

**Securing the Skies from Unruly Passengers**  
*Onwards to the Montreal Protocol*

## **Abstract**

*This paper aims to critically evaluate the legal instruments set out to address unruly behaviours on board an aircraft, examining the deficiency of the responses from the Tokyo Convention of 1963 and assessing the impact of the Montreal Protocol of 2014. The present analysis discusses the effectiveness of the newly adopted definitions and jurisdictional provisions. Notwithstanding the inadequacy of the Tokyo Convention, the amendments made in 2014 thereto are not deemed as full-fledged solutions. Therefore the author encourages a proactive approach leveraging the operational tools adopted by airlines associations, taking the Civil Aviation Requirements laid down by the Indian Ministry of Civil Aviation and Director General of Civil Aviation as a leading example. The severity and increasing relevance of unruly behaviours together with the risk of lawlessness are presented as main reasons to outweigh States' reluctance in the ratification process and trigger a robust legal response including airlines' associations and civil aviation authorities in the drafting process.*

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## 1. Setting the scene

“It would only take one guy to take the plane down”, said an Air Canada air traveller last May:<sup>1</sup> the man had been yelling and throwing wads of paper on board; after his attempt to open the cabin door, the crew decided to restrain him. The flight was diverted and the man was taken into custody at Orlando International Airport.

One month later, a woman caused disturbances on a Southwest Airlines flight as she tried to tear off a piece of the emergency exit door; her behaviour led to a non-scheduled landing and protests by many passengers affected by the event.<sup>2</sup>

These occurrences prove that despite the fascination around air travel, entering a commercial aircraft can be treacherous: being transported in an enclosed setting, possibly after long queues, surrounded mostly by strangers can make a discourteous behaviour, negligible on the ground, hazardous for the whole aircraft.<sup>3</sup>

The label unruly passengers encompasses different conducts that put at risk efficiency, safety and security on board, thus requiring a prompt legal response.

This research endeavour aims to inspect the frameworks in place to address this phenomenon drawing a comparison between the main gaps of “The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, dating from 1963”<sup>4</sup> (TC63) and the principal solutions provided by its revision.<sup>5</sup>

For the purpose of the present analysis, the provisions on the temporal scope,<sup>6</sup> the air carrier’s right of recourse,<sup>7</sup> and the role of in-flight security officers<sup>8</sup> are not investigated; the focus is

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<sup>1</sup> “[Unruly Passenger Disrupts Flight with Wads of Toilet Paper, Hot Coffee, and Threats](#)”, 17<sup>th</sup> May 2017. All websites cited in this paper have been accessed and verified on 9<sup>th</sup> July 2017.

<sup>2</sup> “[Southwest Airlines Flight Diverted after Passenger Tried to Open Emergency Exit Door](#)”, 26<sup>th</sup> June 2017.

<sup>3</sup> See Michael Gill’s remarks on Airlines International “[The Devil in our Midst](#)”, 1<sup>st</sup> August 2013.

<sup>4</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo 14 September 1963, entered into force 4 December 1969, 704 UNTS 219; 20 UST 2941; 2 ILM 1042 (1963). Hereinafter also referred to as Tokyo Convention/Convention/TC63.

<sup>5</sup> Protocol to amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Montreal 4 April 2014, available on the [ICAO website](#). Hereinafter also referred to as Montreal Protocol/Protocol/MP14.

<sup>6</sup> A new temporal scope is set out in Article II of the Montreal Protocol and it is aligned with the Montreal/Warsaw regime and the other aviation security framework, to wit the aircraft is in flight: “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”. See also R. Kane, *Time to Put Teeth into Tokyo?*, 43 Zeitschrift für Luft- und Weltraumrecht 192, at 187 (1994).

<sup>7</sup> Art XIII MP14, new Article 18bis, regulates airlines’ right to seek compensation from unruly passengers at their discretion.

<sup>8</sup> In-flight security officers (IFSOs) are defined in Annex 17 to the Convention on international Civil Aviation as those: “[...] Authorised by the government of the State of the Operator and the government of the State of Registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference. This excludes persons employed to provide exclusive personal protection for one or more specific people travelling on the aircraft, such as person bodyguards”. IFSOs are regulated under Art

on the determination of behaviours and the changes in the exercise of jurisdiction. A critical evaluation of these amendments is deemed relevant because they represent the logical antecedent to structure a legal response to a new phenomenon, besides, they have been identified among the most welcomed developments by the International Air Transport Association (IATA).<sup>9</sup>

At first, the significance of the problem is highlighted, presenting the values at stake and the *excursus* around its regulation (§2); subsequently, the regime laid down in the Tokyo Convention is examined, inspecting its lacunae (§3) then, the prospective opportunities disclosed by the MP14 are reviewed (§4); lastly, an evaluation of the consolidated legal tool is provided suggesting further developments taking into account the recent legal initiatives for Indian domestic air travel (§5).

## 2. Unruly/disruptive behaviours: what is in a name

In the Circular 288 “Guidance Material on Legal Aspects of Unruly/Disruptive Passengers”,<sup>10</sup> the International Civil Aviation Organization (ICAO) refers to unruly behaviours, including solely<sup>11</sup> air travellers, as:

“...passengers who fail to respect the rules of conduct on board aircraft or to follow the instructions of crew members and thereby disturb the good order and discipline on board aircraft.”

