passengers to continue their journey as soon as practicable.²⁴ This provision fails however to cover all forms of unlawful seizure.²⁵ It also fails to prescribe any sanctions against the offence²⁶ and relied heavily on the contracting states to take all appropriate measures to restore control of the aircraft to its lawful commander only.²⁷ The Convention did not make much stern provision against hijacking.

Powers and Duties of States

Contracting States are enjoined to allow the commander of the aircraft to disembark any person who is considered a threat according to the Convention²⁸. The states are expected to take custody of the person in the state²⁹. It however is expected to assist the person to communicate immediately with the nearest appropriate representative of the State of which he is a national³⁰. The state shall also notify the state of the registration of the Aircraft and the state of the nationality of the detained person and if it considers it advisable any other interested State.³¹ A person arrested in accordance with the provisions of this Convention can only be returned to a state of his nationality, where he has permanent residence or where he began his journey by air. This is where the state of landing refuses to admit him and he does not intend to continue his journey³². Note that this might take years and possibly after he might have served some prison terms. The disembarkation for the purposes of this Convention of a suspect does not amount to admission into a state.³³ However any person who is disembarked and who later decides to continue his journey is at liberty to do so.³⁴

¹⁸ Tokyo Convention Art 7

¹⁹ Ibid., Article 7(2)

²⁰ Ibid., Art 9(1)

²¹ Ibid., Art 9(3)

²² Ibid., Art 10

²³ Ibid., Art 11

²⁴ Ibid., Art 11(2)

²⁵ I. H. P. Diedricks-Verschuur, *An Introduction to Air Law*, 208

²⁶ Ibid.

²⁷ See note 23.

²⁸ Tokyo Convention Art 12

²⁹ Ibid., Art 13(2)

³⁰ Ibid., Art 13(3)

³² Ibid., Art 14

³³ Ibid., Art 14(2)

³⁴ Ibid., Art 15(1)

Extradition

The Convention makes a special provision for extradition. It provides that for the purposes of extradition offences committed in an aircraft registered in a State shall for the purposes of the Convention be treated as not only to have occurred in the place of the occurrence but also in the state of the registration of the aircraft³⁵. It however, provides that nothing in this Convention shall be deemed as having created obligation to grant extradition³⁶. It is clear that extradition is guided by treaties of various nations and each country is to be guided by extradition treaty it has entered with the corresponding nation to effect an extradition

Joint and International Operational Agencies

In a case of joint operation of a carrier by many states or an international organisation operating a carrier which are registered in different states, they are expected to determine a state among them which for the purposes of the Convention will be considered as the state of registration and communicate same to the International Air Transport Association (IATA) which shall communicate to all the parties to the Convention³⁷.

Settlement of Dispute

There are three options of settlement in case of dispute between parties to the Convention: negotiation, arbitration and submitting the case to ICJ.³⁸

3. Convention for the Suppression of Unlawful Seizure of Aircraft³⁹

Just after about seven years after the Tokyo Convention, Hague Convention came on board. The need to address the increasing cases of hijacking which was not sufficiently addressed in Tokyo Convention necessitated the coming into effect of this Convention almost immediately after the Tokyo Convention. This Convention applies to any person who on board an aircraft in flight;

- a) Unlawfully, by force or threat thereof or by any other form of intimidation, seizes or exercises control of that aircraft or attempts to perform any such act or
- b) Is an accomplice of a person who performs or attempts to perform any such act commits an offence⁴⁰

The state parties are expected to make the offence punishable by severe penalties. What constitutes severe penalties is not however provided in the Convention. The limitation of the application of this offence to any person on board an aircraft is considered a serious limitation to the application of this Convention. From the wording of the Convention, this offence again is a strict liability offence. A definition of aircraft in flight is provided thus '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 disembarkation⁴¹. In the case of forced landing, the flight shall be deemed to continue until the competent

³⁵ Ibid., Art 16(1)

³⁶ Ibid., Art 16(2)

³⁷ Ibid., Art 18

³⁸ Ibid., Art 24

³⁹ Signed at The Hague on 16th December 1970 (The Hague Convention 1970). The hijackers most active as The Hague Convention is being negotiated were US radicals redirecting flights to Havana, Cuba for political purposes, or to escape punishments for prior criminal acts and Palestine using hijacking as a political weapon to publicize their cause. See Havel 201.

