Unruly Passengers and Passenger Rights

A legal perspective on handling unruly behaviour taking into account the rights of passengers

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Abstract

Chapter 1 of this thesis will describe the problem of unruly passengers and try to outline and explain some of the possible reasons for this phenomenon. Afterwards, the existing legal system will be analysed and scrutinized for its effectiveness. Currently, the system to prosecute unruly passengers does not govern the problem to its whole extent so that many offences, especially minor ones, generally stay unpunished. In addition, it contains several loopholes and States do not provide sufficient law enforcement. This is partly due to insufficient rules of jurisdiction since powers of jurisdiction and prosecution can be allocated to several States. After this analysis, with reference to the ICAO proposal on how to solve the problem, suggestions will be made for the improvement of the existing system in order to govern the problem as a whole. Finally, the question of how to implement such improvements will be addressed.

Chapter 2 will deal with passenger rights that are applicable to the problem of unruly passengers. Therefore, the rights of fellow passengers in terms of civil liability of the airline and of an unruly passenger will be outlined. Next, the rights of an unruly passenger himself in cases of mistreatment and blacklisting will be addressed. Although the unruly passenger breaks the law he possesses rights, which must be respected under the rule of law. Finally, a connection between this phenomenon and the "passenger-rights movement" will be drawn.

Résumé

Le chapitre 1 de cette thèse décrit la question des passagers indisciplinés ainsi que tente d'indiquer et d'expliquer les raisons possibles de ce phénomène. Par la suite, je vais procéder à l'analyse du système juridique existant puis, je vérifierai son effectivité. Actuellement, le système incriminant les passagers indisciplinés ne traite pas le problème comme un tout et plusieurs infractions, et particulièrement les plus bénines, restent impunies. De plus, le système contient de nombreux échappatoires et les États ne fournissent pas d'exécutions forcées suffisantes de la loi. Ceci est en partie dû à des règles insuffisantes relatives à la juridiction depuis que les pouvoirs de juridiction et de poursuites judiciaires peuvent être alloués à plusieurs États. Suite a cette analyse, en référence à la proposition de l'OACI sur comment de résoudre le problème, des suggestions seront faîtes sur la manière d'améliorer le système actuel afin de régir le problème dans sa totalité. Enfin, la question de comment mettre on œuvre de telles améliorations sera abordée.

Le chapitre 2 traite des droits du passager applicables aux passagers indisciplinés. Ainsi, le régime de la responsabilité civile des compagnies aériennes et des passagers indisciplinés seront indiqués. Ensuite, les droits du passager indiscipliné lui-même dans les cas de mauvais traitement et de création de listes noires seront abordés. Bien que le passager indiscipliné ne respecte pas la loi, il possède des droits qui doivent être respectés selon la règle de droit. Enfin, un lien entre ce phénomène et le « mouvement des droits-passagers » sera dressé.

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Introduction

I. The problem of unruly/disruptive passengers or air rage

In the past few years terms of "unruly" or "disruptive passengers" and "air rage"[1] enriched the agendas of ICAO, IATA, airlines and national authorities. During that time the problem of unruly behaviour on board an aircraft has become a major concern for aviation in general and airlines in particular. Incidents range from general disobedience to cabin crew trying to enforce key regulations affecting on board safety[2] to offensive behaviour, threatening, sexual harassment and the most violent physical aggression towards other passengers, crew members and even pilots. In 1998, Peter Reiss spoke of an approximate four-fold increase of such incidents within the past three years.[3] According to a survey by the International Air Transport Association (IATA) there were 1132 incidents reported in 1994, 2036 in 1995, 3512 in 1996 and 5416 in 1997.[4] But this does not reflect the whole extent of incidents with unruly passengers, since "there are no empirical databases maintaining accurate statistics on a regular, industry-wide basis".[5] Hence, there is an estimate that the numbers reported only reflect some 10 percent of the actual cases.[6] Unlike most other public transportation, aviation seems to be the prime

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1 For the purpose of this thesis the problem will be addressed as "unruly passengers or unruly behaviour".

2 J. Balfour & O. Highley, "Disruptive passengers: The Civil Aviation (Amendment) Act 1996 Strikes Back" (1997) XXII Air & Sp. L. 194.

3 See P.T. Reiss, "Increasing incidence of "air rage" is both an aviation security and safety issue" ICAO Journal 53:10 (December 1998) 13.

4 See J. Huang, "ICAO study group examines the legal issues related to unruly airline passengers" ICAO Journal 56:2 (March 2001) 18.

5 S. Luckey "Air Rage" Air Line Pilot 69:8 (September 2000) 18; compare S.J. Prew "Training to combat air rage" CAT-Magazine (June 1999) 34.

6 Luckey, ibid. at 19.

target of this behaviour. But why aviation and why is it such a major concern? To answer that question the scope of the problem has to be determined by describing what actions constitute unruly behaviour. After that, its "special" impact on aviation will be described.

II. Definition

Although referring to the same problem, the terms "unruly passenger", "disruptive passenger" and "air rage" are all used to describe it. This stems from the fact that there are no guidelines as to what should be called "disruptive behaviour".[7] Therefore, the need for a comprehensive understanding of the problem requires a definition of what these apparently "different" terms focus on. One can get a very good first glance of the extent of the problem just by a literal interpretation of the above terms:

"Unruly passenger" means a person who is "not easy to manage or to control"[8]. In its literal sense it can also be understood as any passenger, who does not comply with the rules applicable to his travel by plane. Such rules can comprise legal regulations but also crew orders to secure safety on board.

The term *"disruptive"*, defined as to "disturb the public peace, undermine safety"[9] or "causing difficulties to proceed"[10] seems to refer to passengers causing problems or interruptions in the process of organized air travel. It does not clearly refer to or content a breach of legal norms or illegal behaviour. Therefore, the term *"disruptive"* reflects the problem from a more factual and therefore broader point of view.

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7 Prew, supra note 5.
8 *Oxford Advanced Learner's dictionary of Current English*, 5th ed., s.v. <unruly>.
9 *Black's Law Dictionary*, 7th ed., s.v. <disorderly conduct>.
10 *Oxford Advanced Learner's dictionary of Current English*, supra note 8, s.v. <disruptive>.

The term *"air rage"* cannot be defined literally. But authors made the effort to define this term as the following:

> "The term air rage has been coined to describe 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 motivation factors which endanger the flight crew and/or other passengers and potentially jeopardize the safety of the aircraft itself."[11]

Subsequently, "air rage" refers to "rage-like" physical behaviour, where a passenger gets completely out of control. This uncontrollable behaviour can lead to physical attacks on crewmembers or fellow passengers causing harm and damage. The understanding of this term thereby introduces a violent component to the problem.

Each term from its literal understanding seems to define a different scope of behaviour, which in the worst case can jeopardize safety of an aircraft. The use of at least three different terms for the same problem and the wide variety of behaviour defined by them outlines the extent of the problem. It shows best that these terms describe a vast extent of different behaviour that can range from causing only discomfort to putting lives at risk.[12]

However, the abovementioned definition provides for a potential jeopardy of the safety of the aircraft. This condition thereby narrows the actions governed, since behaviour,

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[11] N.L. Firak & K.A. Schmaltz, "Air Rage: Choice of Law for Intentional Torts Occurring in Flight Over International Waters" (1999) 63 Alb. L. Rev. 1 at 7.

[12] International Transport Workers' Federation, Civil Aviation Section, *Air Rage – The Prevention and Management of Disruptive Passenger Behaviour* (2000) 5. [hereinafter: ITF]

which "only" causes difficulties will not necessarily potentially jeopardize the safety on board. A passenger, who pinches the flight attendant's bottom, touches her breasts and afterwards grasps her by the hips while simulating sexual intercourse[13] harasses her sexually and keeps her from fulfilling her duties. But the distraction of one flight attendant does not necessarily create a potential danger to the aircraft in every case, so that the perpetrator would not be considered as "unruly" under this definition. According to this criticism, the definition

> "Every action that disrupts the safe operation of the flight"[14]

does not help much further in describing the problem properly, since the "disruption of the safe operation of a flight" from its literal sense requires "potential jeopardy" as well. Therefore this definition does not cover the problem to its whole extent either. As a result, a broader definition will be more appropriate to include any unruly behaviour:

> "A passenger who interferes with aircrew duties and/or the quiet enjoyment of fellow passengers or creates an unsafe flight environment".[15]

However, the problem of unruly passengers does not only consist of a wide variety of demeanours on board an airplane. Although the general understanding usually refers to such on-board incidents, the "geographical" scope already begins at airports: Passengers

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[13] S.J. Prew, "Unruly Passengers " 2:2 Aviation Security International (June 1997) 4.
[14] See ITF, supra note 12.
[15] D.J. Borillio, "Air Rage: Modern Day Dogfight" FAA Aviation News 39:2 (March 2000) 14.

showed disturbing or unlawful behaviour already at airline/check-in counters, where agents were threatened or attacked by passengers.[16]

III. Impact of unruly passengers

In December 2000, a Kenyan stormed into the cockpit of a British Airways Boeing 747 passenger jet and started struggling with the pilot. During the struggle the autopilot became disengaged forcing the plane into a nosedive which nearly ended in a crash.[17]

On an All Nippon Airways flight a deranged perpetrator killed the captain after he took a flight attendant as hostage to gain access to the cockpit. He stabbed the captain in the neck, because he wanted to fly the plane.[18]

A British Airways flight from Brazil had to make an emergency landing in Tenerife after a passenger went berserk and tried to open a door over the Atlantic.[19]

Other examples of unruly behaviour, less dramatic, include a passenger that kicked a US flight attendant in the small of her back causing considerable damage, because the flight attendant asked him to stop smoking on a non-smoking flight.[20] A first class passenger defecated on a serving cart, because he was refused more alcohol.[21] And a Saudi princess choked and scratched a flight attendant, because in her view she was not served drinks fast enough.[22]

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16 "Bar Violent Passengers from U.S. Airlines, says Bethune" Aviation Week & Space Technology 151:5 (2 August 1999) 23.
17 "Kenyan held in air drama 'may fly soon' " *Gulf News* (8 January 2001) 5; "Mid-air fight in BA cockpit" *Gulf News* (30.December2000) 3.
18 Luckey, supra note 5.
19 "Prevention is better than cure" Airline Business (February 1999) 36.
20 Prew, supra note 13 at 4.
21 Ibid.
22 Ibid.

In recent years, incidents like those mentioned have received more and more public attention. The sudden awareness of this problem has mainly resulted from the dramatic increase of incidents involving unruly passengers.[23] But the problem of unruly passengers is not only a recent one. One of the first cases of unruly behaviour was already registered in 1948. In the famous case of *US vs. Cordova (and Santano)*[24], Mr. Cordova and Mr. Santano were highly intoxicated, when they boarded a flight in San Juan, Puerto Rico with destination New York. While in-flight, they continued to consume alcohol on board, which they had brought in privately. Over the high seas, an argument broke out between the two men. Watched by other passengers, the crowd gathering in the back of the plane caused the aircraft to climb steeply. When the pilot decided to interfere in the fight he was attacked by Cordova who bit into his shoulder and knocked down the stewardess. After he was overpowered the crew locked him up for the rest of the flight.

These examples of unruly behaviour describe quite well the impact and the importance of unruly passengers on aviation. If, however, the numbers of incidents are put in relation to the total number of passengers travelling every year, the percentage seems negligible. Unruly passengers represent about 0.000006 – 0.000018 per cent of the annual passenger load.[25] As a result, the number of incidents involving unruly passenger in aircraft are the lowest of any public space.[26] An airplane is safer than any other public space, even

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[23] Huang, supra note 4 at 18.
[24] *US vs. Cordova*, 89 F. Supp. 298 (E.D.N.Y. 1950)
[25] F. Kahn, "Air rage syndrome" (2000) 4:3 Aviation Quarterly 142.
[26] "Unruly passenger challenge airlines" Aviation Week & Space Technology 151:17 (25 October 1999) 60.

churches, places of employment and certainly the sidewalk.[27] But although these numbers seem to be minimal, the problem is a major one. The importance of the problem can therefore not rest upon statistics, but has to stem from something else.

Because of its nature, aviation is extremely sensitive to any disruption. It is the crew who mainly guarantees the aircraft flight safety. Interfering with the crew's duties by unruly behaviour can therefore cause serious disturbance in the operation of the aircraft. Therefore, such interference with on-board procedures may threaten the aircraft flight safety and thereby the lives of the persons on board. "Eventually, one of theses violent incidents could end up in the cockpit and result in a catastrophic hull loss and the death of everyone on board."[28] It is this threat to human lives which makes unruly behaviour a major issue for airlines and puts it in the focus of public interest.

Another reason for public awareness of the problem stems from the aircraft crews themselves. Since they are in the "first line of fire" if a passenger behaves unruly, they often are the aim of passenger's aggression.[29] This can result in personal injury, sexual harassment or other harm to the flight attendant. Although this interferes with the flight attendant's duties and would therefore indirectly threaten passengers' lives, the violation of the flight attendant's personal rights is reason enough to make unruly behaviour a major issue. For this reason flight attendants and their unions pursue a campaign to force all parties like airlines, governments and law enforcement agencies to act.[30]

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[27] Ibid.

[28] Luckey, supra note 5 at 18.

[29] P. Sparaco "Flight Attendants target Zero Air Rage" Aviation Week & Space Technology 153:3 (17 July 2000) 51; "Disruptive Passengers Top List of Cabin Safety Concerns" Air Safety Week 14:11 (20 March 2000) 5.

[30] See ITF, supra note 12; "Disruptive Passengers Top List of Cabin Safety Concerns", ibid.

The main reason for the importance of the problem of unruly passengers stems from the threat to the lives of the passengers. The suffering flight crews have to bear is another reason, which is indirectly linked to the first one, as well. Noticing that they neglected and underestimated the topic, that the crews were untrained to handle and control the problem and that lives of passengers were endangered, the parties involved became aware of this phenomenon. But although many efforts have been made it is still not quite clear how to deal with unruly passengers from the legal point of view.

IV. Reasons for unruly behaviour

The first task to solve a problem is to examine what the reasons for this problem are. With identified causes, one can choose effective and efficient remedies to prevent and to repress it. Therefore it is the first objective to find out what causes people to become unruly on board an aircraft.

