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THE TOKYO CONVENTION 1963

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Abstract

Purpose: the main aim of this paper is to clarify several issues of conflicting jurisdiction over crimes committed on board aircraft in flight. The study will examine the way in which the Tokyo Convention attempts to provide justice in the event of aviation security violations, and discuss its effectiveness in preventing such offences in the future. **Methods:** formal legal and case-study methods together with inductive reasoning, and comparison were used to analyse the legislation in the area of jurisdiction over crimes and other offences committed on board aircraft in flight. **Results:** it follows from the study that although the Tokyo Convention has contributed considerably to the establishing of clearer rules of jurisdiction over offences committed on board aircraft, considerable deficiencies of this treaty remain. The results have important implications for international policy-making. **Discussion:** the results of the study reveal several weaknesses of the Tokyo Convention. Firstly, it does not provide any definition or list of offences to which it applies, instead it relies on national penal laws to do so. In addition, the 'freedom fighter exception' and the lack of a strong enforcement mechanism may prove to impede the effective attainment of the Tokyo Convention's main objectives – that is, to provide justice in the event of aviation security violations, and prevent such offences in the future. Therefore, further improvement in aviation security legislation is necessary to ensure that it is effective and adequate in the challenges faced today.

Keywords: aviation offences; aviation security; in-flight crimes; international aviation law; jurisdiction; Tokyo Convention.

1. Introduction

Air transport is an integral part of the globalized world economy. By facilitating the growth of international trade, tourism and international investment, and generating employment not only in the aviation sector but also in other industries, it plays one of the key roles in developing and fostering modern international relations.

One of the most important international aviation law instruments, the Chicago Convention, provides that every aircraft has the nationality of the State in which it is registered [1]. On this basis, it is generally accepted that a nonexclusive right to

exercise prescriptive jurisdiction over aircraft rests with the state to which such an aircraft is registered. However, questions of enforcement and curial jurisdiction with regard to crimes committed on board aircraft in flight are more complex. This discussion focuses on the Tokyo Convention's attempts to provide clarity to such issues, and its effectiveness in doing so.

2. Previous research and publications

A number of researchers have worked in the area of international aviation law, and in particular, aviation security law; among them are A. Abramovsky,

O.M. Grygorov, B.F. Havel, J. Huang, J.G. McCarthy, M. Plachta, V.I. Ryzhy, G.S. Sanchez, W.P. Schwab, S. Shubber, J.R.O. Wilberforce. However, with the rapid growth of the airline industry and recent developments in international affairs, there is a need for an up-to-date review and analysis of the regulatory framework in aviation security law.

3. Research tasks

This paper aims to examine the current mechanism of legal regulation with regards to jurisdiction over crimes and other offences committed on board aircraft in flight. It also seeks to identify existing gaps in regulation of aviation security so that the results of the study could be taken into account when developing new regulatory frameworks.

4. Research results

Prior to the Tokyo Convention,¹ there existed many opportunities for a person committing an offence on board aircraft to go unpunished due to serious gaps within or the absence of relevant legislation [2]. For example, in *U.S. v Cordova*, on a flight from Puerto Rico to New York, operated by an aircraft registered in the U.S., Cordova engaged in a fight with another passenger while the aircraft was flying over the high seas [3]. Attempts by crew members to stop the fight resulted in a stewardess being struck, and the pilot bitten by Cordova. When the aircraft landed at New York, Cordova was taken into custody and charged with assault. However, at that time there was no federal jurisdiction to punish offences committed on board aircraft over the high seas. Under the Federal law of that time, U.S. criminal law was applicable to crimes committed in the territory of the United States and those committed on vessels on the high seas [4, p. 25]. It was noted in *U.S. v Cordova* that an aircraft was not a 'vessel' and that 'on the high seas' does not mean 'over the high seas'. Because of this gap in U.S. legislation, Cordova managed to escape punishment. However, soon afterwards such a deficiency in the U.S. legislation was remedied [5].