The definition is the outcome of a long-awaited regulatory process and presents several deficiencies. This chapter aims to situate disruptive behaviours in their relevance as an alarming phenomenon affecting air travel as a whole.<sup>12</sup> In this respect, the preliminary questions to give

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VII of the Protocol, new Article 6(3), whereby it is codified that the aircraft commander may authorise or request, *but not require*, the assistance of such officers to restrain a passenger; however they have not been added to the categories of persons automatically entitled to take reasonable preventive measures without the aircraft commander’s authorisation. The newly drafted provisions extends to IFSOs the protection from lawsuits enshrined in Article 10 of the consolidated framework. For further insights see P.P. Fitzgerald, *Air Marshals: The Need for Legal Certainty*, 75 *Journal of Air Law and Commerce* 357 (2010).

<sup>9</sup> Working Paper submitted by IATA to the ICAO 39th Assembly ICAO, A39-WP/139 at 4. See T. Colehan, *Unruly Passengers: The Airline Industry Perspective on the Revision of the Tokyo Convention*, *Journal of Aviation Management* at 10-11 (2014) [hereinafter Colehan].

<sup>10</sup> *Infra* §2.2.

<sup>11</sup> However not only passengers might be unruly: on a flight to Las Vegas, a delusional airline pilot was restrained because he left the cockpit and started running, and banging on a restroom doors, screaming that the plane would have not reached the scheduled destination see “[Unruly JetBlue pilot charged with interference with flight](#)”, 5<sup>th</sup> April 2012; recently, a flight attendant confronted a passenger verbally and physically for a dispute as to whether a pram could be taken on board, “[American Airlines flight attendant suspended after stroller incident on plane](#)”, 22<sup>nd</sup> April 2017. How to deal with crew’s misbehaviour is a remark that emerged also during the recent exchange of views on the draft rules set by Indian Ministry of Civil Aviation and the Director General of Civil Aviation, *infra* §5.

<sup>12</sup> The severity of the problem can be also inferred from the fact that Lloyds of London has created an insurance policy to cover the costs of incidents caused by unruly behaviours.

answer to are the following: who are unruly passengers, what triggers their actions, and how they represent a problem for the airline industry?

It would be convenient to attribute the origin to one cause, as, for instance, cramped spaces on flights, but the occurrences vary and have multiple, often combined, explanations,<sup>13</sup> and call for a cohesive regulatory response.

## 2.1. The order of magnitude

The frequency and gravity of unruly passenger incidents is showed by data collected from individual civil aviation authorities and evidence voluntarily<sup>14</sup> provided by IATA member airlines: as of 2016, reported disruptive behaviours increased from 9,316 in 2014 to 10,854 in 2015.<sup>15</sup> In 2015, 11% of incidents indicated physical aggression, and 40% of airlines diverted a flight due to an unruly passenger.<sup>16</sup> 53% of IATA members affirm that unruly passengers have become have significantly increased in frequency in past 5 years.<sup>17</sup>

The wide spectrum of anti-social conducts encompasses failure to comply with crew instructions, verbal abuse, sexual assault, damage to the aircraft.<sup>18</sup> Related factors include drug/alcohol intoxication, lengthy and crowded flights, poor airline customer service, smoking bans, confined conditions, persistent overbooking and delays,<sup>19</sup> which may induce frustration leading to dangerous acts.<sup>20</sup> The phenomenon is labelled air rage, defined as:

“A conduct occurring during air travel, which can fall anywhere on a behavioural continuum from socially offensive to criminal. Air rage describes intentional acts that are highly disproportionate to motivating factors, which endanger the flight crew and/or other passengers and potentially jeopardize the safety of the aircraft itself”.<sup>21</sup>

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<sup>13</sup> Besides it is often the case that business class passengers misbehave: last March, after being refused a business class seat, an Indian member of parliament hit an Air India employee with his slippers. See “[Shiv Sena MP Ravindra Gaikwad Attacks Air India Staffer With Slipper Over Ticket Row](#)”, 24<sup>th</sup> March 2017.

<sup>14</sup> The lack of an obligatory reporting system may lead to underestimate the relevance of the phenomenon.

<sup>15</sup> IATA Fact Sheet “[Unruly Passengers](#)”, June 2016. See also IATA Press Release No. 53, “[Collaboration Needed to Stem Unruly Passenger Incidents](#)”.

<sup>16</sup> IATA [Infographic](#), September 2016.

<sup>17</sup> *Ibidem*.

<sup>18</sup> For an extensive overview See IATA “Unruly Passenger Prevention and Management” at 69, 2<sup>nd</sup> ed. (2015).

<sup>19</sup> For further insights see S.T. Collins & J.S. Hoff, *In-Flight Incivility Today: The Unruly Passenger*, 12 Air and Space Law, 1 (1998).

<sup>20</sup> The phenomenon has been labelled air rage, See S. R. Ginger, *Violence in the Skies: The Rights and Liabilities of Air Carriers when Dealing with Disruptive Passengers*, 23(2) Air and Space Law at 109 (1998) [hereinafter Ginger]. M. P. Fogg, *Air Rage: Is It a Global Problem? What Proactive Measures Can Be Taken to Reduce Air Rage, and Whether The Tokyo Convention Should Be Amended to Ensure Prosecution of Air Rage Offenders?*, 7(2) ILSA Journal of International & Comparative Law 511-537 (2001). R.I.R. Abeyratne, *The Fear of Flying and Air Rage – Some Legal Issues*, 1(1) Journal of Transportation Security 45-66 (2008).