A study done by the London Guildhall University[31] tried to examine the problem and the airlines' reactions. Out of 400 questionnaires mailed out to airlines, 197 came back on time and were usable.[32] The analyses of these questionnaires revealed the following reasons for unruly behaviour from the perspective of airlines:

- Too much alcohol (88 per cent);
- Passenger's demanding or intolerant personality (81 per cent);
- Flight delays (78 per cent);

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[31] London Guildhall University "Survey of the world's airlines highlights various approaches to handling disruptive passengers" ICAO Journal 56:2 (2001) 21 [hereinafter: Guildhall study].

[32] Guildhall study, ibid. at 22.

- Stress of air travel (75 per cent);

- Smoking ban (70 per cent);

- Cramped conditions in the aircraft cabin (66 per cent);

- Passenger denied carry-on baggage (59 per cent);

- Passenger's expectations too great (57 per cent);

- Crew mismanagement of passenger's problem (51 per cent);

- Passenger denied upgrade (48 per cent).

Other often mentioned causes are a lack of fresh air in the cabin, fear of flying, opposition to authority[33], drugs[34], denied boarding[35] and claustrophobia[36]. Carriers like Air Canada already acknowledge these reasons in their policies about the handling of unruly passengers.[37]

Further examination of this wide variety of reasons shows that there is not a single cause but "a complex cocktail of factors included"[38] triggering unruly behaviour. This reference shows that there are a lot of opinions about the causes involved. In reality, little is known about them[39] and no one knows the answer.[40] However, no one has fully scrutinized the causes of air rage yet[41], and the industry still refuses to fund studies to

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[33] "Prevention is better than cure", supra note 19 at 37.
[34] Ibid. at 36.
[35] J.R. Asker "Why are passengers so angry at Carriers?" Aviation Week & Space Technology 151:17 (25 October 1999) 50.
[36] P. Sparaco, supra note 29 at 51.
[37] Air Canada "Disruptive Passenger Policy" (30 November 2000), Pub 123, 15-11, [not published].
[38] "Calm down" Flight international (11-17 November 1998) 5.
[39] "Prevention is better than cure", supra note 19 at 37.
[40] Ibid.
[41] P. Sparaco, supra note 29 at 51.

analyze this complex problem.[42] But only the identification of reasons can help to understand why they cause this problem and how to prevent it.

V. Some reasons explained

1) Alcohol

Alcohol is on top of the list of causes of unruly behaviour. A recent study from the German association "Cockpit"[43] outlines the percentage of intoxicated behaviour. From a total of 1252 incidents, 389 included excessive alcohol consumption. Nearly a third of all incidents therefore involved alcohol. Alcohol restricts the amount of oxygen that flows through the brain, which exacerbates the effect of heavy drinking.[44] Furthermore, it dehydrates the body. The lack of water can lead to irritability, fatigue and tunnel vision.[45]

Flying still has a special image which makes people consume alcohol before and during the flight. "Air travelers have been drinking on airplanes since people began flying."[46] In addition, drinking is a social activity. As with smoking, boredom can be a trigger to start: The passenger arrives in-time at the airport and afterwards has to wait a certain time until he can board the plane. Airport terminals are an alcohol-friendly environment.[47] Being commercial centres a passenger is likely to be attracted by a bar and have drink. If he travels Business or First-class, he might even be offered drinks for free in the VIP

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[42] "Unruly passenger challenge airlines", supra note 26 at 62.
[43] K.G. Meyer & T. Gommert, "Disruptive passengers – eine rechtliche Würdigung" (2000) 49 Zeitschrift für Luft- und Weltraumrecht [ZLW] 159.
[44] "Prevention is better than cure", supra note 19 at 36.
[45] D. Fairchild, "Air Rage Caused by Intentional Oxygen Deprivation; Airlines reduce oxygen to increase revenues" online: <http://www.flyana.com/rage.htlm> (date accessed: 14 March 2001).
[46] Luckey, supra note 5 at 19.
[47] P. Sparaco, supra note 29 at 51; J.A.Y. Harkey, "Causes of and Remedies for Passenger Misconduct", online: <http://www.a1.com/indymensa/julie02.html> (date accessed: 17 March 2001).

lounge. The whole atmosphere attracts a person to consume alcohol. On-board the aircraft, the passenger is offered drinks again.[48] On long-haul flights, these drinks are even gratuitous. Getting alcohol for free still is a very attractive incentive for consuming it, especially since most (if not all) airlines have a policy of unlimited alcohol in first and business class.[49] Perhaps the passenger has to stop-over, which is likely in today's hub and spoke environment. There again, he has some time to spend and the airport marketing might attract his attention. Thus, continued alcohol consumption is very likely in the aviation environment.

But usually alcohol itself is not the root problem, which causes the person to become unruly. Alcohol is a facilitating factor in exacerbating underlying psychological characteristics, as it loosens control over certain personal traits, three of them in particular: a feeling of entitlement, opposition of authority and a fear of flying.[50] Hence, the passenger is less and less able to control his demeanour and behave in a socially appropriate way.

2) Ban on Smoking

In the study done by "Cockpit", 566 of those 1252 cases involved no-smoking regulations. This represents about 50 per cent of incidents. Smoking reduces the blood

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[48] See an example, where a passenger has been served eleven drinks within one and a half hour flight: S. Luckey, "Statement before the Subcommittee on Aviation, Committee on Transportation and Infrastructure, U.S. House of Representatives", online: Airline Pilots Association <http://www.alpa.org/internet/tm/tm061198.htm> (date accessed: 17 March 2001).

[49] Ibid.

[50] Ibid; Reiss, supra note 3.

oxygen carrying capacity by introducing carbon monoxide into the lungs.[51] As with such reduction by alcohol, this can have irritating effects on the body.

Furthermore, the body's addiction to nicotine plays an important role: With advancing technology flights become longer. Under the current hub and spoke system, with airports being no-smoking zones as well, a traveller could be unable to smoke during the whole flight. During this time "the nicotine-lover's wait to light up can become unbearable"[52]. The results are stress and tension. Moreover, the ban on smoking makes smokers substitute by drinking more alcohol so they end up with a twin problem.[53]

3) Cabin Environment

The effects of cabin environment on passenger behaviour stems from two main factors: bad cabin air and cramped seating.

a) Bad cabin air

The way cabin air is used influences the amount of oxygen in the blood.[54] A lack of oxygen and a high level of carbon dioxide in the cabin air can have serious impact on a passenger's behaviour. The combination of hypoxia (lack of oxygen) and high carbon dioxide can cause changes of mood, panic and aggressive behaviour. [55] An environmental physician supports this theory: "Curtailment of fresh air in airplanes can be causing

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[51] "Are unruly passengers oxygen-deprived?" Air Safety Week (22 November 1999) 7.
[52] F. Fiorino, "Passengers who carry 'surely bonds of earth' aloft" Aviation Week & Space Technology 149:25 (21/28 December 1998) 123.
[53] Luckey, supra note 48.
[54] "Are unruly passengers oxygen-deprived?", supra note 51.
[55] Ibid.; Kahn, supra note 25 at 142.

deficient oxygen in the brain of passengers, and this often makes people act belligerent, even crazy. I'm positive about this, and it can be proven with a simple blood test."[56]

The altitude a person is located in influences the amount of oxygen in the blood.[57] At 5000 feet the concentration drops to about 93 per cent. Medical authorities consider this the lowest limit for normal brain function in most people. Modern jetliners maintain a cabin altitude equivalent to 8000 feet. As shown above, the consumption of alcohol in this situation reduces the amount of oxygen even further: One ounce of alcohol coursing through the bloodstream further impedes the blood's ability to carry oxygen and is equivalent to adding another 2000 feet. At 10000 feet the oxygen concentration in the blood has decreased to 90 per cent. In the event that the passenger is a smoker, the oxygen deprivation by smoking a pack of cigarettes over a 24-hour period before the flight equals to adding another 5000 feet. Eventually, a passenger's oxygen level may have sunk on a level equivalent to being located at 15000 feet. At this height the oxygen level has sunk to 85 per cent, far under the lowest level of normal function. This results in degraded judgement, memory and thought processes with the passenger being unaware of his situation.[58]

In addition to the low oxygen level there is an even higher level of carbon dioxide in the cabin. A news report aired in Germany pointed out that the carbon dioxide limit for buildings in Germany lies at 1000 parts per million (PPM). Measured economy class cabins revealed a level of 1300 – 3300 PPM.[59]

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[56] Fairchild, supra note 45.
[57] "Are unruly passengers oxygen-deprived?", supra note 51; Harkey, supra note 47.
[58] "Are unruly passengers oxygen-deprived?", ibid.
[59] Ibid.

b) Cramped seating situation

Cramped seating is another factor that influences passenger behaviour from a psychological basis.[60] Seats may have become wider in the last decades but the pitch (the distance between points on seats in sequential rows) has declined 2-2.5 inches.[61] The average economy class seat is now 17 inches wide and has a pitch of 28-31 inches. This seating situation is already believed to be one main reason of deep vein thrombosis (DVT) and pulmonary emboli (fatal blood clots in the lungs), because of a permanent stasis of the lower limbs.[62]

Allegedly, the seat being reclined into a passengers space is one cause for unruly behaviour.[63] It is exactly the feeling of intrusion into personal space which raises the feeling of aggression. With load factors being the highest in decades[64], too many people are cramped into too small space within an aircraft. There is no room for personal space which constantly leads to a feeling of being threatened, intensifies emotional reactions and exacerbates stress.[65]

4) Stress

Another factor to be considered is the passenger's stress level. Today, public display of uncontrolled anger and violence has become common.[66] A recent survey revealed that

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[60] Harkey, supra note 47; Luckey, supra note 48.
[61] Asker, supra note 35 at 50.
[62] Kahn, supra note 25 at 142.
[63] F. Fiorino "Seating situation is root of much passenger discomfort" Aviation Week & Space Technology 151:17 (25 October 1999) 62 at 63.
[64] Asker, supra note 35 at 50.
[65] "Why is everybody losing their cool?" *Daily Telegraph* (23 October 1999) 10 at 14.
[66] Ibid. at 11; see also Harkey, supra note 47.

two-thirds of office workers suffer from work related stress resulting in excessive indulgence, insomnia and illness.[67] Added to that is the typical situation of an air traveler:

> He rises early and is sleep deprived, fights airport traffic and spends lots of time searching for a parking lot.[68] Then he has to wait in long lines at check-in/security lines after which a bedraggled agent is trying to bribe several passengers into taking a later flight while rebooking some poor souls who were bumped off the previous flight.[69] Afterwards, he encounters the usual overhead-stowage melee clogging the aisles. Finally in his seat, he is told that there will be a takeoff delay.[70] Moreover, he is frequently crammed into a narrow, high density seat, surrounded by carry-on luggage, grasping a tiny bag of pretzels while trying to quench a powerful thirst from a 3-ounce glass that also contains two ice-cubes.[71] He is fighting for elbow-room with the person beside him, feels the knees of the person behind him pressing in his back; when tries to hold his leg in the aisle he risks injury from a trolley. The passenger gets frustrated, since his expectation fused by the airline's marketing efforts promised him to be happy in a semi-reclined position with a glass of champagne. Instead, food is hardly bearable, the service slow and he is told when to sit and when to stand.[72]

All these factors are capable of increasing a passenger's personal stress level to the point that he is no longer able to stand or control his behaviour. The most critical point in this chain is how frustrated and angry the person feels before coming on board.[73] The onboard factors, like alcohol, are partially triggers but also likely to raise the stress level in general.

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[67] Ibid.
[68] Fiorino, supra note 52 at 123.
[69] Luckey, supra note 5 at 20.
[70] Fiorino, supra note 52 at 123.
[71] Luckey, supra note 5 at 20.
[72] Compare "Why is everybody losing their cool?", supra note 65 at 12.
[73] Ibid. at 12.

Chapter 1: Unruly Passengers

I. The existing legal system...

A thorough examination of international air law reveals that there is no specific regulation for unruly behaviour. Instead, there are international instruments relating to offences which primarily prevent hijacking, sabotage and terrorist attacks on aircraft. This part will generally describe those instruments, which might be applicable to unruly passengers, whereas the next part will examine if and to which extent such an applicability exists.

1) The Tokyo Convention

The main purpose of the Tokyo Convention[74] was to secure international collaboration against terrorism in air transport. It therefore governs offences on board the aircraft as well as any other act that may jeopardize (a) the safety of either aircraft or persons or property therein or (b) good order and discipline on board.[75] But the convention will only apply to an aircraft registered in a Contracting State, if the aircraft is in flight, on the surface of the high seas or outside the territory of any State.[76] An aircraft is deemed to be "in flight" from the moment power is applied for the purpose of take-off until the ending of the landing run.[77]

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[74] *Convention on offences and certain other acts committed on board aircraft*, 14 September 1963, ICAO Doc. 8364 (entered into force 14 December 1969) [hereinafter: Tokyo Convention].
[75] Tokyo Convention - Art. 1 (1).
[76] Art. 1 (2).
[77] Art. 1 (3).

With regard to jurisdiction, it is the State of registration which is competent to exercise it over the offences and acts mentioned above. Although States are obliged to establish such jurisdiction under their national laws, it does not exclude any criminal jurisdiction exercised in accordance with national law, so that there will be concurrent jurisdiction.[78] Under special circumstances a State already having jurisdiction is given the right to interfere with the flight in order to exercise this jurisdiction.[79]

In order to have law enforcement on board the aircraft to restrain passengers if necessary, the aircraft commander is vested with special powers while the aircraft is in flight. Contrary to the definition of "in flight" in Article 1, for these powers the aircraft is deemed to be "in flight" after closing the external doors after embarkation until reopening for disembarkation.[80] If he has reasonable grounds to believe that a person is about to commit an act mentioned in Article 1, para.1, the commander is empowered to impose reasonable measures on this person to stop such acts and to deliver this person to the competent authorities.[81] The commander can also authorize personnel or passengers to act on his behalf. Passengers or crew can even act with such an authorization, if they have reasonable grounds to believe that immediate measures are necessary.[82] Measures of restraint are limited until the plane lands, with some special exceptions.[83] In order to comply with this limit, the commander has the right to disembark such persons.[84] As such measures could create liability of the empowered persons, they have immunity for

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[78] Art. 3.
[79] Art. 4.
[80] Art. 5 (2).
[81] Art. 6 (1).
[82] Art. 6 (2).
[83] Art. 7 (1).
[84] Art. 8, 9.

actions taken in accordance with the Convention[85] in order to encourage them to fight the wrongful acts contemplated by the Convention.[86] Pursuant to the right of disembarkation, States are obliged to allow disembarkation and, upon being satisfied that the circumstances so warrant, to take the person into custody. States also have either to grant that person liberty to continue his journey or return him to the territory where he began his journey.[87] The Convention contains a legal presumption that for reasons of extradition the act committed on board the aircraft is deemed to have happened also in the State of registration. Nothing in the Convention, however, shall be deemed to create an obligation to extradite the offender.[88]

2) The Hague Convention

The Hague Convention[89] is applicable to unlawful seizure or exercise control of an airplane or attempts thereof.[90] The act must involve force or threat or any other form of intimidation. Although such behaviour can fall under the definition of unruly behaviour, and despite the fact that there have been cases possibly falling under the scope of the Convention[91], these are only the most extreme examples. Therefore, this Convention does not provide for a scope broad enough to prosecute unruly passengers and shall therefore not be examined any further.