Conversely, when more than one state asserts jurisdiction with regard to a particular offence committed on board aircraft in international flight, a conflict of jurisdictions would normally occur. As an example, let us consider the following hypothetical

situation: An aircraft registered in Ukraine and operated by a Turkish carrier was flying from New York to Istanbul. At the time when the aircraft was flying over Germany, two passengers: A (a national of the Russian Federation) and B (a U.S. national), engaged in a fight, which resulted into passenger A causing grievous bodily harm to passenger B. The aircraft commander decided to land in the Czech Republic before reaching their final destination in order to provide medical aid to passenger A and remove passenger B from the flight.²

In the aforementioned hypothetical instance, Germany could claim jurisdiction on the basis of the territorial principle, as the State whose territory the aircraft was overflying at the time when the offensive act was committed. The territory of a state includes its land area, territorial waters, and the airspace above its land and sea territory [6]. It therefore follows that where an aircraft is flying over the high seas or above *terra nullius*, the territorial principle appears to be ineffective. Moreover, it is not always possible to accurately determine the position of the aircraft at the moment when the offence was perpetrated. On the basis of the law of flag, Ukraine may also claim jurisdiction, as the state of registration of the aircraft on board which the incident occurred.³ On the other hand, the flight was operated by a Turkish carrier, which makes it possible for Turkey to claim the right to assert jurisdiction in this case. As the landing state, the Czech Republic is equally entitled to claim jurisdiction over the alleged offender. Indeed, due to the physical control of the alleged offender by the landing state, it may appear that it holds an informal priority in exercising its jurisdiction over the committed offence. It should be noted, however, that acts that constitute an offence in State 1 may not be considered as an offence in State 2. Additionally, the U.S. may invoke the passive personality principle⁴ to claim jurisdiction due to the fact that this hypothetical offence was committed against a U.S. national. Conversely, the Russian Federation, as the national state of the offender, might also claim jurisdiction on the ground that its Criminal Code

¹ Convention on Offences and Certain Other Acts Committed on Board Aircraft (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention].

² The aircraft commander is authorised to disembark in the territory of any state in which the aircraft lands any person if he has reasonable grounds to believe that such person has committed, or is about to commit an offence on board aircraft. See Tokyo Convention, art. 8(1).

³ In international aviation, the flag State refers to the State of registration.

⁴ Passive personality principle allows a State to assert jurisdiction with regard to the offence committed against its national anywhere in the world [7, pp. 301-302].

applies to criminal offences by all Russian nationals, regardless of whether the act in question took place in the territory of the Russian Federation or elsewhere abroad [8].

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, as formalised at Tokyo in 1963, aims to eliminate such gaps in jurisdiction by establishing international rules and promoting the adoption of the adequate national legislation of states parties as applicable to offences committed on board international flights, with a general aim to promote aviation security and prevent impunity. 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 on board’ and to other ‘offences against penal law’ [2, art. 1].

By vesting the State of registration of the aircraft with a nonexclusive right to exercise jurisdiction over offences and acts committed on board, the Tokyo Convention endeavours to provide a solution to situations where conflict of jurisdictions exists [2, art. 3]. Moreover, Article 3(2) provides that the state of registration should seek to establish its jurisdiction over such offences. It follows, therefore, that although there is no specific provision governing the priority of states in exercising jurisdiction, the Convention implies a priority of the state of registration. However, this does not mean that such a state will always be the first one to assert its jurisdiction. Article 4 provides a list of cases when any state party to the Convention may interfere with an aircraft in flight in order to exercise its jurisdiction over offences committed on board: where the offence has effect on the territory of that state; when it has been committed by or against the national of such one state; when it is an offence against the security of that state, or consists of a breach of that state’s navigation rules, or when the exercise of jurisdiction is necessary to comply with obligations under a multilateral agreement [2, art. 4].