<sup>21</sup> N.L. Firak & K. Schmaltz, *Air Rage: Choice of Law for Intentional Torts Occurring in Flight over International Waters*, 63 Albany Law Review 1, at 7 (1999).

Even more significant than figures are the core values at stake, representing the red thread of this analysis. Unruly passenger incidents cause inconveniences to travellers, flight and cabin crew, operational disruption, costs for air carriers,<sup>22</sup> and threats to safety and security. Ensuring efficient, safe, and secure operation of commercial flights is the goal that governments, airlines, and the entire aviation industry aim to safeguard.<sup>23</sup> Hence the importance of searching for air law instruments to address disruptive behaviours presented in the next section.

## 2.2. The legal context

Several acts qualified as unruly occurred during the 1990s<sup>24</sup> and in 1997, ICAO Council established a Secretariat Study Group; its Circular 288 “Guidance Material on Legal Aspects of Unruly/Disruptive Passengers”<sup>25</sup> was the first endeavour to set a uniform list of offences and new criteria for jurisdiction, aiming for a wide transposition by ICAO Member States. The Resolution A33-4 “Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)”,<sup>26</sup> unanimously adopted during the 33<sup>rd</sup> Session of ICAO Assembly, recommended States to incorporate the Circular model legislation. These instruments represented a short-term response and lacked the legal strength to trigger implementation by States.

In 2009, ICAO, thanks to the proactive approach of IATA, set a second Secretariat Study Group with the mandate to investigate whether and to what extent disruptive behaviours on board an aircraft could be covered by the existing regime under the Tokyo Convention.<sup>27</sup> After meetings in 2011, the group recommended to establish a Special Sub-Committee evaluating the feasibility of a modernisation of TC63.<sup>28</sup> Supported by ICAO Council, in 2012 the Committee

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<sup>22</sup> Especially for unscheduled landings to disembark or deliver unruly passengers.

<sup>23</sup> ICAO, A39-WP/139 at 2.

<sup>24</sup> The cases are various and anecdotal ranging from inebriated business men, to swearing or delusional travellers, for an overview of 1990s incidents see W. Mann, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 *Journal of Air Law and Commerce* at 859 (1999) [Hereinafter Mann].

<sup>25</sup> Hereinafter also referred to as Circular/Circular 288.

<sup>26</sup> ICAO, A33-4, Adoption of National Legislation on Certain Offences Committed on Board Civil Aircraft (Unruly/Disruptive Passengers), available on [ICAO website](#). Hereinafter also referred to as Resolution/Resolution A33-4.

<sup>27</sup> A. Piera, *ICAO's Latest Efforts to Tackle Legal Issues Arising from Unruly/Disruptive Passengers: The Modernization of the Tokyo Convention 1963*, 37 *Air and Space Law* at 232 (2012).

<sup>28</sup> ICAO LC/SC-MOT-WP/1, Rapporteur A. Piera “Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers”, at 1 (2012) [hereinafter Piera].

called for a comprehensive revision of the framework; this step led to the 2014 Diplomatic Conference where the Montreal Protocol was adopted.<sup>29</sup>

Given the low number of ratifications<sup>30</sup> despite TC63 inadequacy, the question is raised on the effective impact its amendments. In the following chapter, the Convention and the Protocol are examined, as respectively the backward and forward looking legal response.

### **3. The legacy of the Tokyo Convention**

The TC63 is among the most widely-ratified instruments developed by ICAO, hence a cornerstone for the international civil aviation community.<sup>31</sup> Originally, its objectives were: establishing jurisdictional criteria in regard to acts on board the aircraft; granting the aircraft commander powers to protect safety, good order and discipline on board; defining duties and responsibilities of the State of landing in cases of disembarkation and delivery; dealing with the crime of hijacking.<sup>32</sup>

Inspecting it as a tool to regulate unruly passengers, it presents critical gaps, and two are examined in the present discussion: the lack of a common denominator for offences as a basis for domestic legal systems, as well as the absence of a definition of good order and discipline on board; the insufficiency of the State of registration jurisdiction.

The relevant provisions are analysed separately in the following sections, and, in the subsequent chapter, their correspondent development under the MP14 is evaluated.

#### **3.1. TC63 vacuum: definitions**

The Tokyo framework adopted a broad formulation when describing conducts, encompassing both offences under penal law, and acts, regardless their being offences, capable of jeopardizing good order and discipline aboard the aircraft.<sup>33</sup> TC63 Article 11(1) does not shed light on what

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<sup>29</sup> R.I.R. Abeyratne, *A Protocol to Amend the Tokyo Convention of 1963: Some Unanswered Questions*, 39 *Air and Space Law* 48 (2014).

<sup>30</sup> As of 2017, the Protocol has received 30 signatures, 3 ratifications, 5 accessions; it is not in force until 22 States ratify it, list of Parties available on [ICAO website](#).

<sup>31</sup> List of the 186 Parties available on [ICAO website](#).