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[85] Art. 10.
[86] R.I.R. Abeyratne, *Legal and Regulatory Issues in International Aviation*, (Irvington-on-Hudson, NY: Transnational Publishers, 1996) at 407;
[87] Art. 12, 13, 14, 15.
[88] Art. 16.
[89] *Convention for the suppression of unlawful seizure of aircraft*, 16 December 1970, ICAO Doc. 8920 (entered into force 14 October 1971) [hereinafter: Hague Convention].
[90] Art. 1.
[91] See supra notes 17-19.

3) Montreal Convention

"The primary aim of the Montreal Convention[92] was to arrive at a generally acceptable method of dealing with alleged perpetrators of acts of unlawful interference with aircraft. In general, the nations represented at the Montreal Conference agreed that acts of sabotage, violence and related offences interfering with the safety and development of international civil aviation constituted a global problem which had to be combated collectively by concerned nations of the international community."[93]

This quotation describes very well the scope of the Montreal Convention. It governs unlawful and intentional acts of sabotage against aircraft as well as acts of violence against a person on board that aircraft, if this act is likely to endanger the safety of that aircraft.[94] The scope of the Montreal Convention is wider than that of the Tokyo Convention, since the definition of "in flight" equals the one of the Tokyo Convention governing the rights of the aircraft commander.[95] The Montreal Convention also distinguishes between an aircraft being "in flight" and "in service"[96], thus widening the scope to a greater degree. Due to the fact that the Convention governs several different offences, even the geographic scope is wider. Every offence or a group of offences is assigned to a specific geographic scope of applicability.[97]

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92 *Convention for the suppression of unlawful acts against the safety of civil aviation*, 23 September 1971 ICAO Doc. 8966 (entered into force 26 January 1973) [hereinafter: Montreal Convention].

93 A. Abramovsky, "Multilateral Conventions for the Suppression of Unlawful Seizure and Interference with Aircraft Part II: The Montreal Convention" (1975) 14 Colum. J. Transnat'l L. 269 at 278.

94 Montreal Convention - Art. 1 (1).

95 Art. 2.

96 Ibid.

97 Art. 4 (2-6).

Jurisdiction for prosecuting offenders under the Montreal Convention is given to possibly four different States: the State on which territory the offence took place, the State of registry, the State of landing if the offender is still on board, and the State of the operator of the aircraft for the case of a leased one.[98] The Convention, however, goes further than that. It also establishes "universal jurisdiction"[99], which means that every State shall have jurisdiction if the perpetrator is in its territory and it does not want to extradite him to one of the other countries having jurisdiction.

Under the Montreal Convention States are obliged to take the alleged offender into custody and to inquire into the facts.[100] In order to secure the prosecution of the alleged offender the Convention embodies the principle "aut dedere aut judicare".[101] The State having custody over the perpetrator must either submit the case to its own authorities or extradite him. For reasons of proper extradition the Montreal Convention (a) deems offences to be included in existing extradition treaties, (b) gives the option to consider itself an extradition treaty, (c) constitutes its offences as extraditable ones and (d) presumes that for reasons of extradition the offence has also taken place in the States having jurisdiction under the Convention.[102]

Furthermore, the Convention obliges States to take measures to prevent the declared offences, facilitate the continuation of the journey and afford each other international assistance.[103]

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[98] Art. 5 (1).
[99] Art. 5 (2).
[100] Art. 6.
[101] Art. 7.
[102] Art. 8.
[103] Art. 10, 11, 12.

4) Annex 17

Annex 17[104] to the Chicago Convention[105] aims to set a standard for aviation security in order to safeguard international civil aviation operations against acts of unlawful interference.[106] It obliges States to institute a national organization, which shall implement and supervise the security program.[107] It provides therefore for preventive security measures relating to passengers and their cabin baggage, checked baggage, cargo, other goods, access control and airport design.[108] Finally, the management of response to acts of unlawful interference is governed.[109]

II. ...and its impact on unruly passengers

Due to the scope of the abovementioned conventions and international instruments, it appears that there is a gap of jurisdiction as far as minor offences, including unruly passengers, are concerned.[110] The State of landing, if it is not the State of registration, would treat such offences committed during the flight as a matter for another country.[111] Nevertheless, this paper examines to what extent these conventions apply to unruly behaviour.

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[104] *International Standards and Recommended Practices; Security: Safeguarding International Civil Aviation against Acts of Unlawful Interference; Annex 17 to the Convention on International Civil Aviation*, 6th ed., Montreal 1997, [hereinafter: Annex 17].

[105] *Convention on international civil aviation*, 7 December 1944, ICAO Doc. 7300/6 (1980) (entered into force 4 April 1947) [hereinafter: Chicago Convention]

[106] Chapter 2.

[107] Chapter 3.

[108] Chapter 4.

[109] Chapter 5.

[110] *Report of the secretariat study group on unruly passengers* (First meeting, 25-26 January 1999) ICAO Doc. SSG-UP/1-Report [hereinafter: ICAO-Report 1] at 2; L. Weber & A. Jakob, "News from International Organizations (ICAO)" (1997) XXII Air & Sp. L. 216 at 218.

[111] Reiss, supra note 3 at 14.

1) The Tokyo Convention

a) Scope of Application

Under Article 1, the Tokyo Convention applies to offences against penal law and to all other acts, that may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board. Analysing unruly behaviour reveals that it often includes such acts as battery, assault, verbal and sexual harassment. These acts are usually criminalized under domestic penal law so that from this point of view, several aspects of unruly behaviour could be covered by the Convention.

The problem, however, lies in the fact that the Convention does not define the term "offence".[112] It is left to the discretion of each State to declare which offences will be punishable on board aircrafts under their domestic law.[113] One author observed that "the offence is not made a crime under international law; its definition is to be determined by the municipal laws of the contracting State".[114] Neither does the Convention create a new offence to be applied in domestic law.[115] This reluctance of the Tokyo Convention leads to "disunified" law on board aircraft: Some States might decide to extend their criminal law with regard to crimes governing unruly behaviour, some might not, thus creating

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[112] N.M. Matte, *Treatise on Air-Aeronautical Law*, (Montreal: McGill University 1981) at 335; I.H. Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 6th ed., (The Hague: Kluwer Law International 1997) at 207; A.I. Mendelsohn, "In-Flight Crime: The international and domestic picture under the Tokyo Convention" (1967) 53:3 Va. L. Rev. 509 at 516; R.I.R. Abeyratne "Unruly passengers – legal, regulatory and jurisdictional issues" (1999) XXIV Air & Sp. L. 46 at 50.

[113] R.P. Boyle & R. Pulsifer, "The Tokyo Convention on offences and certain other acts committed on board aircraft" (1964) 30 J. of Air L. 305 at 335; Matte, Mendelsohn, ibid.

[114] A.E. Evans, "Hijacking: Its Cause and Cure" (1969) 63 Am. J. Int. L. 695 at 708.

[115] T. Unmack, *Civil Aviation: Standards and Liabilities*, (London: LLP 1999) at 382.

uncertainty over what acts are within the scope of the Convention.[116] As a result, certain aspects of unruly behaviour could constitute an offence on board an aircraft from State A, but not on board an aircraft of State B.

Another unfortunate result, for the case that several States declare one specific crime to be applicable, is the lack of a common definition of that crime. This could result in different interpretations by different national courts due to different legal traditions having the effect that a passenger has to "fulfill different conditions", e.g. take different actions for having committed the same offence under different domestic laws.

Furthermore, to what does the term "penal law" refer? Does it only include unlawful acts against tort or criminal law or does it even refer to every kind of law which penalizes a certain behaviour like fiscal, customs or administrative law?[117] This problem, however, is only an apparent one, which will be clarified within the discussion of jurisdiction.[118]

The problem of unclear terminology also arises with regard to the restriction of time in which the Convention shall apply. Article 1 (2) States that it is applicable to aircraft in flight, which starts pursuant to Article 1 (3) "...from the moment when power is applied for the purpose of take-off...". Answering the question as to when this moment takes place, has created a strong discussion.[119] It can be regarded as the moment when the aircraft applies power to taxi[120] to the beginning of the runway or when it uses its power

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[116] Balfour & Highley, supra note 2 at 195.
[117] G.F. Fitzgerald, "The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft" (1963) 1 Can. Y.B. Int'l L. 230 at 236; Matte, supra note 112 at 337.
[118] See page 30, below.
[119] For a discussion of this problem see R.D. Margo, *Aviation Insurance*, 2nd ed., (London: Butterworths, 1989) at 154 note 68; R. Kane, "Time to put Teeth into Tokyo?" (1994) 43 ZLW 186 at 195.
[120] Balfour & Highley, supra note 2 at 196.

to accelerate on the runway.[121] This question has great practical impact for unruly behaviour taking place exactly in the time-period of taxiing. The law of which State will be applicable? However, from the practical point of view, the term "in-flight" has to refer to the moment, when the aircraft cannot be stopped at all or only under great effort. Until this moment the State where the aircraft is situated can exercise its jurisdiction so that there is no need to vest another State with jurisdictional powers.

The Tokyo Convention is also applicable with regard to all other acts, whether they are offences or not, that may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.[122] This definition circumscribes more clearly the punishable behaviour a passenger has to commit. But although this is a broader description, the terms used open the door for extensive interpretation: what do the terms "good order" and "discipline" imply? There is no guideline or description as to how a person should behave on board an aircraft.

A crucial problem arises from the same unclear terminology: At what point is the safety of the aircraft or persons jeopardized by an unruly passenger? As mentioned above, unruly behaviour has a wide variety; from verbal threats over disobedience of orders to physical assault.[123] This could support an interpretation that every interference with the flight crews' duties distracts them from their crucial safety functions and thereby jeopardizes the safety of the aircraft or of persons on board. However, the First Circuit

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[121] C.N. Shawcross & K.M. Beaumont, *Air Law*, 4th ed., (London: Butterworths, 1977) at VIII(2) note 3.
[122] For the purpose of this thesis, these acts will be referred to as "jeopardizing acts".
[123] See page 4, above.

held in *U.S. v. Flores*[124] that not every assault on a flight attendant interferes with his or her duties so that not all unruly behaviour would be covered by this interpretation. Nevertheless, it has to be examined whether the Tokyo Convention could apply for acts that interfere with the flight crew's duties:

The definition of an "unruly passenger" as "a passenger who interferes with aircrew duties and/or the quiet enjoyment of fellow passengers or creates an unsafe flight environment" illustrates that one main problem of unruly behaviour lies in the interference with the aircrew's duties. However, this definition does not support a conclusion that every interference with aircrew duties at the same time jeopardizes the safety of the aircraft or persons on board.

An analysis of domestic law might help to solve this problem: § 315 of the German penal code is the implementation of the Tokyo Convention into domestic law. In one case a German Court of Appeals had to decide whether smoking in the lavatory on a non-smoking flight was a violation of § 315.[125] The prosecutor asserted that by activating the smoke detector and causing it to make a loud noise, the aircrew was alarmed and thereby distracted from fulfilling its safety functions. However, the court stated that the safety of the flight would only be jeopardized by a real fire but not by the mere activation of a smoke detector.[126] Therefore, not every distraction of an aircrew member would constitute a jeopardy to the safety of the flight.

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[124] *U.S. v. Flores,* 968 F.2d 1366 (1st Cir. 1992).
[125] Oberlandesgericht Düsseldorf, Zeitschrift für Luft- und Weltraumrecht [ZLW], 50 (2001) 111.
[126] Ibid. at 112.

This conclusion is affirmed by two cases under U.S. law: In the case of *Schaeffer v. Cavallero*[127] a passenger vigorously protested, when he was asked to check one of his two pieces of carry-on luggage. After he eventually checked it but did not get a receipt for the bag he "so vociferously pursued his demand for the receipt" that he was asked to deplane. He refused and had to physically removed. The court held an impolite or unpleasant passenger debating a non-safety issue with an airline employee in a boisterous or abusive manner does not at any time pose a potential threat to safety.[128]

In the case of *U.S. v. James Tabacca*[129] the Ninth Circuit Court of Appeals has held that it is not necessary to prove that an aircraft is actually endangered in order to bring an assault charge under the Federal Aviation Act. Under this federal provision[130] the protection of the crew of the plane safeguards the safety of the passengers. Protection of the crew in the performance of their crucial safety functions helps to maintain the safety of the flight. This provision provides protection against assaults and intimidation directed against the flight crew or flight attendants "that interfere with performance of duties of the member or attendant or lessen the ability of the member or attendant to perform those duties".[131] The court therefore held that to convict, it is sufficient to show that the act of assault or intimidation merely interfered with the performance of the flight attendant's duties.[132]

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[127] *Schaeffer v. Cavallero*, 29 F. Supp. 2d 350 (S.D.N.Y. 1999).
[128] Ibid at 351.
[129] *U.S. v. James Tabacca,* 924 F.2d 906 (9th Cir. 1991).
[130] 49 U.S.C. § 46504.
[131] R.P. Warren, "An Outline to Prosecuting Federal Crimes Committed Against Airline Personnel And Passengers" online: <http://www.air-transport.org/publications/101.asp> (date accessed: 12 March 2001>.
[132] Fitzgerald, supra note 117 at 909.