It can be argued that some provisions of the Tokyo Convention impair its overall efficiency. One of the main arguments in favour of this view is the fact that the jurisdiction *ratione temporis*⁵ is limited by the Tokyo Convention to the time period when an aircraft is ‘in flight’, and according to Article 1(3), ‘an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run

ends’. It is submitted that such a definition constitutes a serious flaw of the Tokyo Convention, because it does not take into account a possibility of an incident occurring while the aircraft is taxiing to the runway for take-off following embarkation or back to the terminal for disembarkation after landing. Thus, for example, if a person attempts to unlawfully seize control over the aircraft while it is taxiing to the runway, this would not be considered an offence under the Tokyo Convention. By contrast, a broader definition of when to consider an aircraft to be in flight was proposed in 2014 at ICAO International Conference on Air Law: ‘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’.

Secondly, although it introduces a category of strict liability crimes in Aviation Security Law, the Tokyo Convention does not provide any definition or list of offences to which it applies, thus relying on national penal laws to do so [9, p. 194].

Thirdly, the ‘freedom fighter exception’ provided for by Article 2 means that no state is obliged to extradite or prosecute a person who has committed an offence of a political nature. Hence it is conceivable that aviation criminals may seek a safe haven, so to speak, in a state sympathetic to their political motivations. This weakness may be addressed by excluding such a provision from the text of the convention in order to prevent impunity with regards to criminals violating aviation security on political, religious or racial grounds.

Another major weakness of the Tokyo Convention is that it lacks a strong enforcement mechanism. This is particularly evident with respect to the principle of *aut dedere aut judicare*⁶, whereby if the landing state with physical control over an alleged offender does not extradite that person, it should exercise its jurisdiction and initiate criminal proceedings against him or her. Article 16(2) provides, however, that ‘nothing in this treaty should be understood as obliging any State party to extradite the offender’, and although the landing state is obliged to ‘make a preliminary enquiry into the facts’, there is no direct requirement in the Convention to proceed with further prosecution. This appears to be at odds with the *aut dedere aut judicare* principle above, thus leaving opportunities

⁵ Latin phrase for jurisdiction by reason of time.

⁶ Latin phrase for ‘extradite or prosecute’, meaning that a State is obliged to either extradite the alleged offender to face trial in another State that has requested his or her extradition, or conduct an investigation and prosecute the offender when the latter is physically present within its territory.

for offenders to escape unpunished. However, a bilateral extradition treaty may exist between states providing for the obligation to extradite.

An example of the perceptible step towards fostering compliance with aviation security treaties may be seen in the issuance in 1978 of the Bonn Declaration on Hijacking, where major aviation states declared their intention to cease air services to and from 'any country that refuses extradition or prosecution of those who have hijacked an aircraft and/or do not return such aircraft' [10]. Here, however, because of the non-binding nature of the declaration, any state not willing to abide by the principles declared will appeal to their recommendatory character.

Last but not least, the Tokyo Convention does not provide for any efficient dispute settlement mechanism, except for arbitration. But it then entitles any state to make a reservation should they not wish to be bound by the arbitration provision [2, art. 24].

5. Conclusion

Ultimately, although the Tokyo Convention has contributed considerably to the establishing of clearer rules of jurisdiction over offences committed on board aircraft, it is evident that considerable deficiencies of this treaty remain. Consequently, in the advent of an ambiguous situation, this may prove to impede the effective attainment of the Tokyo Convention's main objectives – that is, to provide justice in the event of aviation security violations, and indeed prevent such offences in the future. Further improvement of the Tokyo Convention is therefore necessary to eliminate gaps in regulation

and ensure that it is effective and adequate in the challenges faced by contemporary aviation security.