<sup>32</sup> Proceedings of the Conference on Aviation Security, organised by the International Institute of Air and Space Law, January 1987, Peace Palace, The Hague, at 24. For further reference see B. Cheng, *Crimes on Board Aircraft*, 12 *Current Legal Problems* 177 (1959).

<sup>33</sup> R. Boyle & R. Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board the Aircraft*, 30 *Journal of Air Law and Commerce* at 331 (1964) [hereinafter Boyle & Pulsifer].



amounts to an offence for the purpose of the Convention, opening the door to diverse interpretations according to the national laws of the Contracting State exercising jurisdiction under the Convention.

The absence of a common determination is in-between providing flexibility and causing ambiguity. Its rationale was giving margin to Contracting Parties, and adapting the legal framework to technological innovations and new security measures.<sup>34</sup> Furthermore, delineating lists of behaviours tend to encounter the risk of not being inclusive enough, or of giving rise to overlaps with other existing provisions.<sup>35</sup>

However, without common indications, the harmonisation sought by international legal instruments is impaired. Moreover, Contracting Parties may face difficulties on how offending behaviours fit their domestic regime, thus leaving perpetrators unpunished.

A definition at a supranational level would have provided a common guidance for national prosecution and sanctions, and offer uniform criteria for States when determining the basis for their jurisdiction, especially when extraterritorial elements are involved.<sup>36</sup>

Conducts are delineated in greater detail under the Resolution: the instrument, by-product of the Circular, sets two categories and a safeguard clause to capture behaviours at a higher extent. The first two tiers include respectively offences representing a hazard on board *per se*, and behaviours whose level of danger for the aircraft environment needs to be proven.<sup>37</sup> A list in the Convention, despite the greater burden to amend it, would have had greater legal strength and would have harmonised and improved the legal certainty for passengers, law enforcement authorities, and airlines.<sup>38</sup>

Moreover, the notion of good order and discipline is not specified in TC63, opening the door to extensive interpretations, which Courts have tended to counterbalance with contrived distinctions.

In *US v. Flores*,<sup>39</sup> an altercation between a passenger and a flight attendant escalated into physical aggression; despite discrepancies on other elements of the incident, it is undisputed that after the event, the stewardess regained her composure fulfilling her duties for the rest of

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<sup>34</sup> M. Jennison, *ICAO Adopts Flawed Protocol to Amend the Tokyo Convention of 1963*, 27 *Air & Space Lawyer* at 3 (2014) [hereinafter Jennison].

<sup>35</sup> *Ibidem*.

<sup>36</sup> *Infra* §3.2.

<sup>37</sup> Piera, at 23.

<sup>38</sup> Colehan, at 15.

<sup>39</sup> [\*U.S. v. Flores\*](#), 968 F.2d 1366 (1992).

the flight. The Court leveraged her proficient performance, and the fact that neither the airline's schedule, nor the in-flight service had alterations, to interpret the relevant piece of US legislation in a restrictive manner, holding that interfering with crew members' or flight attendants' duties is an essential element of a criminal charge under US law, implying that the incident did not jeopardize good order and discipline on the aircraft.<sup>40</sup>

The Higher Regional Court for Düsseldorf,<sup>41</sup> when deciding whether smoking in the lavatory of a non-smoking flight amounted to a violation of the provision under the penal code implementing TC63, made a distinction between the hazard to safety caused by a real fire and the mere activation of a smoke detector: even if in both cases the alarm would ring distracting crew members from carrying out their safety functions, only in the former it would be a risk compromising good order and discipline.

### 3.2. TC63 vacuum: jurisdiction

Under international law, States' jurisdiction to prosecute requires a substantial connection between the person or the act and the State claiming sovereign jurisdiction, and this link must be implemented through a sovereign act of legislation.<sup>42</sup> Establishing the competent State exercising jurisdiction is crucial as otherwise unruly passengers incidents may lead to conflicts between States claiming jurisdiction, offenders risking double jeopardy, offences going unpunished.<sup>43</sup>

Article 3 is TC63 jurisdictional provision and each of its paragraphs has a significant value. The first one is pivotal being the legal basis for Contracting States to recognise the authority of another Party to exercise its jurisdiction on an aircraft of its registry. This matter was sensitive as it granted the extraterritorial exercise of criminal jurisdiction even when flying in foreign airspace.<sup>44</sup>

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<sup>40</sup> Similarly argued in *United States v. Tabacca*, 924 F.2d 906 (9<sup>th</sup> Cir.1991), *Schaeffer v. Cavallero*, 29 F. Supp. 2d 350 (S.D.N.Y. 1999).

<sup>41</sup> Oberlandesgericht Düsseldorf Beschluf vom 29.06.2000 (1 Ws 362/00) – 50 Zeitschrift für Luft- und Weltraumrecht at 111 (2001).

<sup>42</sup> R.I.R. Abeyratne, *Unruly Passengers – Legal, Regulatory and Jurisdictional Issues*, 24 Air and Space Law at 52 (1999).

<sup>43</sup> *Ibid.*, at 48-49. The jurisdiction exercised on board the aircraft is normally defined as “quasi-territorial”, see G. Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitations*, at 226 (2012). This concept started as a *fictio iuris* whereby it is attributed jurisdiction on the basis of the flag borne by the ship, and was transposed also to aircraft via registration obligations laid down in Articles 17-18 of the Convention on International Civil Aviation, signed in Chicago 7 December 1944, entered into force April 4, 1947, U.N.T.S. 295.