Finally, the abovementioned provision of the Federal Aviation Act itself gives proof that not every interference with a flight attendant's duties automatically poses a threat to safety. The two cases and the provision only show that interference with the duties of the flight crew/attendant is presumed to be capable of endangering the safety of the flight. But in order to cover this potential threat the provision had to cover interference with the flight attendant's duties in particular and not any behaviour endangering the safety of the aircraft in general. This suggests that the interference with the flight attendants duties can but does not automatically endanger the safety of the flight. "Butt pinching" interferes with the flight attendant's duties, since it is distracting and annoying. But it would be excessive to say that a passenger thereby jeopardizes the safety of the flight.

For the unlawful seizure of an aircraft Article 11 tries to prevent the problems of unclear terminology and law. This article "specifies the circumstances that would constitute the offence"[133] in order to "ensure cooperation"[134] among States for preventing this kind of behaviour. However, this would only govern unruly behaviour in its most excessive form.

b) Jurisdiction and Prosecution

Article 3 (1) of the Tokyo Convention grants jurisdiction for offences committed on aircraft to the State of registration. Article 3 (2) contains the respective obligation for all Contracting States to establish such jurisdiction under their particular domestic laws. Article 3 (1), together with the geographical scope of the Convention under Article 1 (2),

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[133] Abeyratne, supra note 86 at 404.
[134] Matte, supra note 112 at 344.

"accords international recognition" for this kind of extraterritorial jurisdiction.[135] Finally, Article 3 (3) makes clear that national criminal jurisdiction is not excluded by the Convention. Therefore, a system of concurrent jurisdiction exists between all States, the criminal law of which has been exercised in accordance with their national laws.[136] Article 4 even allows a State to interfere with the aircraft in flight, if one of the enumerated conditions is met.

This system intends to provide prosecution of any offender on board any aircraft all over the world. After the alleged offender has been disembarked, the State of landing should take him into custody (Article 13) providing that State with time for either criminal or extradition proceedings. As a ground of extradition, Article 16 presumes that the offence has also been committed in the territory of the State requesting extradition. Unfortunately, this system contains three serious flaws:

First, the system of concurrent jurisdictions has some fundamental difficulties. It establishes broad grounds of jurisdiction in order to allow prosecution of the unruly passenger but has the negative side effect that the passenger runs the risk of double jeopardy, namely of being prosecuted for the same offence in another State.[137] In criminal law an offender is protected against such a situation by the general principle "ne bis in idem". As the Convention does not define the term "penal law" the application of this principle can become difficult, since the unruly passenger could be punished under different kinds of laws or by different kinds of tribunals.[138] On the other hand, implementing this principle in the Convention could have helped to ensure its uniform

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[135] Abeyratne, supra note 112 at 49; Boyle & Pulsifer, supra note 113 at 333.
[136] Matte, supra note 112 at 339.
[137] Fitzgerald, supra note 117 at 239; Matte, supra note 112 at 340.
[138] Fitzgerald, ibid. at 239, 240.

application with regard to the applicable "penal law" and therefore with regard to applicable "offences". The result would have been a reduction in, if not in the end of competing jurisdictions, once an offender has been punished.[139] However, although that principle was included in the drafts, it was not retained in the Convention[140] on the ground that it is of such general application that it did not require expression in this specialized text.[141]

Another striking point regarding the application of different domestic penal codes under the Tokyo Convention concerns the argument "ignorance is no excuse". A State obliges its citizens to inform themselves and to know about the rules applicable to them, therefore all laws and the law-making process are publicly available. Consequently, a person having violated a regulation cannot justify his deed with the argument not to have known that it was forbidden. Although the number of regulations a citizen has to know is growing steadily it is manageable task to inform himself. However, as soon as a passenger embarks on an aircraft, this task becomes a problem. He is aware of where the aircraft he is flying with is registered, therefore he has no possibility to find out which State has jurisdiction on board this aircraft. Moreover, there is no way to find out which behaviour is criminalized on board this aircraft, since it is left to the discretion of every State to declare which offences on board an aircraft its domestic law will be applicable.[142] Finally, there is no legal service available. With the current practice of all carriers, the argument "ignorance is no excuse" eventually becomes ad absurdum,

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[139] Ibid.
[140] Matte, supra not 109 at 340.
[141] G.F. Fitzgerald, "Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963" (1964) 2 Can. Y.B. Int'l L. 191 at 202;
[142] See supra note 112; for the same problem the other way round J. Bailey, "Flying high above the law" (1997) XXII Air & Sp. L. 81 at 89.

because the passenger has no chance to find out which law is applicable to him on this flight. The solution for this problem would either be guidelines to the law of the State of registration on each aircraft or an international standard applicable to each aircraft from which State whatsoever.

Secondly, Article 3 suffers from missing definitions and unclear terminology. Although the State of registration is obliged to extend its jurisdiction over offences and other acts committed on board aircraft, the missing definition of "offence" leaves it to the discretion of States to define which crimes shall be defined as "offences" leading to "disunification" under domestic law.[143] This means that the uniformity Article 3 sought to achieve is circumvented by having each State set its own standard under its domestic law. In addition to that, States also have the ultimate discretion as to whether to assert jurisdiction over acts made criminal under their respective domestic laws[144], since the terminology in Article 3 (1) the term "...is competent to exercise..." only reflects a competence - but no obligation. Some States strongly opposed the idea of mandatory prosecution, therefore the text of Article 3 (1) reflects that "while each State is obliged to establish jurisdiction over offences committed on board aircraft registered in that State, each State has power to define the precise offences over which jurisdiction is to be asserted and to decide whether to enforce its jurisdiction".[145] Hence, there is no obligation for a State or its authorities to prosecute or punish an unruly passenger.

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[143] Mendelsohn, supra note 112 at 516; compare also page 22, above.
[144] Mendelsohn, ibid.
[145] Fitzgerald, supra note 141 at 195; Boyle & Pulsifer, supra note 113 at 335.

However, the extension of competence to exercise jurisdiction not only to offences but also to "jeopardizing acts" makes the term "penal law" of Article 1 (1) more transparent: This extension was included due to the fact that in the U.S. violations of air regulations are subject to non-penal or civil penalties (so called "civil violations") and would not technically fall within the meaning of the term "offences".[146] This clarifies that the term "offence" as used in Article 1 (1) does not refer to non-penal or civil penalties so that subsequently the term "penal" law does only refer to criminal law.

Article 3 (2) only refers to "offences" but keeps silent on jurisdiction over the "jeopardizing acts" falling under the scope of the Convention.[147] This supports an interpretation under which States are not obliged to extend their jurisdiction to "jeopardizing acts", which are no "offences". This causes a jurisdictional gap, since the intended system under which at least the State of registration has jurisdiction[148] is circumvented: If an unruly passenger "only" commits a "jeopardizing act" which does not constitute an offence, the State of registration might not have jurisdiction, because it was not obliged to extent its jurisdiction to these acts. As a consequence, a situation can arise in which no State at all has jurisdiction over such "jeopardizing acts".

Thirdly, problems arise regarding extradition. Among all States possibly having jurisdiction under Article 3, the State of landing, which is the closest to the offender and to the main witnesses, is not explicitly given jurisdiction.[149] This can result in a situation where the State of landing does not have jurisdiction over the unruly passenger - neither

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[146] Fitzgerald, ibid. at 194.
[147] ICAO-Report 1, supra note 110 at 4.
[148] Mendelsohn, supra note 112 at 515.
[149] See for a discussion of that topic: Mendelsohn, supra note 112 at 514.

under the Tokyo Convention nor under domestic law. Consequently, this State should extradite him to a State having jurisdiction, most likely to the State of registration. But this, first of all, requires taking the alleged offender into custody. Article 13 (2) obliges a State to take a perpetrator into custody only if it is satisfied that the circumstances warrant such action. But this obligation is only applicable if the passenger is suspected of unlawful seizure of the aircraft or of having committed a "serious offence" under the penal law of the State of registration. Therefore, this obligation will only be applicable to a limited number of unruly passengers, complicating extradition for minor crimes. Even if these conditions are fulfilled, the State is left free to judge for itself (a) whether the act is of such a nature as to warrant such action on its part, and (b) whether it would be consistent with its laws, since under paragraph 2 any such custody is to be effected only by law of the State taking custody.[150] Moreover, under this provision custody may only be continued for a "reasonable" period of time necessary to institute extradition proceedings. However, the State might not be able to keep the offender long enough in custody[151], since domestic law can harshly restrict the time of custody. This could oblige a State to set the unruly passenger free before being able to extradite him. Therefore, it always depends on the State of landing/disembarkation to fulfill the first condition for extraditing an unruly passenger.

Furthermore, in order to extradite an unruly passenger a request for extradition from a State having jurisdiction is needed.[152] For making such a request a State has to have a certain interest in prosecuting the unruly passenger, otherwise there would be no

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[150] Boyle & Pulsifer, supra note 113 at 348.
[151] Matte, supra note 112 at 345.
[152] Ibid. at 349.

incentive for such a request. The safety of aviation constitutes such an interest, but often economic issues like bearing the cost of extradition and prosecution hinder this. This stems from the difference between the usual case in which extradition is granted and the situation arising under the Tokyo Convention: The situation in which extradition is usually requested involves a crime taking place in a State with an alleged offender fleeing that State. The place of crime, necessary witnesses and authorities to investigate that crime are available in that particular State. If there is sufficient proof found against the alleged offender and his current whereabouts are known, the authorities will request extradition on the basis of this proof. In case of an unruly passenger under the Tokyo Convention, the competent authorities are in the State of registration, whereas the alleged offender is in the State of landing/disembarkation. The witnesses, if they are not nationals in the State of registration, will either be in the State of landing/disembarkation or elsewhere in the world. For a successful extradition and subsequent prosecution, the State of registration has to investigate the crime properly. Everything, however, except the competent authorities are in another country. Therefore, the State of registration will calculate thoroughly as to whether the expense, time and effort directed both to investigation and prosecution of that offence would be proportionate to the national interest which might be served by the prosecution of that unruly passenger.[153]

This issue assumes even greater importance under the global scope of aviation. In today's aviation the majority of aircraft are leased. Therefore, it is likely that the aircraft is not registered in the State in which the airline has its main place of business but in the State of the leasing company. With respect to extradition, the State of the leasing

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[153] Mendelsohn, supra note 112 at 517.

company will have little interest in pursuing a matter in which none of its nationals has been involved, and facing the trouble and expense of an extradition and subsequent trial.[154] At the Tokyo Conference there was a proposal to solve this problem by giving competence to exercise jurisdiction to the State of which the person leasing the aircraft is a national.[155] However, this proposal was not adopted, since some delegates felt that such a serious matter as criminal jurisdiction should not be made to depend upon a mere contract of lease between one airline and another.[156] Nevertheless, with regard to today's aviation situation such clause would constitute a great achievement.

The next problem is that Article 16 (2) explicitly does not create an obligation to grant extradition.[157] Therefore, every offence must be dealt with under the network of existing extradition treaties.[158] If there is no extradition treaty between the States involved, the unruly passenger will go unpunished. Even in the case of an existing extradition treaty the Convention does not guarantee the passenger's extradition. As a consequence of Article 3 (2), Article 16 only refers to "offences" in the sense of Article 1. The legal presumption of Article 16 (1) is consequently not applicable to "jeopardizing acts". This leaves it to the extradition treaty whether extradition would be possible for such acts. Moreover, the Convention fails to make the offences and other acts committed on board, which are its subject matter, extraditable offences under the existing treaties.[159] Again, extradition depends on the existing extradition treaties with the result that the unruly passenger is unlikely to be extradited, if he did not commit a serious offence.

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[154] Abeyratne, supra note 112 at 55.
[155] Fitzgerald, supra note 141 at 203.
[156] Ibid.
[157] Ibid. at 201.
[158] Abeyratne, supra note 112 at 55; Kane, supra note 119 at 190.
[159] Kane, ibid. at 195; Boyle & Pulsifer supra note 113 at 351.

c) Powers of the Commander

As mentioned above, Chapter III of the Convention gives the aircraft commander certain rights while the aircraft is in flight:

Article 6 (1) gives him the right to take reasonable measures including restraint, if upon reasonable grounds he believes that an offence or jeopardizing act in the sense of Article 1 (1) has been committed or is about to be committed. But his action must be necessary either to protect the safety of the aircraft or persons or property therein, or to maintain good order and discipline on board, or to enable him to deliver persons into custody. Under Article 6 (2) he can require or authorize any crew member or request any passenger to give assistance. This provision also gives crew members and passengers the right to take preventive measures without being authorized, if they have reasonable grounds to believe that safety reasons so require. Finally, measures of restraint are limited under Article 7.

Article 6 (1) (b) could have solved the lack of applicability of the Tokyo Convention to unruly behaviour that neither constitutes an offence nor threatens the safety of the flight, since these "minor acts" usually threaten good order and discipline on board. Unfortunately, this provision needs Article 1 (1) to be fulfilled for its applicability. Subsequently, Article 6 (1) (b) can only be applied in the case of offences, since "jeopardizing acts" already fall in the scope of Article 6 (1) (c). Even if Article 6 (1) (b) could have enabled the commander to take effective measures against all kinds of unruly behaviour, it would have suffered from the already discussed problem of unclear terminology. What do the terms "good order" and "discipline" mean and how should either the commander or any passenger know when these conditions are fulfilled?

One author assumed that the power of the commander to restrain a passenger is extended by the connection between Article 6 (1) (c) and Article 1 (1) (a) to a third category - offences against penal law, which neither jeopardize the safety nor good order aboard the aircraft.[160] Since the Convention is applicable to "offences against penal law" and since Article 6 (1) (c) refers to delivery or disembarkation of the passenger this would extend the power of restraint to the abovementioned category. However, this assumption overlooks the fact that for disembarking a passenger Article 8 refers to Article 6 (1) (a, b) with the result that these conditions have to be fulfilled anyway.