References

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I.M. Сопілко, Є.О. Шевчук. Юрисдикція щодо правопорушень вчинених на борту літака під час польоту за Токійською конвенцією 1963

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Мета: основна мета даної статті полягає в уточненні деяких аспектів юрисдикції щодо злочинів та інших правопорушень вчинених на борту повітряного судна під час польоту. У статті розглядається правовий механізм регулювання авіаційної безпеки відповідно до Токійської конвенції 1963 року, а також оцінюється його ефективність щодо попередження правопорушень проти авіаційної безпеки у майбутньому. **Методи:** для аналізу правового регулювання у сфері юрисдикції щодо злочинів та інших правопорушень, вчинених на борту повітряного судна під час польоту, використано метод індукції, системний підхід, формально-юридичний та case-study методи. **Результати:** з дослідження випливає, що хоча Токійська конвенція внесла значний внесок у встановлення більш чітких правил юрисдикції щодо злочинів та інших правопорушень, вчинених на борту повітряних суден, вона не є досконалою і містить певні недоліки. Таким чином, законодавство у сфері юрисдикції щодо злочинів та інших правопорушень, вчинених на борту повітряного судна під час польоту, потребує доповнення та вдосконалення. **Обговорення:** результати дослідження дозволяють виділити основні недоліки Токійської конвенції. По-перше, Конвенція не надає чіткого визначення або переліку злочинів та інших правопорушень, до яких вона застосовується; натомість у цьому питанні вона покладається на

внутрішні закони держав. Крім того, наявність виключення про злочини політичного, расового або релігійного характеру ("freedom fighter exception") і відсутність дієвого примусового механізму може стати перешкодою для досягнення основних цілей Конвенції – забезпечення правосуддя у разі порушення авіаційної безпеки, а також запобігання подібним злочинам та іншим правопорушенням у майбутньому. Таким чином, подальше вдосконалення законодавства в галузі авіаційної безпеки є необхідним для забезпечення його ефективності та відповідності викликам сьогодення.

Ключові слова: авіаційна безпека; авіаційні правопорушення; злочини на борту повітряного судна; міжнародне повітряне право; Токійська конвенція; юрисдикція.

И.Н. Сопилко, Е.А. Шевчук. Юрисдикция в отношении преступлений совершенных на борту воздушного судна во время полета на согласно Токийской конвенции 1963

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Цель: основная цель данной статьи заключается в уточнении некоторых аспектов юрисдикции в отношении преступлений и других правонарушений совершенных на борту воздушного судна во время полета. В статье рассматривается правовой механизм регулирования авиационной безопасности в соответствии с Токийской конвенцией 1963 года, а также оценивается его эффективность в предупреждении правонарушений против авиационной безопасности в будущем.

Методы: для анализа правового регулирования юрисдикции в отношении преступлений и других правонарушений, совершенных на борту воздушного судна во время полета, используется метод индукции, системный подход, формально-юридический и "case-study" методы. **Результаты:** несмотря на тот факт, что Токийская конвенция внесла значительный вклад в установление более четких правил юрисдикции в отношении преступлений и других правонарушений, совершенных на борту воздушных судов, она не является совершенной и содержит ряд недостатков. Таким образом, законодательство в сфере юрисдикции в отношении преступлений и других правонарушений, совершенных на борту воздушного судна во время полета, требует дополнений и совершенствования.

Обсуждение: результаты исследования позволяют выделить основные недостатки Токийской конвенции. Во-первых, Конвенция не содержит конкретного определения или перечня преступлений и других правонарушений, к которым она применяется; в этом вопросе она полагается на внутренние законы государств. Кроме того, наличие исключения о преступлениях политического, расового или религиозного характера ("freedom fighter exception") и отсутствие действенного принудительного механизма может стать препятствием для достижения основных целей Конвенции – обеспечения правосудия в случае нарушений авиационной безопасности, а также предотвращения подобных преступлений и правонарушений в будущем. Таким образом, дальнейшее совершенствование законодательства в области авиационной безопасности необходимо для обеспечения его эффективности и соответствия потребностям современности.

Ключевые слова: авиационная безопасность; авиационные правонарушения; международное воздушное право; преступления на борту воздушного судна; Токийская конвенция; юрисдикция.

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