<sup>44</sup> Boyle & Pulsifer, at 334.

Delegates discussed whether implementing the extraterritorial jurisdiction was mandatory.<sup>45</sup> Paragraph 2 provides that each Contracting State retains the power to define the offences over which jurisdiction is asserted pursuant to paragraph 1 and to decide whether to enforce its jurisdiction,<sup>46</sup> making thus clear the non-mandatory character of its implementation.<sup>47</sup> Moreover, this paragraph mentions only *offences*, hence it is debatable whether the provision applies to *acts* nonetheless jeopardizing safety, good order and discipline.<sup>48</sup> Paragraph 3 clarifies the supplementary nature of jurisdiction as structured in the Article.<sup>49</sup>

Article 4 is also relevant as it establishes the conditions under which a State other than the State of registration may interfere with the latter's exercise of jurisdiction, provided that the purpose is the exercise of its criminal jurisdiction. *A contrario*, such State may interfere for any other purpose deemed proper,<sup>50</sup> in accordance with the State's exclusive sovereignty principle over the airspace above its territory.<sup>51</sup>

The exceptions, together with Article 3 second and third paragraph, water down the extended territorial jurisdiction structured in the examined provision.

Furthermore, not vesting the State of landing of jurisdiction is detrimental to its performance of obligations laid down in the Convention: accepting passengers delivered by the aircraft commander, taking their custody, making preliminary enquiries.<sup>52</sup>

Article 4 might represent a solution, nevertheless the problem remains when offences have insufficient connecting elements to the State in question: e.g. an incident over the high seas, by a passenger of State A, on an aircraft registered in State B, landing in State C.<sup>53</sup> In the absence of a notion of universal jurisdiction, as clear from TC63, and without a clause in State C legislation extending its jurisdiction under these circumstances, such State may assert no jurisdiction to prosecute.<sup>54</sup>

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<sup>45</sup> *Ibidem*. For the debate on jurisdiction between civil law and common law countries See C. N. Shawcross, K. M. Beaumont, P. Martin, R. D. Margo, *Shawcross and Beaumont on Air Law*, chapter 36 paragraph 2 (1977).

<sup>46</sup> *Ibid.*, at 335.

<sup>47</sup> Piera, at 12. The paragraph also underlines States' sovereignty in determining conducts and applicable penalties, preventing any automatic application of the criminal code of the State of registration, see Boyle & Pulsifer, at 334.

<sup>48</sup> *Ibidem*.

<sup>49</sup> Boyle & Pulsifer, at 336.

<sup>50</sup> *Ibid.*, at 337.

<sup>51</sup> Article 1 Convention on International Civil Aviation.

<sup>52</sup> Article 13 TC63.

<sup>53</sup> Piera, at 13.

<sup>54</sup> Ginger, at 110.

Another hiatus might occur in cases of leased aircraft, as the State exercising jurisdiction under the Tokyo framework might not be the same of the aircraft operator.<sup>55</sup> Proposals were put forward to vest the State of the operator of jurisdiction in such circumstances, in addition to the State of registry, yet no reference was made in the final text of the Convention.

The unsolved questions of the 1963 regime led to the Montreal Protocol amendments, critically analysed in the next chapter, with a view to assessing their impact in regulating unruly behaviours.

#### **4. The solutions of the Montreal Protocol?**

As seen *supra*, a long path led to the adoption of the 2014 regime. Pursuant to the angle chosen for the analysis, this chapter inspects the provisions dealing with TC63 lack of definitions and jurisdictional vacuum, evaluating to what extent the Protocol regulatory technique is satisfactory.

##### **4.1. MP14 amendment: delineating conducts**

Article 15bis MP14 represents the first clarification on conducts endangering the good order and discipline on board in an international instrument.<sup>56</sup>

It is the author's belief that the provision represents a mild development and further steps are necessary as the margin for definitions, and the consequential lack of clarity, is still ample.

Much of the language derives from the Circular three-tier system, however the residual clause is not included, hence there is no safeguard instrument to capture undescribed conducts. This might leave unregulated new potential menaces on board, coming from e.g. the use of portable electronic devices.<sup>57</sup>

Moreover, despite the legal strength of a list placed in the Convention, the hortatory nature of the provision, deduced from the word "encouraged",<sup>58</sup> weakens its relevance. Furthermore, efforts in defining good order and discipline have not been undertaken, as no mention features in the Protocol. Given the examined relevance of such absence, this is a major shortcoming.

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<sup>55</sup> This raises problems also with regard to the powers of the aircraft commander being unlikely to have a minimum knowledge of the laws of the State of registration if the aircraft is operated under a dry lease arrangement. J. Balfour & O. Highley, *Disruptive Passengers: The Civil Aviation (Amendment) Act 1996 Strikes Back*, 22 *Air and Space Law* at 195 (1997) [hereinafter Balfour & Highley]. See also Boyle & Pulsifer, at 324.

<sup>56</sup> The list in the Resolution, feeble in terms of legal strength, as argued *supra*, was meant to supplement the conducts vaguely defined in the TC63 without derogating State Parties' implementing legislation. See Piera, at 29.