The entitlement of crew members and other passengers to restrain an unruly passenger for safety reasons is another effective measure against unruly behaviour, since experience has shown that it usually needs several persons to do so. But at the same time this provision contains the danger that passengers are not qualified to determine when the safety of the aircraft or persons or property on board is endangered, which is why it was criticized at the Tokyo Conference.[161] Delegating such rights to passengers, of course, bears the danger of "sheriff-like behaviour". Usually, however, passengers only intervene in extreme situations, so that the provision was accepted on the ground that it contemplates emergency situations. Furthermore, intervening without authorization by the commander is only allowed for the purpose of preventive measures.[162]

Article 8 gives the right to disembark an unruly passenger in the territory of any State under the same condition as using restraint. Remarkably, this provision allows

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[160] Mendelsohn, supra note 112 at 521.
[161] Boyle & Pulsifer, supra note 113 at 339.
[162] Ibid. at 340.

disembarkation in "any State", which is not limited to Contracting States.[163] Since a State that has not ratified the Convention is under no obligation to allow disembarkation, measures of restraint can be continued in the case of refusal under Article 7 (1) (a). For a Contracting State the Convention contains the obligation to allow disembarkation of a passenger under Article 13. Once again, the lack of power to enforce that obligation reflects the weakness of the Convention. Moreover, States permitted disembarkation of a passenger but deported him right away on the same flight, thereby staying in accordance with the Convention.[164] As States are anything but willing to admit to their territories aliens suspected of a criminal offence[165], the Convention does not oblige States to do so. Hence, disembarkation of an unruly passenger is a possible measure but it depends on the State of disembarkation whether it will be an effective one.

Article 9 authorizes the commander to deliver any passenger to the competent authorities of any Contracting State, if he believes that this passenger has committed a serious offence under the penal law of the State of registration. This provision suffers from some serious problems. As a result of too many proposed definitions, the Legal Committee had to abandon its attempt to define the expression "serious offence".[166] Already the lacking definition of the term "offence" created uncertainty and now the commander should base his actions on two undefined, uncertain terms. However, since he is not a lawyer, this provision requires him to determine subjectively that these

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[163] Unmack, supra note 115 at 386
[164] Meyer & Gommert, supra note 43 at 171.
[165] Fitzgerald, supra note 141 at 200.
[166] Fitzgerald, supra note 117 at 245.

conditions were fulfilled.[167] This argument can at the same time create delicate situations: in what capacity, according to what knowledge and to what extent can the commander assess the seriousness of the crime without the Convention at least providing examples for that?[168] The situation becomes even more complicated in the case of an aircraft leased without the crew: Since the penal law of the State of registration is to be applied, the commander can easily and excusably be totally ignorant of the laws of the State in which the aircraft he is flying is registered.[169] Although unruly behaviour is in most cases unlikely to constitute a "serious offence", making this measure more unlikely to be applied, such a case could create serious problems and difficulties for punishing the unruly passenger.

Finally, Article 10 provides legal immunity for either commander, crew, any passenger and owner or operator of the aircraft for actions taken in accordance with the Convention. In order to provide the commander with the possibility of taking measures without hesitation and from an objective point of view, this provision was instituted to protect those persons who have acted to preserve the safety of the aircraft from any legal responsibilities.[170] However, those persons have to act in accordance with the Convention, so that for taking measures against an unruly passenger the unclear terminology could possibly defeat the purpose of this article.

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[167] Fitzgerald, supra note 141 at 196; Boyle & Pulsifer, supra note 113 at 342.
[168] Matte, supra note 112 at 343.
[169] Kane, supra note 119 at 194; Fitzgerald, supra note 117 at 246.
[170] Fitzgerald, supra note 141 at 196; Matte, supra note 112 at 344.

Contrary to the rest of the Convention, Chapter III, containing the powers of the commander, has a different geographic scope of application. Article 5 (1) provides for a different geographic scope than Article 1 (2). Under this provision, the powers of the commander are only applicable if either the last point of take-off or the next point of intended landing is situated outside the territory of the State of registration, or the aircraft subsequently flies in the territory of another State. Consequently, the Convention denies application of these powers on purely domestic flights in the State of registration. Article 5 (2) defines the term "in flight" as the time when all external doors are closed following embarkation until any such door is opened for disembarkation. The only exception is the case of a forced landing. This definition is different from Article 1 (3) which stems from the idea that as long as the doors are open ground authorities would be available in case of incidents.[171] The powers of the commander subsequently apply when the aircraft is a "closed universe".[172]

The geographic scope of application has been criticized as being too narrow[173], since an application of Chapter III also on domestic flights would create an international standard to fight unruly passengers. Moreover, the important immunity given to the commander would be applicable. Although States are obliged to incorporate the Tokyo Convention into their respective national laws, they will usually only transform the powers given by the Convention on international flights, but not extend those powers to domestic flights. This creates an illogical inconsistency within the application of the

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[171] Fitzgerald, ibid. at 193.
[172] Ibid.
[173] K.G. Meyer, "Unruly Passengers under the Law", online: Luftrecht online <http://www.luftrecht-online.de/index-4.htm> (date accessed: 5 March 2001).

Convention.[174] While the whole Convention except Chapter III is applicable to unruly passengers even on domestic flights, although its application might be unnecessary due to existing national jurisdiction, the commander cannot use his powers given under the Convention. Therefore, Chapter III should have made applicable on flights anywhere in the world, including purely domestic flights within one country.[175] However, the current practice in which most aircraft are leased should be kept in mind. It is therefore possible that they are not flying in their State of registration so that Chapter III would be applicable anyway. The only exception might arise in an aviation market like the U.S., holding several big leasing companies, so that the aircraft flies in the country of registration. In order not to create a legal gap in handling unruly passengers, Chapter III should therefore be applicable on purely domestic flights as well.

d) Shortcomings

As indicated, this legal instrument contains some serious flaws which hinder successful handling of unruly passengers: Firstly, the system of jurisdiction and extradition does not work properly. This results less from a bad system but from missing obligations in the Convention. Neither does it oblige States to exercise their jurisdiction, nor to prosecute an offence, nor does it create an obligation to extradite offenders. There are not even sanctions that ensure that States fulfill their duties under the Convention.

Secondly, the actual scope of applicability is too narrow. This also stems from the missing definition of the term "offence" as well a missing explanation of its nature. Since the Convention leaves it to Contracting States to define the scope under their jurisdiction

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[174] Compare Mendelsohn, supra note 112 at 526.
[175] Ibid. at 528.

the system becomes "disunified" due to different national jurisdictions and interpretations. This causes serious problems in handling unruly passengers on an international level. Theoretically, however, the Tokyo Convention offers a broad scope of application so that under a common system all kinds of unruly behaviour could be covered.

Thirdly, the wording of the Convention is unclear and far from satisfactory. Unclear terminology and missing definitions guarantee on the one hand a broad application but on the other hand uncertainty and many loopholes which States can use to circumvent their obligations.

In conclusion, the Convention does not create a common standard with regard to these points but leaves it to States' sovereignty so that States can act within their own discretion. The strength of this international system can therefore only result from the implementation in national law.

2) *The Montreal Convention*

a) Scope of Application

As mentioned above, the primary aim of the Montreal Convention was to arrive at a generally acceptable method of dealing with alleged perpetrators of acts of unlawful interference with aircraft.[176] Article 1 endeavours to fulfill this aim by defining the offences broadly in order to embrace all the possible acts that might occur.[177] For the case of unruly behaviour, however, only Article 1 (1) (a) is likely to be applicable. Pursuant to this provision, a passenger has to commit unlawfully and intentionally an act

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[176] Abramovsky, supra note 93 at 278.
[177] Abeyratne, supra note 112 at 56.

of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft. Under Article 1 (2) attempt and complicity give rise to the same degree of culpability as successful perpetration.[178] For an aircraft being "in-flight" the Convention uses the same definition in Article 2 (a) as the Tokyo Convention for the powers of the commander. Furthermore, the Montreal Convention is only applicable for this offence, if either place of take-off or place of landing are outside the territory of the State of registration, or if the offence is committed in the territory of another State as stipulated by Article 4 (2). As a result, purely domestic flight in the State of registration are excluded.

Every unruly behaviour has to meet the double requisites of unlawfulness and intent. While it is difficult to see how an act of violence could in fact not be an offence[179]and thereby unlawful, the element on intent is harder to be fulfilled. Considering the reasons of unruly behaviour, it might be possible that the passenger in such a situation is not able to control himself anymore, thus he would not act intentionally. On the other hand, this would be an easy excuse for every unruly passenger, since it is hard to prove in which state of mind that person acted. A successful approach could count factors which have been proven to influence a person's will to act, e.g. alcohol. These factors, however, should influence the penalty rather than the element of intent, thus creating a loophole in punishing unruly passengers. Consequently, the element of intent should not be given too much importance.

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[178] Abramovsky, supra note 93 at 282.
[179] Unmack, supra note 115 at 392.

The passenger has to commit an act of violence. While an act of violence can include armed attacks or physical assault[180], it can also be interpreted as including verbal assault and intimidation.[181] This broad application would be capable of covering a broad scope of unruly behaviour. But as another condition, the act of violence has to be likely to endanger the safety of the aircraft. Hence, the standard to determine whether the Convention is applicable in a given situation is not the gravity or heinousness of the act but rather its effect on the safety of the aircraft.[182] However, contrary to the "jeopardizing acts" in the Tokyo Convention, these acts have only to be "likely" to endanger safety; the threshold to fulfill this condition is therefore lower. Nevertheless, this narrows the scope of application towards unruly behaviour, since, for example, an assault by a drunken passenger on another passenger would usually not constitute such a "likelihood".[183] Moreover, as shown above, not even every interference with a flight attendant's duties would fulfill this condition.[184]

On the other hand, the Convention does not clarify how broad the causation from the act of violence to the likelihood of endangerment has to be. In the example of the passenger assault it could be argued that such a situation is likely to create panic and tumult thereby endangering the safety.[185] The same could happen in the example of the interference with a flight attendant by claiming that it disables or lessens her capacity to perform in a case of emergency.[186] However, this is a very broad interpretation, which is

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[180] G.F. Fitzgerald, "Towards legal suppression of acts against civil aviation" (1971) 585 International Conciliation 42 at 67.
[181] Abeyratne, supra note 112 at 56.
[182] Abramovsky, supra note 93 at 283.
[183] Unmack, supra note 115 at 392.
[184] See pages 25-27, above.
[185] Abramovsky, supra note 93 at 285.
[186] Ibid.

mainly based on hypothesis. Therefore, one has to be careful, especially under criminal law, in applying that interpretation, as under criminal law the well known principle "nullum crimen, nulla poena sine lege (certa/scripta)"[187] is applicable. In the author's opinion this interpretation tends to stretch the scope of that offence too far for creating certainty. However, it depends on the implementation and interpretation of the causal link under domestic law to see to what extent unruly behaviour can be governed.

b) Jurisdiction and Prosecution

"The Montreal Convention breaks new grounds and goes beyond codification in providing for the international legal action to be taken by States in respect of many acts..."[188] These words express best that the international community had learned from the mistakes made in the Tokyo Convention, thus providing for a very broad scope of applicable jurisdictions. Article 5 first obliges the State in which territory the offence was committed to establish jurisdiction over the offences governed by the Convention. This provision is applicable to unruly behaviour, since under Article 1 (1) (a) the aircraft has to be "in flight", which it is presumed to be when all external doors are closed. Therefore, contrary to the Tokyo Convention, unruly behaviour while taxiing is covered by the Convention. Second, the State of registration is given jurisdiction. Third, the Convention provides the State of landing with jurisdictional powers, which from the practical point of view is the most effective measure. As a single condition for this case the alleged offender still has to be on board the aircraft, which unruly passengers always

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[187] This principle forbids any punishment, for a crime which was not written down (scripta) or certain enough (certa) at the time of commitment; see *Convention for the protection of human rights and fundamental freedoms*, Art. 7 (1), 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953).

[188] Fitzgerald, supra note 180 at 75.

are. Fourth, again filling a gap of the Tokyo Convention, the State of the operator of a leased aircraft falls under the obligation to establish jurisdiction. This and the State of landing are two very important provisions for a successful prosecution of unruly passengers. Finally, the Montreal Convention adopts, like the Hague Convention, the principle of universal jurisdiction, which has been a controversial topic.[189] However, instead of fully honouring this principle, which would oblige every State to establish jurisdiction, it has been restricted to the actual presence of the offender in a particular state.[190] Still, by establishing all these different jurisdictions, the Montreal Convention guarantees a complete system, which is important for prosecuting unruly passengers worldwide.

Contrary to the Tokyo Convention, which does not mention this subject at all, under Article 3 Contacting States are under the obligation to make the offences mentioned in the Convention punishable by "severe penalties". However, the term stays undefined[191], so that it does not provide for any minimum period of incarceration[192] nor for a certain kind of punishment. This failure could have created the possibility that international relations might further be strained, especially when a wide discrepancy in punishment exists between the state of registration and the state which apprehends and prosecutes the offender.[193] Such tensions could also be fuelled by different kinds of punishments, be it the death penalty or the application of the "*Shari'a*".

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[189] Ibid. at 73.
[190] Diederiks-Verschoor, supra note 112 at 212.
[191] Abeyratne, supra note 112 at 58.
[192] Ibid. at 295.
[193] Abramovsky, supra note 93 at 296.

With regard to prosecution, Article 7 is inspired by the well-known principle "aut dedere aut judicare", which obliges a State either to extradite an offender or to punish him. The Convention, however, only requires Contracting States to submit the case to the competent authorities for the purpose of prosecution if they do not extradite the alleged offender.[194] This means that the prosecutorial discretion of the competent authorities is preserved as long as those authorities take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State.[195] Although mandatory prosecution has been embodied in the International Convention on White Slave Traffic and the International Convention of Counterfeiting Currency, it was considered to be unacceptable to many countries, thereby reducing the Conventions effectiveness.[196] Hence, State authorities in charge of handling the prosecution may well decide that according to their domestic law, the alleged offender should not be prosecuted at all.[197] This is a weak spot in the system of prosecution, since States safeguard their sovereignty to maintain wide discretion in differentiating between alleged offenders on the basis of individual circumstances and political climate.[198] However, in some States under domestic law the authorities have discretion to start prosecution. For a case of mandatory prosecution they would have to change their established national laws and principles, which confronts them with an amount of difficult work, since this should only apply with regard to offences governed by the Convention. Furthermore, mandatory prosecution does not guarantee an indictment, because this decision can also be in the

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[194] D.M. Fiorita, "Aviation Security: Have All the Questions Been Answered?" (1995) XX:II Ann. Air & Sp. L. 69 at 88; Abramovsky, supra note 93 at 293; Abeyratne, supra note 112 at 59.
[195] Fiorita, ibid.
[196] Abramovsky, supra note 93 at 294.
[197] D. Costello, "International Terrorism and the Development of the Principle Aut Dedere Aut Judicare" (1975) 10 J. Int'l L. & Econ. 483 at 488.
[198] Abramovsky, supra note 93 at 294.

discretion of the authorities. Finally, an indictment does not guarantee punishment. Consequently, the factor of political influence can interrupt the process at various stages of prosecutorial discretion, thus it can never be excluded. From this point of view, mandatory submission to competent authorities is the best solution.