⁴⁰ Convention for the Suppression of Unlawful Seizure of Aircraft, Signed at The Hague on 16th December 1970 (The Hague Convention 1970) ICAO Doc 8966 Art 1.

⁴¹ Hague Convention Art 3(1)

authorities take over the responsibility for the aircraft and for persons and property on board⁴². Once more, the Convention does not apply to military aircraft and applies only if the place of take-off or the place of actual landing⁴³ of the aircraft on board which the offence⁴⁴.

Jurisdiction

State parties are enjoined to take proactive steps to establish its jurisdiction. The following cases where enumerated:

- a) When the offence is committed on board an aircraft registered in that state,
- b) When the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board.
- c) When the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or if the lessee has no such place of business, his permanent residence in that state⁴⁵.

The contracting state shall take measure to establish jurisdiction over the offence in the case where the alleged offender is present in its territory and is not extradited. The Convention does not exclude any criminal jurisdiction exercised in accordance with national law⁴⁶. Where there is joint air transport by states or international operating agencies, one state among the states shall be designated for the purpose of exercising jurisdiction⁴⁷. Note that prosecution and trial of the offender is not made mandatory in the Convention. Diederiks-Verschoor argues that the Convention indeed introduced the principle of universal jurisdiction which implies that an offender is liable to be prosecuted anywhere in the world but with very important restriction.⁴⁸

The power of State

This is largely the same thing that obtained in Tokyo Convention. A critical study shows that article 13 of Tokyo Convention is repeated in article 6 of Hague Convention. These articles are about the powers of the state to take custody of the offender. Article 7 of Hague Convention expects the state to prosecute with competent authorities in a situation the state fails to extradite the offender. The provision here is in pari materia with the provisions of Tokyo Convention too.

Extradition

Article 8 makes more elaborate provision for extradition and the essential elements of it are thus:

- a) The offence is deemed to be included as extraditable offence in any extradition treaty existing between contracting states
- b) If a state makes extradition based on the condition that there must be an existing treaty, they can use this Convention as the treaty for that purpose where none exists subject to other conditions requested by the state.

⁴² Ibid., Art 3(1)

⁴³ This word covers scheduled, intended and forced landing. See I. H. P. Diederiks-Verschoor, *An Introduction to Air Law* 217

⁴⁴ Hague Convention Art 3(2)

⁴⁵ Ibid., Art 4(1)

⁴⁶ Ibid., Art 4(3)

⁴⁷ Ibid., Art 5

⁴⁸ I. H. P. Diederiks-Verschoor, *An Introduction to Air Law*, 212. The restriction is that the state that will prosecute will have the custody of the offender. Nobody will be tried in absence. See particularly note 26. I. H. P. Diederiks-Verschoor, *An Introduction to Air Law*, 212.

- c) Contracting states which do not make extradition conditional based on a treaty shall recognise the offence as extraditable subject to other conditions requested by a state.
- d) The offence shall be treated for the purpose of extradition between contracting states not only in the place in which it occurred but also in the territories of the state required to establish their jurisdiction in accordance with the provisions of this Convention.

As in the Tokyo Convention, the state party is enjoined to use all reasonable effort to restore control of the aircraft to the commander.⁴⁹ As well as affording one another greatest measure of assistance⁵⁰. State parties are also enjoined to report as promptly as possible any relevant information in its possession concerning;

- a) The circumstances of the offence
- b) The action taken so far with regards to ensuring safety of the aircraft and passengers
- c) The measures taken in relation to the offender.
- d) The results of any extradition proceedings or other legal proceedings⁵¹

Dispute Settlement

Three modes of settlement were provided for in the Convention: negotiation, arbitration, and International Court of Justice as the last Option⁵².