<sup>57</sup> See 2000 Boeing Aero Magazine [Interference from Electronic Devices](#) and EASA on [Portable Electronic Devices \(PED\) on board](#).

<sup>58</sup> According to the general rules of interpretation of treaties enshrined in Article 31 of the Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679.

Definitions at a supranational level are very sensitive especially because the characterization of offensive conducts varies among States, representing the values mirrored in their legal system. Nevertheless, without turning the Protocol in a criminalization framework, which would require extensive provisions around extradition and human rights protection,<sup>59</sup> the guidance in Article 15bis does not improve uniformity among domestic regimes. Without a definition on the relevant behaviours affecting the discipline on board, it may be also difficult to gauge the standard of conduct, either objective or subjective, of the air crew, a point which the Protocol has not addressed. In this respect, the main question is whether the actions are to be reviewed in light of the facts and circumstances known to her/him at the time that those actions were taken, thus applying a narrower threshold with a more subjective standard,<sup>60</sup> or a broad, objective standard of reason<sup>61</sup> is to be preferred.<sup>62</sup>

#### **4.2. MP14 amendment: addressing the jurisdictional hiatus**

As argued in §3.2, the apparent jurisdictional solution provided by TC63, entailed a jurisdictional vacuum. Addressing this concern, the Montreal Protocol adds a mandatory character to the exercise of jurisdiction, and both the State of landing and the State of the operator are competent to assert it.<sup>63</sup>

As for the latter, the choice is welcomed as it is also aligned with other air law international instruments focusing on criminal liability.<sup>64</sup>

As for the former, States' criticism was raised as landing depends on the aircraft commander authority, and thus the choice of the regime to be applied,<sup>65</sup> undermining legal certainty.<sup>66</sup> Nevertheless, a compelling argument in favour of the amendment is that risk of lawlessness as explained *supra* would threaten the integrity of the air transport system.<sup>67</sup>

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<sup>59</sup> Jennison, at 3.

<sup>60</sup> Leading case: *Zikry v. Air Canada*, C.F. 1716/05 (Haifa Magistrate Ct. Nov. 9, 2006) (Judge Tubi) (Israel).

<sup>61</sup> Leading case: *Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010) and *Cerqueira v. American Airlines*, 520 F.3d (1st Cir., 2008).

<sup>62</sup> See G. Chouest, *Eid v. Alaska Airlines*, 36 Air and Space Law 335 (2011) and J. Donnelly, *Unruly passengers on board aircraft: a review of the current liability regime* 24 Irish Criminal Law Journal 34 (2014).

<sup>63</sup> MP14 Article IV, new Article 3.

<sup>64</sup> E.g. Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague 16 December 1970, entered into force 14 October, 1971, 860 UNTS 105 / [1972] ATS 16 / 10 ILM 133, available on [UN Treaty Collection website](#); Article 5 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded at Montreal 23 September 1971, entered into force 26 January, 1973, 974 UNTS 177; 24 UST 564; 10 ILM 1151 (1971), available on [UN Treaty Collection website](#).

<sup>65</sup> J. Bailey, *Flying High Above the Law*, 2 Air and Space Law at 82 (1999).

<sup>66</sup> Especially when flights are diverted because of the disruptive incident. The discussions during the Diplomatic Conference led to the compromise solution of mandatory jurisdiction for the State of intended landing. See Jennison at 3 on article IV MP14, introducing Article 3, 2bis sub(a).

<sup>67</sup> Piera, at 14-15.

An alternative option could have been relying on the proactive approach of the State of registration in seeking extradition. Nevertheless, many States do not perceive disruptive behaviours serious enough to bear the costs of an extradition procedure.<sup>68</sup> Moreover, extradition must respect the double criminality rule, which can be highly difficult to comply with given the lack of common guidance on definitions.<sup>69</sup> The Protocol has also not introduced the principle *aut dedere aut judicare*,<sup>70</sup> proving to deal unsatisfactorily with this deficiency of the Tokyo Convention,<sup>71</sup> and leading to the exclusion of extradition as a valuable instrument to trigger.

The considerable improvements to Article 3 of the Convention, yet do not represent a full-fledged solution. In the Consolidated Text a system of priorities in the jurisdictional exercise is not developed. This lacuna is prominent considering that strong sentiment around its need was already expressed during the discussions on TC63.<sup>72</sup>

Moreover, despite new Article 3bis, the question is raised whether the provision is sufficient to comply with the subject of double jeopardy. At the time of the adoption of the Tokyo framework, a proposal was put forward in this regard and its wording is quite distant from today's MP14 correspondent Article. In fact, the 1962 Rome Legal Committee text proposal on Article 3 provided that:

- “1. Where a final judgment has been rendered by the competent authorities of one Contracting State in respect of a person for an offence, such person shall not be convicted in another Contracting State for the same act if he was acquitted or if, in the case of a conviction, the punishment was remitted or fully carried out, or if the time for the carrying out of the punishment has expired.
2. The provisions of paragraph 1 of this Article shall not apply if the person is a national or a permanent resident of the second State or if the act constituted an offence against the national security of such State, and its laws permit further trial.
3. Whenever, pursuant to the preceding paragraphs, a new punishment may be imposed by the competent authorities of another Contracting State, those authorities shall take into account the punishment or part of punishment already carried out in the first State.”