An interesting observation has been whether Article 7, in order to create the obligation for a State to submit the case to the competent authorities, requires a request for extradition from another State. As mentioned above, extradition needs a request.[199] Hence, if no request for extradition is received by the State in whose territory the alleged offender is found, the requested State would not be bound to establish its jurisdiction over the alleged offender[200] because the "aut dedere" principle would not apply. However, such interpretation would negate and frustrate the aim of this principle to create a flawless system of jurisdictions. As a solution it has been proposed that the obligation to prosecute arises after a reasonable time has passed and there has been no request for extradition.[201]

Unfortunately, the Convention does not embody the principle "ne bis in idem", so that it is questionable whether an unruly passenger could be under the danger of double jeopardy if one State submitted the case to its authorities but then dismiss the case later on. The question arises whether another State now can or even has the obligation to take action under the Convention.[202] This would result in a situation in which an unruly passenger could face prosecution in many countries as long as he has not been punished.

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[199] Matte, supra note 112 at 349.
[200] Fiorita, supra note 194 at 88.
[201] Ibid.
[202] Compare Fiorita, supra note 194 at 88.

Therefore, this principle should apply in the sense that the fulfillment of the obligation to submit the case to the competent authorities by one State Party in respect of a particular alleged offender is equivalent to the fulfillment of that same obligation by all State Parties to the same Convention[203], so that no obligation for another State Party can arise. The application of that principle should even bar every other State Party from exercising its jurisdiction in order to prevent the abovementioned situation.

Concerning extradition, the Montreal Convention avoids the mistakes made in the Tokyo Convention. Article 8 provides that the offences covered by the Convention are deemed to be extraditable offences in the case that no extradition treaty is needed as well as under any existing extradition treaties. Furthermore, it obliges States to include these offences in future extradition treaty. In case no extradition treaty exists, States have the possibility to consider the Convention as a legal basis for extradition. Finally, it presumes that the offence has also taken place in the territory of the requesting State.

It seems that although Article 8 apparently creates a comprehensive system for extraditing an alleged offender, it is restricted since Article 8 (2, 3) makes extradition "subject to the other conditions provided by the law of the requested State".[204] Subsequently, restrictions under domestic law would always affect extradition. Therefore, no obligation to extradite would exist[205], because a State can refuse extradition on the basis of nationality or on political grounds.[206] This is a valid criticism,

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[203] Ibid.
[204] Diederiks-Verschoor, supra note 112 at 213.
[205] Ibid.
[206] C. Emanuelli, "Legal Aspects of Aerial Terrorism: The Piecemeal vs. the Comprehensive Approach" (1975) 10 J. Int'l L. & Econ. 503 at 510.

but in the end it does not create a gap in the system, since the principles of "universal jurisdiction" and "aut dedere aut judicare" apply. In the event that an extradition is impossible due to domestic law, the case has to be submitted to the competent authorities. If this creates difficulties in regard to prosecution, this will be the burden to bear for that particular State; otherwise, it will face sanctions from the international community. However, extradition will be subject to the international principle of "double criminality", which provides that for extradition the act committed has to constitute an offence in the requesting country and in the country in whose territory the alleged offender is found.[207] Since the Montreal Convention defines the offences to which it shall apply, this requirement will be fulfilled between Contracting States.

c) Shortcomings

The Montreal Convention avoids many flaws from which the Tokyo Convention suffers. Article 1 (1) (a), however, is unfortunately unable to govern all kinds of unruly behaviour, since its scope is too narrow for that. The lacking definition of the term "severe penalties" may create international tension and unjust treatment of an unruly passenger because of different approaches in defining that term and different legal cultures. The absence of the "ne bis in idem" principle in the Convention and the resulting danger of double jeopardy can also contribute to that.

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[207] Abramovsky, supra note 93 at 297.

3) Annex 17

As mentioned above[208], Article 17 aims to safeguard international civil aviation against acts of unlawful interference. The question arises what the term "unlawful interference with international civil aviation" includes. According to Abeyratne, it broadly includes hijacking, aviation sabotage (such as the causing of explosions in aircraft on the ground and in flight), missile attacks against aircraft, armed attacks on airports, passengers and other aviation-related property, and the illegal carriage of narcotics by air.[209] These examples reveal that "unlawful interference" requires a specific threshold of violent behaviour to be fulfilled. Applying this to unruly behaviour, it becomes obvious that Annex 17 will only apply to more severe kinds of such behaviour.

With regard to measures against such acts Annex 17 focuses on preventive actions instead on legal repression. Without doubt, preventive measures against unruly behaviour have to be taken but the ones mentioned in Annex 17 are not appropriate, as they mainly deal with prevention of use of arms and weapons. However, Annex 17 offers a basis for preventive measures against unruly behaviour.

All in all, Annex 17 at this time only has a very small scope of application towards unruly passengers and does not offer an effective legal instrument against their behaviour.

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[208] See page 21, above.
[209] R.I.R. Abeyratne, *Aviation Security Legal and Regulatory Aspects* (Aldershot: Ashgate, 1989) at 51.

III. Evaluation of the existing system

Surveying the existing legal system applicable to unruly passengers leads to several conclusions:

The scope of application of the existing Conventions does not cover the whole extent of unruly behaviour. Drafted to prevent and repress terrorism in international aviation, these Conventions do not fit properly to deal with minor offences. The Tokyo Convention leaves it to States to define the term "offence" thus preventing concerted action, whereas a definition would offer the chance to govern the whole spectrum of unruly behaviour. The threshold to commit a "jeopardizing act" is too high for many kinds of unruly behaviour – unless one accepts a very broad interpretation of causation. The Montreal Convention has a narrower scope of application towards unruly behaviour but it lowers the threshold by requiring that the endangerment of the safety of the aircraft is "likely".

Furthermore, definitions and a very clear terminology are needed. As an example, the missing definition of the term "offence" in the Tokyo Convention, contrasted with the defined crimes in the Montreal Convention, proves that it is necessary to define crimes on board aircraft at an international level. Not only does that prevent "disunification" caused by the application of domestic law, but it creates an international standard which States will recognized and which will lead to concerted action.

Clear regulation of the powers of the commander and the crew are inevitable. The Tokyo Convention empowers the commander of the aircraft with several rights, all of the them important to fight unruly behaviour on board. These powers are also applicable under the Montreal Convention, as long as the State of registration has ratified both

Conventions, since an act governed by the Montreal Convention will constitute an "offence" under the Tokyo Convention.

An efficient system of prosecution and an obligation to extradite are needed. Though having a broader scope of application, the Tokyo Convention suffers from problems with jurisdiction and flaws in the system of extradition. Especially, missing obligations to exercise jurisdiction or to extradite an alleged offender contribute to its inefficiency. The Montreal Convention has an efficient system of jurisdiction and extradition, resulting especially from the principles of universal jurisdiction and "aut dedere aut judicare". However, not one of the Conventions contain any sanctions for non-compliance of a Contracting State with its obligations or measures to enforce them.

In conclusion, the existing system is insufficient to deal with unruly passengers. It does not apply to all kinds of unruly behaviour and where it does, it suffers from flaws at other points. However, it offers the possibility to fight unruly behaviour by learning from its flaws and achievements.

IV. Effective legal remedies against unruly passengers

In regard to the conclusions drawn from the existing legal system a guideline of necessary legal requirements to fight unruly behaviour shall be elaborated. At the same time the "Progress Report on Unruly Passengers"[210] by the Legal Commission for the ICAO-General Assembly shall be taken into account. It will be the aim of this part to work out if and which international measures have to be taken.

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[210] Legal Commission, *Progress report on the acts or offences of concern to the international aviation community and not covered by existing law instruments (unruly passengers)*, ICAO GA, 33rd Session, ICAO Doc. A33-WP/35 LE 6 (2001) [hereinafter: ICAO-GA Report].

1) Catalogue of punishable offences

As concluded above, the problem of "disunified" law due to different national legislation constitutes a severe problem in prosecuting unruly passengers. The lacking definition of the term "offence" in the Tokyo Convention illustrates the impact of that problem.[211] Apart from the uncertainty about the applicable law, it hinders prosecution in the State of landing. "Since the jurisdiction over unruly passengers will sometimes involve extraterritorial elements, the State of landing may encounter certain difficulties in ascertaining the scope of its jurisdiction".[212] Its authorities are uncertain about the applicable law and whether they have jurisdiction. Furthermore, the "double criminality" rule[213] has to be fulfilled creating difficulties in providing evidence as to what constitutes an offence in another country.[214] Therefore, it is important to have an international standard as to which behaviour will be considered criminal in order to facilitate international prosecution. Hence, ICAO proposes a list of offences to provide a common denominator for offences as a basis for national prosecution and to offer uniform criteria for States to extend their respective jurisdiction.[215]

The list of offences is divided in three sections: the first deals with offences comprising acts of interference with a crew member on board a civil aircraft. Under this section the following acts constitute an offence:

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[211] See page 22, above.
[212] ICAO-GA Report, supra note 210, Attachment B at 3.
[213] See page 49, above.
[214] *Report of the secretariat study group on unruly passengers* (Third meeting, 10-11 February 2000) ICAO Doc. SSG-UP/3-Report [hereinafter: ICAO-Report 3] at 3.
[215] ICAO-GA Report, supra note 210, Attachment B at 3.

(1) Assault, intimidation or threat, whether physical or verbal against a crew member, if such act interferers with the performance of the duties of the crew member or lessens the ability of the crew member to perform those duties;
(2) Refusal to follow a lawful instruction given by the aircraft commander, or on behalf of the aircraft commander by a crew member, for the purpose of ensuring the safety of the aircraft or of any person or property on aboard or for the purpose of maintaining good order and discipline on board.

Paragraph 1 provides for special protection of crew members, since they are not only responsible for maintaining good order and discipline on board but also for the safety of the aircraft.[216] In line with that reasoning, this category protects the crew members on duty and, by extension, the public by maintaining the crew's effectiveness enforcing rules of conduct and good order.[217] This terminology takes into account all kinds of possible interference with the crew members, even if the safety of the flight is not endangered, thereby covering a vast extent of unruly behaviour.

Paragraph 2 enforces the acceptance of orders given on board an aircraft. Since orders by flight attendants are often refused due to a feeling of entitlement and opposition to authority[218], all instructions are deemed to be given on behalf of the commander.[219] This is in line with the powers given to the commander under the Tokyo Convention. The term "refusal" includes intentional and express conduct of non-compliance, but not merely inadvertent conduct.[220] This offence has a broad scope of application towards unruly behaviour. However, one must be careful applying this provision, since flight attendants are not police officers and this provision gives them vast powers, thereby also offering the possibility of misuse. The term "good order and discipline" is a particular

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[216] Ibid. at 4.
[217] Huang, supra note 4 at 19.
[218] Reiss, supra note 3 at 13.
[219] ICAO-GA Report, supra note 210, Attachment B at 4.
[220] Ibid.

weak spot, unless there will be a definition or guidelines as to what behaviour falls under this term. Its general terminology opens the door for different "moral standards" depending on the flight crew. Thereby it contributes to "disunification" of an international standard, although this list of offences should emphasize the objective of uniformity.[221] It is questionable, whether this term complies with the "Nullum crimen, nulla poena sine lege certa" rule[222], since these offences are intended to be implemented into national law.[223] As most acts will be covered by the term "safety of the aircraft or of any person or property on board", it should be removed.

The second section involves those acts that endanger safety or jeopardize good order and discipline on board:

> (1) Any person who commits on board a civil aircraft an act of physical violence against a person, or of sexual assault or child molestation, thereby commits an offence.
> (2) Any person who commits on board a civil aircraft any of the following acts, if such act is likely to endanger the safety of the aircraft or of any person on board, of if such act jeopardizes the good order and discipline on board the aircraft, thereby commits an offence:
> (a) assault, intimidation or threat, whether physical or verbal against another person;
> (b) intentionally causing damage to, or destruction of, property;
> (c) consuming alcoholic beverages or drugs resulting in intoxication.

Due to the gravity of the act, paragraph 1 deems all these actions being offences without the requirement of endangering the safety of the flight.[224] By governing acts against "other persons" including other passengers, this provision provides for good security of all passengers against unruly behaviour. Such regulation does not exist under

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[221] *Report of the secretariat study group on unruly passengers* (Fifth meeting, 19-20 April 2001), ICAO Doc. SSG-UP/5-Report [hereinafter: ICAO-Report 5] at 3.
[222] See page 44, above.
[223] ICAO-GA Report, supra note 210, Attachment B at 5.
[224] ICAO-GA Report, supra note 210, Attachment B at 5.

the current legal system, since the Tokyo Convention at least requires the "likelihood of endangering the safety". However, that protection is restricted to physical violence, so that mere verbal molestation or threats are not covered.

Paragraph 2 intends to close this gap, as it governs all different kinds of unruly behaviour towards other persons or their property. In addition however, it requires that this act is "likely to endanger the safety of the aircraft or any person on board" or "jeopardizes good order and discipline". As mentioned above, the term "good order and discipline" should be removed. Instead, the offence under paragraph (2) (a) should be extended to include a term like "creation of a social danger" in order to govern cases in which passengers are disturbed without being threatened.