4.0 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation⁵³

Hague and Tokyo Conventions dealt mainly with offences committed on board aircraft, The Montreal Convention, and its 1998 amending protocol, was needed to address other offences not mentioned or taken care of by Hague and Tokyo Conventions. A careful reading of Montreal Convention shows that several provisions in it are similar with those covering the same subjects in Hague Convention. They include (a). non applicability of the Convention to military, custom and police (art 4), (b)the definition of the word 'in flight' Art 2 (c) joint and international operating agencies art 9 (d) settlement of disputes Art 13-16.

The Montreal Convention is elaborate in its definition of the offences it meant to tackle Montreal Convention defines this offence thus:

- 1. Any person commits an offence if he unlawfully and intentionally;
 - a) Performs an act of violence against a person on board an aircraft in flight it that act is likely to endanger the safety of that aircraft.
 - b) Destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight or
 - c) Places or causes to be placed on an aircraft in service by any means whatsoever, a device or substance which is likely to destroy that aircraft or to cause damage to its which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight., or
 - d) Destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight or.

⁴⁹ Hague Convention Art 9

⁵⁰ Ibid., Art 10

⁵¹ Ibid., Art 11

⁵² Ibid., Art 12

⁵³ Signed at Montreal on 23 September 1971(Montreal Convention).

e) Communicates information which he knows to be false thereby endangering the safety of an aircraft in flight⁵⁴

The import of the word ‘unlawful and intentionally’ needs to be explored, this calls to mind the shooting of MH17 in 2014 and the Korean Airline disaster of September 1, 1983⁵⁵. A lot of clarifications are needed explore the exact reach and intent of the word ‘unlawful and intentionally’.

The Convention also treats attempt to commit this offence and an accomplice as the principal offenders.⁵⁶ Surprisingly, the mental element is now included in one of the ingredients of the offence as the Convention uses the word ‘unlawfully and intentionally’⁵⁷. The definition of the offence is more elaborate in comparison to the definition in Tokyo and Hague Conventions⁵⁸. Attempts to commit the offences mentioned above and any accomplice is deemed a principal offender.

The definition of aircraft in flight is the same as in Hague Convention⁵⁹. The Montreal Convention went ahead to define aircraft in service as ‘being in service from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty four hours after any landing, the period of service shall in any event extend for the entire period during which the aircraft is in flight as defined in paragraph (a) of this article.’⁶⁰ Each contracting state is enjoined to establish its jurisdiction in the following cases:

- a) When the offence is committed in the territory of the state;
- b) When the offence is committed on against or on board an aircraft registered in that state;
- c) When the aircraft on board which the offence is committed lands in territory with the alleged offender still on board;
- d) When the offence is committed against or on board an aircraft leased without a crew to a lessee who has his principal place of business or if he has no such place of business, his permanent residence in that state.⁶¹

The states were enjoined to impose severe penalties on offenders.⁶² What constitutes severe penalties was not however provided. It was left at the discretion of the contracting states. The contracting states were expected to take all reasonable means to prevent the offences in accordance with national and international law⁶³. This Convention applies both to domestic and international flights.

⁵⁴ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Signed At Montreal on 23 September 1971 (Montreal Convention) ICAO doc 9145 Art 1

⁵⁵ These passenger Airlines were shot down by the Military who claimed that they thought the passenger planes are enemy planes. Thus the issue of unlawfully and intentionality demands clearer definition.

⁵⁶ Montreal Convention Art 1(2)

⁵⁷ Ibid., Art 1.