The Montreal Protocol in its Article V does not include any specific reference on this matter; however, *ne bis in idem* is a principle embedded in the great majority of States, hence its explicit reference in the final text should not be alarming.

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<sup>68</sup> Colehan, at 13.

<sup>69</sup> More extensively on the principles governing extradition P.M.J. Mendes de Leon, *Syllabus Aviation Security Law 2016-2017*, at 4 (2016-2017); I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law* at 391 (2012); A. Piera and M. Gill, *Will the New ICAO–Beijing Instruments Build a Chinese Wall for International Aviation Security?*, 47 *Vanderbilt Journal of Transnational Law* at 205 (2014).

<sup>70</sup> Consolidated framework Article 16.

<sup>71</sup> M. Milde, *International Air Law and ICAO*, at 232 (2012).

<sup>72</sup> Boyle & Pulsifer, at 329.

The Montreal Protocol appears to be an imperfect legal tool, trying to solve the jurisdictional gap on the one hand, still raising doubts on definitions on the other. The concluding remarks of the last chapter weigh MP14 shortcomings against the risk of lawlessness.

## 5. Concluding remarks: a passage to India

Shaping a legal response to address a new phenomenon entails several difficulties. This especially occurs in the case of unruly behaviours being acts with minor consequences on the ground, but that on board an aircraft can escalate into serious violence. Searching for an air law international instrument might cause frictions with States penal regimes and their *potestas* in defining offensive conducts.<sup>73</sup>

The international legislator has intervened amending the 1963 regime; the Montreal Protocol is a step in the right direction, nevertheless, a wide ratification is crucial for its success. States' inertia is hidden in the discussions on establishing the mandatory character of the State of landing exercise of jurisdiction, revealing that even when effective solutions are provided, States' concerns are hurdles yet to overcome.<sup>74</sup>

The risk of lawlessness is too alarming not to support the adoption of a worldwide framework; the author of this paper calls for a more robust legal response, especially when determining the conducts at stake. The severity of the phenomenon, undermining paramount concerns to the international civil aviation community, is deemed as a solid justification to establish a common and clear denominator for offensive conducts.<sup>75</sup>

Airlines have enhanced their coordination in the fields of prevention, management, and deterrence<sup>76</sup> with effective interim solutions shaping new policies and best practices, and also structuring training programmes for aircrew and ground service personnel,<sup>77</sup> highlighting the role played by airports, service providers, and public authorities.<sup>78</sup> These operational instruments,

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<sup>73</sup> *Ibid.*, at 335.

<sup>74</sup> Criticism is due to the risk of a multitude of trivial cases to deal with and to States' unwillingness of subjecting their citizens to a foreign legal system especially when unruly passenger incidents lead to a non-scheduled landing. *See* Jennison, at 2.

<sup>75</sup> Already in 1997, Balfour and Highley called for a "[...] Convention to be convened by ICAO to deal with these specific lower level problems which are caused not by hijackers and terrorists but by ordinary disruptive passengers whose actions are inflamed by drink or drugs or simply the stress of flying". *See* Balfour & Highley, at 200.

<sup>76</sup> ICAO, A39-WP/139 at 3 emphasises the deterrent value of the right of recourse in Article XIII introducing Article 18bis MP14. For the same purpose, ICAO developed samples notices to adequately inform passengers on disruptive behaviours.

<sup>77</sup> IATA "Unruly Passenger Prevention and Management" *op. cit.*

<sup>78</sup> IATA Fact Sheet, *op. cit.*, contains reference to restaurant/bar operators' role in providing their staff with responsible service of alcohol training to prevent passengers' intoxication.

despite not being able to substitute a legal response, could represent a useful starting point to delineate unruly conducts at a wider extent in a prospective international convention. They could operate in a manner comparable to soft law in public international law, thus instruments that despite their non-binding nature, have a normative value and can even lead to the development of customary international law.<sup>79</sup>

In this respect, a recent initiative launched by the Ministry of Civil Aviation of India and the Director General of Civil Aviation (DGCA) can set the example on how to develop effective responses through a bottom-up approach.<sup>80</sup>

The Indian Institution has drafted a Civil Aviation Requirements (CAR)<sup>81</sup> acknowledging the importance of tackling unruly behaviour to the greatest extent, not only those occurring on board an aircraft but also during embarkation and disembarkation. The proposed framework has been made available for consultations for thirty days and by the 30<sup>th</sup> June, the government was expected to finalise it.<sup>82</sup>

The regulatory proposal is an endeavour to set a step-by-step definition of conducts according to their severity: the first level of misdemeanour comprises verbal harassment or physical gesture; the second encompasses physically abusive behaviours, e.g. pushing, hitting, inappropriately touching; the third includes life-threatening acts, e.g. damage to aircraft operating system, assault to flight compartment.<sup>83</sup>

Each category entails a different flying ban,<sup>84</sup> ranging from three months to two years.<sup>85</sup> The ban imposed by an airline does not affect other carriers' discretion to decide independently on

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<sup>79</sup> See B. Conforti, *The Law and Practice of the United Nations* (1996) and D. Thürer, Soft Law, in [Max Planck Encyclopedia of Public International Law](#), as updated in June 2017.