The additional requirements that the behaviour is "likely to endanger the safety of the aircraft or any person on board" and "jeopardizes good order and discipline" intend to limit jurisdiction. "If the State of landing is expected to exercise jurisdiction over any simple assault on board a foreign aircraft even if such act neither occurs in its territory nor affects its interest, it may be considered that the net is cast too wide from a jurisdictional point of view."[225] As a result the question arises, which State is supposed to prosecute those "simple acts of assault"? Unruly behaviour is not restricted to serious offences but mainly comprises minor ones. The existing international regulations are not specifically designed to deal with other less serious types of offences committed by unruly passengers.[226] The heart of the problem, however, lies in its effects to aviation worldwide. Therefore, concerted action should be taken to deal with it to its whole extent. This should be reason or interest enough for a State to prosecute any such

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[225] Ibid.
[226] ICAO-GA Report, supra note 210, Attachment B at 1.

behaviour, since it will result in reciprocal actions by other States. In addition, if a State considers an act not worth prosecution, it is also unlikely that another State will request extradition, because it will consider it not worth the costs and trouble. This leaves the unruly passenger unpunished. It would therefore be best to remove these restrictions, since the State of landing has the best resources to prosecute any unruly passenger. Countering the argument that this could result in mandatory prosecution, one has to remember that there is no such obligation.[227] States only have to submit the case to its competent authorities, so that they still have the discretion whether to prosecute that specific case. Moreover, the drafters of the ICAO proposal have already circumvented that restriction of jurisdiction themselves by using the term "good order and discipline". This term is so wide that it will cover minor acts as well, thereby making them offences under the provision.[228]

Noteworthy is, that the consumption of alcohol resulting in intoxication constitutes an offence. First, there is no definition at what point a person is considered to be intoxicated. Although every person has an individual "tolerance" to alcohol, it requires a defined threshold to inform people when they are considered to be intoxicated, so that they know when they are about to commit an offence. Second, it is unclear whether the person has to intend to become intoxicated and third, airlines themselves are serving the alcohol. In a sense, they contribute to the offence, thereby nearly becoming an accomplice. Hence, the term "intoxication" needs to be defined.

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[227] See page 46, above; ICAO-Report 3, supra note 214 at 4.

[228] ICAO-GA Report, supra note 210, Attachment B at 5: Cases of "physical acts of violence that are likely to endanger the safety of the aircraft" are also covered by the Montreal Convention which then will apply normally.

The third section covers offences which do not fall under the other categories but are still capable of endangering the safety of the aircraft. Pursuant to that section, any person commits an offence, who:

(1) smokes in the lavatory, or smokes elsewhere in a manner likely to endanger the safety of the aircraft;
(2) tampers with a smoke detector or any other safety related device on board the aircraft;
(3) operating a portable device when such act is prohibited.

This provision shall prevent behaviour which is potentially dangerous. The wording is very precise, thus making it a clear and understandable provision. The only disadvantage is that there is no general clause for other behaviour that is likely to endanger the safety of the aircraft, which today might be unforeseeable. A provision such as "similar acts that endanger/are likely to endanger the safety of the aircraft or persons on board" would cover everything and at the same time provide enough certainty to be applicable under domestic law.

Apart from the abovementioned flaws, ICAO has made a good step towards an international standard against unruly passengers by drafting such a list of offences. The provisions govern nearly all different sorts of unruly behaviour against crew members and other passengers, thus making it possible to prosecute these acts worldwide.

2) *Jurisdiction*

a) General Principles

Concerning jurisdiction, there are several principles in international law on which it can be based. The first principle is known as the "*territoriality principle*". It provides that

each State has sovereign control over all acts occurring within or above its territory.[229] Its application does not depend on the perpetrator's nationality.[230] The Chicago Convention recognizes this principle in Article 1.

The second principle is the "*nationality principle*". It stems from the assumption that a State has practically unlimited legal control over its nationals.[231] Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for extra-territorial acts.[232] Thus, States can establish jurisdiction over acts committed by their citizens abroad.

The "*protective or security principle*" allows States to assume jurisdiction over aliens for acts abroad which affect the security of the State.[233] This concept rests upon the necessity for a State to protect itself from acts which threaten its security, territorial integrity or political independence.[234] The justification for the assertion of jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender.[235]

The "*passive personality principle*" makes it possible to punish aliens for acts abroad harmful to nationals, because of the nationality of the victim. This principle, however, is the least justifiable[236], so that it is rejected by Anglo-American jurisdictions except in

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[229] Mendelsohn, supra note 112 at 511.
[230] Abramovsky, supra note 93 at 287.
[231] Mendelsohn, supra note 112 at 511.
[232] I. Brownlie, *Principles of Public International Law*, 5th ed., (London: Clarendon Press, 1998) at 306.
[233] Ibid. at 307.
[234] Mendelsohn, supra note 112 at 512.
[235] Ibid.
[236] Ibid.

cases of terrorism.[237] However, an attack against a national of a particular State can be considered an attack against the State itself, so that jurisdiction could derive from the protective principle[238]. Nevertheless, the attack has to be of certain severity, like terrorism, in order to fulfill the requirements of threatening security or integrity of the territory.

Finally, the "*universality principle*" allows jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy.[239] It is the reprehensible nature of the crime which justifies this kind of jurisdiction.[240] To a certain extent, the principle of universality is the protective principle applied to the interests of the international community as a single multifaceted entity.[241]

b) The ICAO Approach

ICAO had to solve a difficult task in finding a proper way to punish unruly passengers. They had contemplate situations in which on a plane registered in the U.S. but operated by a Dutch carrier inbound to Thailand a French passenger knocks out a German and find the best way to achieve prosecution and punishment of the offender. With such complications in mind ICAO has proposed a provision on jurisdiction which States shall implement in their national law. The ICAO Report proposes that each State shall extent its jurisdiction to every act of the list of offences, if the offence took place on board:

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[237] C.L. Blakesley, "Extraterritorial jurisdiction" in M.C. Basssiouni, ed., *International Criminal Law*, 2nd ed., (Ardsley NY: Transnational Publishers, 1999) 33 at 40; Mendelsohn, supra note 112 at 512; compare Fiorita, supra note 194 at 71.

[238] R. Boerd, "United States Legislative Approach to Extraterritorial Jurisdiction in Connection with Terrorism" in Bassiouni, supra note 237, 145 at 150.

[239] Brownlie, supra note 232 at 307.

[240] Mendelsohn, supra note 112 at 512.

[241] Abramovsky, supra note 93 at 288.

(1) any civil aircraft registered in that State; or
(2) any civil aircraft leased with or without crew to an operator whose principal place of business in that State or, if the operator does not have a principal place of business, whose permanent residence is in that State; or
(3) any civil aircraft on or over the territory of that State; or
(4) any other civil aircraft outside that State, if
    (a) the next landing of the aircraft is in that State; and
    (b) the aircraft commander has delivered the suspected offender to the competent authorities of that State, with the request that the authorities prosecute the suspected offender and with the affirmation that no similar request has been or will be made by the commander or the operator to an other State.

The term "in flight" as used in this section means the period from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.

Paragraph 1 contains the so called "*flag jurisdiction*". For aircraft, the Tokyo Convention introduced this kind of jurisdiction, which is connected to the territoriality principle. Since an aircraft is not the territory of any State, but instead has to be registered, the link was made to the State of registration. For the prosecution of unruly passengers, however, the Tokyo Convention illustrates the practical problems of this jurisdiction, as often extradition of the offender is required. Moreover, evidence and witnesses will have to be brought to the State of registration creating practical difficulties for a trial.

The principle laid down in the jurisdiction under paragraph 3 is the territoriality principle, which notion is also reflected in Article 1 of the Chicago Convention.

c) Jurisdiction of the State of operator?

Paragraph 2 gives the right to establish jurisdiction to the State of the operator. This kind of jurisdiction was first introduced in Article 4 (1) (c) of the Hague Convention and shall prevent the problems arising from today's aviation environment in which most of the aircraft are leased. Therefore, it might not be adequate to include only the State of registry, since the State of the operator may also have to be involved for purposes of

jurisdiction.[242] As illustrated under the Tokyo Convention[243], having only the State of registry exercising its jurisdiction creates problems regarding extradition, because - due to a lack of interest - that State will not be willing to exercise its jurisdiction over a case in which none of its nationals is involved. Therefore, it is inevitable to implement this jurisdiction for a successful worldwide prosecution of unruly behaviour.

Although this jurisdiction reflects the notion of Article 83 bis[244] of the Chicago Convention this system was criticized due to a fundamental difference between criminal jurisdiction and supervision of such matters as airworthiness.[245] This opinion, however, does not take into account that this jurisdiction has been accepted twice in international Conventions[246] and that it does not exclude any domestic jurisdiction. On the other hand, the ICAO-Report seeks implementation of this jurisdiction into national law.[247] As this jurisdiction was agreed upon under international Conventions it is therefore only applicable with regard to Contracting States. Hence, with regard to that criticism the question arises whether a State can extent its domestic jurisdiction this way under the principles of international law without an obligation from an international Convention:

Although the State of operator is only a substitute for the State of registry, jurisdiction on board aircraft stays with the latter under the general principle established by the Tokyo Convention. Hence, the problem is that jurisdiction of the State of operator governs extra-territorial acts. Furthermore, the State of operator could have to ask for

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[242] ICAO-GA Report, supra note 210, Attachment B at 8.
[243] See page 32, above.
[244] *Protocol relating to an amendment to the Convention on International Civil Aviation*, 6 October 1980, ICAO Doc. 9318 [hereinafter: Article 83bis]
[245] ICAO-Report 5, supra note 221 at 3.
[246] Article 4 (1) (c) of the Hague Convention and Article 5 (1) (d) of the Montreal Convention.
[247] ICAO-Report 5, supra note 221 at 5.

extradition in a case in which none of its nationals was involved and which occurred outside its territory.

Extra-territorial acts can only be the object of jurisdiction in a lawful way if there is a substantial and bona fide connection between the subject-matter and the source of jurisdiction.[248] This means, there must exist a substantial link between the person or the act and the State claiming sovereign jurisdiction.[249] The necessary link for jurisdiction of the State of registry is the registration of the aircraft. Although the State of operator is a substitute for the State of registry, this link cannot be transferred. The reason why such a regulation was made, however, is that the operator of that airline/aircraft has its place of business in this State. Hence, this State has jurisdiction over the operator and it will also take into account the operator's economic interests, since that benefits this State. This fact brings the State of operator as close to an extra-territorial act committed on the operator's aircraft as the State of registry. Therefore, if jurisdiction cannot be established under one of the other principles, the substantial link for the State of the operator to establish jurisdiction in these cases results from this State's jurisdiction over the operator due to his place of business in its territory. However, only time will tell whether States are willing to establish and exercise jurisdiction in this case.

d) Jurisdiction of the State of landing?

Paragraph 4 implements a new element of jurisdiction based on the emerging practice under which Australia, Canada, the United Kingdom and the United States[250] have extended their jurisdiction under domestic law to cover offences committed on board

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[248] Brownlie, supra note 232 at 313.
[249] Abeyratne, supra note 86 at 407.
[250] ICAO-GA Report, supra note 210, Attachment B at 2.; **Compare** Reiss, supra note 3 at 14.

foreign aircraft outside their territory. This provision gives jurisdiction to the State of landing over acts committed on board an civil aircraft in flight outside its territory if the next point of landing is in that State and if the aircraft commander has delivered the alleged offender to the competent authorities with a request for prosecution.

The definition of the term "in flight" is equivalent to the one used in Article 1 (3) of the Tokyo Convention in order to prevent a wider jurisdiction of the State of landing.[251] Unfortunately, the problems this definition brings with it[252] have not been clarified.

In order not to give the State of landing excessive jurisdiction, a request by the commander is required for prosecution.[253] This clause was criticized for giving the commander the power to decide whether an alleged offender should be prosecuted.[254] However, ICAO deemed it necessary to have a restriction of jurisdiction, because this jurisdiction contains an extra-territorial element toward which a cautious attitude should be maintained. Such caution is necessary at present, as there does not seem to be a clear rule under public international law with regard to this kind of jurisdiction.[255]

As with the jurisdiction of the State of the operator, the extra-territorial element of this jurisdiction and the absence of a clear rule under public international law raise doubts with regard to its implementation into domestic law. As pointed out before, jurisdiction over extra-territorial acts needs a substantial link to the State exercising such jurisdiction.[256] The usual case of extra-territorial jurisdiction therefore arises under the "protective principle", where the security or integrity of a State is endangered. The

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[251] ICAO-Report 5, supra note 221 at 4.
[252] See page 23, above.
[253] ICAO-Report 1, supra note 110 at 4.
[254] *Report of the secretariat study group on unruly passengers* (Fourth meeting, 26-27 October 2000), ICAO Doc. SSG-UP/4-Report [hereinafter: ICAO-Report 4] at 3.
[255] ICAO-GA Report, supra note 210, Attachment B at 7.
[256] See above, page 62.

"passive-personality principle" offers another possibility for applying such jurisdiction. Nevertheless, this principle is considered a rather dubious ground upon which to base claims of jurisdiction under international law and was therefore strenuously opposed by the US and Britain.[257] Under both principles, there is an "effect" between the act and the State or its nationals which creates the necessary link. Although controversial, this "effects" doctrine has been applied to economic issues as well.[258] The classic statement was made in the case of *U.S. v. Aluminum Co. of America*[259] in which the court stated that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[260] The European Court of Justice also established jurisdiction over corporations not based in the Community in the field of competition law.[261]

The problem of the jurisdiction of the State of landing is that it lacks such a link or such an "effect". An example illustrates this problem: As a precondition, none of the other principles must apply in such a case. Hence, there will be a plane inbound to a State which is neither the State of registry nor the State of the operator. Also, no person on board that aircraft is a national of that State. Suppose an offence is committed on board that aircraft while it is not in the airspace of that State. How can the necessary link to establish jurisdiction over this extraterritorial act be justified?

The only direct link is that the aircraft is landing in that State after the crime was committed. However, this will not be enough to recognize an "effect" under international

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[257] M.N. Shaw, *International Law*, 3rd ed., (Cambridge: Grotius Publications, 1991) at 408; Mendelsohn, supra note 112 at 512.
[258] Shaw, ibid.
[259] *U.S. v. Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945).
[260] Ibid.
[261] Shaw, supra note 257 at 428.

law, since unlike in the examples of extra-territorial jurisdiction, there is no apparent comparable "effect" on the territory or on the nationals of the State of landing. One could argue that the offence has such an "effect" on the safety of aviation creating a strong enough link, but this argument is contestable. First, in the case of a minor offence, it is difficult to argue that the safety of aviation was threatened. As a result, jurisdiction could only be established for serious offences, leaving a gap in prosecuting unruly passengers. Second, safety of aviation is in the interest of all States, not only of that State in particular, so that there is no direct "effect" on the interest of that State. For these reasons, it has been argued that a State, by establishing jurisdiction as the State of landing, exceeds the limits set by general principles of international law in respect of State jurisdiction over criminal matters.[262]

On the other hand, the State of landing is the best choice to guarantee successful prosecution of an unruly passenger. When the aircraft lands, all the passengers, and thus all the witnesses to the offence, are present; the accused can be apprehended, depositions taken and all evidence immediately gathered.[263] As a result, it would further justice by a sure and rapid submission of the accused to penal process, hinder his escape, facilitate the interviewing of the witnesses and avoid the problems of extradition.[264] However, a problem is that the commander could determine in which State the offender shall be prosecuted by deciding to disembark the passenger after an emergency landing.[265] Therefore, the additional question arises as to what connection the State of first landing has to both the offence and its participants and, hence, which interest it has in

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[262] Fiorita, supra note 194 at 86.
[263] Mendelsohn, supra note 112 at 514.
[264] M.E. Ritchie, *Crimes aboard aircraft* (LL.M. Thesis, McGill University, 1958) [unpublished] at 215.
[265] Ibid.

prosecution the alleged offender.[266] Thus, the insufficient "effect" to grant the State of landing jurisdiction creates the same problem prosecution as it does for jurisdiction. Furthermore, the State of landing would have to bear the cost of prosecution and trial over an offence in which none of its nationals might have been involved. If the offence was grave enough, the offender could even face prison, which would mean that this State would have to come up for his prison costs.