⁵⁸ See art 1 of Hague Convention, Art 1 of Tokyo Convention

⁵⁹ Montreal Convention Art 2

⁶⁰ Paragraph (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 forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for the persons and property on board.

⁶¹ Montreal Convention Art 5

⁶² Ibid., Art 3

⁶³ Ibid., Art 10

5. Observation and Recommendations

1. The Tokyo Convention is a bold step towards tackling criminal offences in aviation industry.
2. The three Conventions did not specify what would amount to severe penalty leaving it at the discretion of the contracting state parties. This would obviously lead to different penalties depending on the State that tries the offender.
3. The Conventions are not codes of criminal or penal provisions. Thus even where a state has ratified and even domesticated this instrument but failed to enact a national penal law it may not be able to prosecute the offenders appropriately.
4. There is need for an international body to sanction countries that fail to comply with safety standards.⁶⁴
5. The Tokyo Convention could not provide any definition of the word 'offence'.
6. The Tokyo Convention has a very restrictive approach towards extradition.
7. The Tokyo Convention position on not prosecuting offenders created more problems than solutions. As persons can raise political, racial or religious defences as permitted by the Convention
8. Despite the fact that The Hague Convention was meant to address some key issues not properly taken care of by the Tokyo Convention, it failed to impose obligations on states to prosecute. The states still had the discretion to prosecute or extradite. The state can decide not to prosecute and not to extradite.
9. The Hague Convention failed to make any mandatory provision on extradition and made the states to comply with their various extradition treaties with various states and other conditions of treaties. This is a major loophole.
10. The inadequacy of the existing legal framework made the European Union and the United States in 2004 to reach an agreement requiring airlines flying to or from United States to furnish passenger name records(PNR) in their reservation and departure control system within fifteen minutes of their departure time.⁶⁵ Although this plan suffered a setback due to criticism from the EU members as they complained of breach of their privacy.⁶⁶ The last agreement on PNR was made in 2012 due to more dangers posed by terrorism.⁶⁷
11. After the failed bomb attack in December 2009 against a Delta Airline flight bound from Detroit from Amsterdam, the United States began to install full body scanners.⁶⁸ There was worldwide outcry of breach of privacy. But the question remains between life and privacy which one takes priority? Both are moral questions and the answers are not very simple.
12. There is some agreement between United States and EU after the terrorists from Yemen used printer cartridges to conceal bombs in United Parcel Service and FedEx all cargo plane.⁶⁹ This is one area where there has not been so much disagreement (areas involving terrorism).⁷⁰
13. The Conventions respected the sovereignty of the contracting states.
14. The Conventions are silent on what happens when any state are the major sponsors of the crimes relating to Aviation. The presumptions of these Conventions are that the crimes will always be committed by individual persons or individual persons acting in agreement with

⁶⁴ B F Havel and G. S. Sanchez, *The Principles and Practice of International Law* (New York, Cambridge University Press, 2014) 179

⁶⁵ *Ibid.*, 213.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, 214

⁶⁹ *Ibid.*, 215

⁷⁰ *Ibid.*

one another. But there could be cases when states sponsor these crimes. In those cases, the Conventions have no answers.

6. Conclusion

It is obvious that the recent challenge of terrorism which is the greatest challenge in global safety today was not as advanced when the Conventions under review were drafted. The attention of the global community is now drawn more than ever to the activities of the various terrorist groups like *Boko Haram*, *Al Qaeda* and so on. There is then the need for the review of the Conventions. It is long overdue; it is because of the inadequacy of the Conventions that the United States and EU are making further agreements to strengthen their legal provision for their security framework. There is therefore the need for all these new developments to be reflected in form of Conventions instead of agreements and rules. There is also the need to strengthen issues bordering on jurisdiction to make it easier to extradite and prosecute and indeed make prosecution compulsory. Particular and specific punishment should also be prescribed in the Conventions. The Convention should establish a court that will try offenders where it is possible that they will get sympathy of the state that has their custody.