<sup>80</sup> The Minister of State for Civil Aviation Jayant Sinha explained that the increase in incidents of air passengers' unruly and disruptive behaviour called the ministry to act pro-actively and pre-emptively, see "[No-Fly Draft Rules in Place: Unruly Passengers May Be Suspended from Flying for up to 2 Years](#)", 5<sup>th</sup> May 2017. During the last spring in fact, several incidents concerned members of parliament causing a ruckus in national airports and repeated travel bans.

<sup>81</sup> The Civil Aviation Requirements is available on the [DGCA website](#).

<sup>82</sup> However, due to the complexity of the issue, discussions are still ongoing at the time of writing. The talks appear to be in a stalemate on the inclusion of airline crew and ground staff, see "[No Decision on No-Fly List for Unruly Passengers](#)", 28<sup>th</sup> June 2017.

<sup>83</sup> Article 4(10) CAR, see also "[Draft Civil Aviation Requirements Issued on Handling of Unruly and Disruptive Passengers](#)", 6<sup>th</sup> May 2017; "[DGCA Rules on No-Fly List: Regulations Need to Balance Passenger Rights Too](#)", 25<sup>th</sup> May 2017.

<sup>84</sup> On the legal implications of governmental and airlines' bans see Mann.

<sup>85</sup> Article 8(1) CAR.



the same passenger/group of passengers.<sup>86</sup> It is ensured a central mechanism held by both the government and the DGCA in order to oversee the national no-fly list.<sup>87</sup>

The rules laid in the CAR are a great example of the need for legal certainty, as they not only try to define the conducts but stipulate that the conditions of carriage shall include statutory warnings on such disruptive behaviours. Moreover, they include an obligation for airlines to adopt a sample incident report to collect evidence with a view to streamlining the communications with the law enforcement authorities.<sup>88</sup>

Furthermore, the draft rules structure a procedure for these incidents so as to guarantee an independent supervision:<sup>89</sup> the airline starts the process by filing a complaint,<sup>90</sup> and a three-member committee is in charge to review it and decide on the ban within ten days of the complaint; an appeal provision is also included for the passenger.<sup>91</sup>

Despite these great achievements, there are some unanswered questions. The CAR prescribes that behaviours considered unruly are prominently displayed in the airport terminal buildings accompanied by warnings that they can invite penal action, but it does not emerge whether the obligations to give such information is attributed to the airport operator or the air carrier. Furthermore, from the ongoing discussion in the Indian scenario, it emerged that there is no consensus on whether or not criminalise unruly behaviours,<sup>92</sup> and how to deal with crew's unruly conduct. The former underlines the severity of the phenomenon, triggering the *extrema ratio* of the penal response, the latter captures how it would be better to phrase the problem in terms of conduct rather than actors, as unruly *behaviours* rather than solely *passengers* are the issue to be dealt with.

At the time of writing, the exchange of views on the CAR is still in progress and IATA is reviewing the draft policy to ensure it is aligned with the industry's position. What the development of Indian air travel captures is the need for legal certainty, which requires to take steps to circumscribe the conducts and whether or not give them a status under criminal law.

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<sup>86</sup> See [“Passengers Unhappy, Call No-Fly List For Unruly Passengers Tilted Towards Airlines”](#), 17<sup>th</sup> May 2017.

<sup>87</sup> *Supra* fn. 82.

<sup>88</sup> Article 6(5) CAR.

<sup>89</sup> See [“India Plans 2-Year 'Flying Ban' For Unruly Passengers”](#), 6<sup>th</sup> May 2017.

<sup>90</sup> The passenger is identified as unruly after an inquiry performed by a committee constituted by the airline at stake. A person can be identified as unruly also by security agencies, however it appears that individuals put under the no-fly list by the security agencies would not be given the right to appeal.

<sup>91</sup> Article 6 CAR.

<sup>92</sup> This choice has been pursued by the Nigerian Civil Aviation Authority for passengers attacking airline officials see [“Unruly Passengers to Face Criminal Charges – NCAA”](#), 8<sup>th</sup> May 2017.

The approach taken by the Indian authorities could be adopted on the international scale creating a working group, not within ICAO only but also under the aegis of IATA. The civil aviation authorities of the member States could give their contribution with their best practices, while airlines' associations could share the recent overarching measures developed over time.

Creating a multi-stakeholders' platform and discuss unruly behaviours in a bottom-up manner is much more effective than maintaining the discussion at the higher level of member States, too much concerned about not giving up their sovereignty to grasp the practical threats and cost disruptive behaviours cause. This remark is not meant to criticise the international efforts pursued so far, but rather face the pitfalls they present and put forward stepping stones for improvement.

The international legislator has strived towards a framework for unruly passengers. The Montreal Protocol is an important regulatory effort and its significance should not be underestimated for the low number of ratifications. Far from providing a one-size-fits-all solution, it certainly discloses opportunities for refinement and the momentum its adoption has opened the door to should be leveraged to take the legislation one step further considering the bottom-up efforts already in place by airlines' associations and civil aviation authorities worldwide. In calling for an international framework, the author supports a multi-stakeholder approach to make the regulatory efforts fruitful and build upon the current shortcomings of the Protocol, hoping to obtain not simply an amended, but a better Tokyo Convention.

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