However, from the legal point of view, this jurisdiction has already been agreed upon under international Conventions and so far there has been no protest of the international community against such jurisdiction under domestic law.[267] By 1958, 14 States had already implemented such jurisdiction[268], although at that time many States would have refused to adopt a Convention containing such a provision, because it would conflict with their theory of penal jurisdiction.[269] However, the situation of extending domestic law under an obligation from an international Convention differs from doing so without such an obligation: the adoption of such jurisdiction under an international Convention is based on international consent, thus "making international law" whereas the mere extension of domestic law is a single action that can easily be regarded as violation of international law. Nevertheless, especially in the case of extending jurisdiction, the effect for non-parties will be the same in both situations. The general rule is that international agreements bind only the parties to them.[270] But the nationals of non-parties can still become subject to the extended jurisdiction as soon as they come under its radius of

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[266] Mendelsohn, supra note 112 at 514; compare Reiss, supra note 3 at 14.
[267] ICAO-GA Report, supra note 210, Attachment B at 7.
[268] Ritchie, supra note 264 at 158: Argentina, Belgium, Bolivia, France, Iran, Italy, Lebanon, Luxembourg, Mexico, Romania, Spain, Syria, Turkey and Yugoslavia.
[269] Ritchie, supra note 264 at 215.
[270] Shaw, supra note 257 at 579.

operation. Therefore, States can enter into international dispute settlement, if they consider a single domestic action unlawful under international law.

With regard to concerted action against unruly passengers, extension of jurisdiction to the State of landing should be based on international consent due to its "progressive" approach under international law. Furthermore, if domestic law is extended without international Convention, it even becomes difficult for the passenger to know which law applies to him, as the point of landing could be selected by the aircraft commander.[271]

At the same time, the adoption of such jurisdiction under international Conventions and the extension of domestic law by a current total of 18 States without any protest from the international community provides proof of a certain State practice. That does not mean that there is already a rule of customary international law, which ICAO does not assume.[272] International law would not be international law, however, if it could not be modified by actions taken by States. Otherwise it would not experience any further development. Hence, this State practice supports a trend toward such an extra-territorial jurisdiction in criminal matters, although the necessary link under current principles of international law does not appear to be sufficient or present at all. Still, approaching this subject, caution should be exercised. In order to avoid confusion and diplomatic difficulties in matters of extradition and international judicial cooperation, a coherent and consistent approach to jurisdiction over extraterritorial crimes needs to be developed.[273] Eventually, only the reaction of the international community can tell whether this kind of extra-territorial jurisdiction will be considered legal or not.

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[271] Mendelsohn, supra note 112 at 514.
[272] ICAO-GA Report, supra note 210, Attachment B at 7.
[273] Blakesley, supra note 237 at 104.

e) The "Double-Criminality" Principle

Another principle which could apply in this case is the "double-criminality" rule. Although this principle usually applies to extradition[274], one State already explicitly included such a clause between the State of landing and the State of registration in its domestic law.[275] Furthermore, the situation of extradition is similar to the extension of jurisdiction to the State of landing: an offender is found in any country having no jurisdiction over the offence committed because of a missing link to it, and another country, because of having jurisdiction, requests extradition. For granting extradition, the act committed must constitute an offence in the State where the alleged offender is present. Otherwise, by extraditing this person, that State would agree to punish him for conduct, which itself does not consider criminal. Giving jurisdiction to the State of landing does not change this situation but replaces extradition by giving jurisdiction. There is still no link between the act and the State of landing. Now, however, a passenger on an aircraft is subject to the law of a State before the aircraft is even over that State; therefore conduct which might be entirely innocent in the State of registration might become punishable after landing in a State which regarded that act as culpable.[276] Since the basic principle is that aircraft have the nationality of the State in which they are registered[277] and that therefore jurisdiction on board aircraft is with the State of registration, the principle of double criminality should apply between the State of registration and the State of landing. For the sake of certainty clarifying in which law is

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[274] Brownlie, supra note 232 at 319; Abramovsky, supra note 93 at 297.
[275] ICAO-GA Report, supra note 210, Attachment B at 2; *Report of the secretariat study group on unruly passengers* (Second meeting, 19-20 August 1999) ICAO Doc. SSG-UP/1-Report [hereinafter: ICAO-Report 2] at 4.
[276] Ritchie, supra note 264 at 216.
[277] Art. 17 Chicago Convention.

applicable, this becomes more necessary since the State of landing could be determined by the commander. Therefore, the "double-criminality" principle should be taken into account in this situation.[278] Otherwise, it could create strange and unjust results.

This argument is a good reason to apply this principle for the sake of an international standard, certainty and justice. Therefore, it is surprising that the ICAO proposal does not include the "double-criminality" rule in the jurisdiction clause. ICAO justifies this with the argument, that there could be practical difficulties in providing evidence as to what constituted an offence in another country and that if jurisdiction is limited to the list of offences proposed in the report, this requirement would probably become unnecessary.[279] This is right in the case every State has implemented this list into its domestic law or agreed upon it in an international Convention, as the adoption of such jurisdiction under an international Convention is only applicable in respect of the specific offences created under those Conventions.[280] As long as there are States, however, which have not implemented that list of offences into their domestic law, international law requires proving of double criminality in order to establish jurisdiction with the State of landing.[281] With the aim of extending national legislation, the ICAO clause on jurisdiction of the State of landing has therefore to be amended by the "double-criminality" principle.

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[278] ICAO-Report 3, supra note 214 at 3.
[279] ICAO-Report 3, supra note 214 at 3.
[280] Fiorita, supra note 194 at 85.
[281] See above, page 68.

f) A Solution?

A solution for the problems arising from the jurisdiction of the State of landing lies in the application of universal jurisdiction. Although at the moment only piracy and war crimes are regarded as being subject to universal jurisdiction under customary international law[282], States have accepted universal jurisdiction in a number of treaties which provide for the suppression by the international community of various activities, ranging from the destruction of submarine cables to drug trafficking, slavery and hijacking.[283] With regard to hijacking, the principle of universality was applied under the Hague and the Montreal Conventions.[284] Compared to these activities, aviation security, as it is in the interest of every State, together with the global scope of aviation offer good reasons to consider crimes committed on board aircraft subject to universal jurisdiction. If crimes aboard aircraft would be made subject to this jurisdiction under an international common sense, be it by an international Convention or by extension of domestic law, there would be no problems with extra-territoriality jurisdiction or double-criminality. The State prosecuting the alleged offender could do so in the awareness that this conduct is considered criminal everywhere.[285] The only condition for that jurisdiction would be a proper implementation of the "ne bis in idem" and the "aut dedere aut judicare" principles. Therefore, universal jurisdiction offers the most effective solution for jurisdictional problems in order to prosecute unruly passengers worldwide.

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[282] Shaw, supra note 257 at 411.
[283] Ibid. at 414; Brownlie, supra note 232 at 308.
[284] Article 4 (2) Hague Convention, Article 5 (2) Montreal Convention.
[285] Ritchie, supra note 264 at 223.

3) Powers of the Crew

The successful handling of disruptive passengers begins on board the aircraft. The flight crew therefore needs special rights to deal with an unruly passenger in the proper way. The International Transport Workers' Federation (ITF) claims to give employees the authority to act.[286] Means of restraint are of special importance in order to detain violent behaviour.[287] As observed above, the Tokyo Convention provides the aircraft commander with the rights to restrain a passenger, to disembark him or to deliver him to the competent authorities. He can even authorize crew members or passengers to take measures of restraint or those can, under certain conditions, take such measures without authorization. In addition, all persons making use of those powers in accordance with the Convention are granted immunity. Hence, in order to deal with unruly passengers these powers are sufficient. That, however, does not seem to be sufficient for the ITF, who ostensibly demands "full immunity" for the whole crew from legal and insurance remedies.[288] Keeping in mind the rights of a passenger, it is not justifiable to give the crew vast power without any limits. Under this demand they would not be liable, even if they overextended their powers. Therefore, an immunity clause like that in the Tokyo Convention is sufficient.

The ICAO proposal does not include any provision regarding the powers of the crew. Considering that the majority of States is party to the Tokyo Convention, this does not seem to be necessary. However, those States that are not party should be advised to implement these powers in their national law.

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[286] ITF, supra note 12 at 13.
[287] Ibid. at 16.
[288] Ibid. at 17

4) Prosecution and Punishment

Although this omission is a criticism of the Montreal Convention[289], the ICAO proposal does not include any guideline as to what extent the offences should be punished. This matter should be left to the discretion of sovereign States.[290] This missing limitation of the extent of penalties can lead to international tensions and injustice when a wide discrepancy in punishment exists between the state of registration/nationality of the offender and the State which apprehends and prosecutes him.[291] A State might even be reluctant to extradite an offender to the requesting State which is likely to treat the offence in the harshest manner.[292] Therefore, ICAO should issue a clause of penalties or, at least, guidelines how to punish the offence.

However, human rights limit the possible variety of different kinds of penalties.[293] The same is true for the right of due process and the right for a fair trial.[294] Nevertheless, it is still questionable whether an alleged offender will get a fair trial[295], since ICAO intends implementation of their proposal into domestic law, but there are still States which do not comply with international human rights. Even ICAO considers this fact should be taken into account.[296] Furthermore, the danger of political trial can never been excluded.[297] This might create obstacles for the acceptance of this proposal, especially, if one takes into account the recent problems of States to agree to other States to exercise jurisdiction

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[289] See page 45, above.
[290] ICAO-GA Report, supra note 210, Attachment B at 3.
[291] Abramovsky, supra note 93 at 296.
[292] Emanuelli, supra note 206 at 510.
[293] See *e.g.* Article 3 of the "*Convention for the protection of human rights and fundamental freedom*", supra note 181.
[294] Ibid. Article 6; see also Tokyo Convention Art. 15 (2).
[295] J.A. de Sousa Freitas, *Jurisdiction over Events aboard Aircraft* (LL.M. Thesis, McGill University 1962) [unpublished] at 131.
[296] ICAO-Report 1, supra note 110 at 4.
[297] See page 46, above.

over their respective nationals[298] because of fear of political trials which could result in excessive punishment. On the other hand, implementation of these rights in human rights conventions is all that could be done on an international level. Hence, States should not be reluctant to accept the ICAO proposal with the suggested changes and amendments.

5) Implementation

The last point to be considered is how to implement the ICAO proposal. The existing options are to implement it into national law, amend Annex 17 or the existing international system, or to create a new international Convention.

ICAO considers the implementation of their proposal into national law as an adequate short and medium-term measure[299] which should therefore serve as the primary legal mechanism for dealing with the unruly passenger problem. Only if these measures do not deal with the problem effectively, should an international legal instrument become necessary as a long term solution.[300] The problem of this option, however, stems from the absence of a clear, generally recognized basis in international law to support the jurisdiction of the landing State. States might not only be reluctant to extend their jurisdiction due to this problem[301], but they might even consider it unlawful. On the other hand, State action is needed to create a new basis for jurisdiction under international law. But this action should be taken in accordance and after consulting with the international

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[298] "U.N. delegates wrangle over reach of new war-crimes court" (16 July 1998) online: CNN, <http://www.cnn.com, s.v. <International criminal court>> (date accessed 15 June 2001>; "International Criminal Court" online: United Nations Association of the U.S.A. <http://www.unausa.org/programs/icc.htm> (date accessed: 15 June 2001).

[299] ICAO-Report 4, supra note 254 at 1.

[300] ICAO-Report 5, supra note 221 at 5.

[301] ICAO-Report 2, supra note 275 at 4.

community, since so far jurisdiction of the State of landing does not comply with the existing principles of jurisdiction under international law.

Another possibility to enforce the ICAO proposal would be an amendment of Annex 17 by introducing the term "unlawful endangerment" into it.[302] The advantage is that Annexes are legally binding upon Contacting States to the Chicago Convention.[303] There would be a vast applicability of a uniform standard all over the world due to the number of ICAO member-States. In addition, an international conference would not be necessary, thus offering a good short-term solution. However, this option bears problems, as well. First, it is questionable whether States will be willing to accept such a far reaching decision to be implemented by an Annex to the Chicago Convention, since it deals with extending national legislation, something that is deeply embedded in their domestic sovereignty and law making process. Hence, they might consider it illegal to establish this under an Annex. Second, States only have to comply to "the highest practical degree"[304] and it is upon the State itself is the judge of what is "practical"[305]. Finally, if States are reluctant to extend their national jurisdiction because of a lacking rule under international law, they will show the same reluctance in doing so under an Annex. Consequently, amending Annex 17 offers a good chance for a wide application of the list of offences but, at the same time, it is thwarted by its own progress.

The third option is to amend either the Tokyo or the Montreal Convention. The Tokyo Convention already has a broad scope of application regarding unruly passengers but at

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[302] ICAO-Report 1, supra note 110, Attachment C at 1; Reiss, supra note 3 at 15; see for a sample draft Meyer & Gommert, supra note 43 at 170;
[303] Art. 37, 54 (l), 90 Chicago Convention.
[304] Art. 37.
[305] Art. 38.; M. Milde, "Enforcement of Aviation Safety Standards – Problems of Safety Oversight" (1996) 45 ZLW 3 at 5.

the same time suffers serious flaws, especially concerning the establishment of a unified system and extradition. On the other hand, it provides the aircraft commander with the necessary power to act. The Montreal Convention has a smaller scope of application but prevented several mistakes made in the Tokyo Convention. It already embodies jurisdiction of the State of landing and universal jurisdiction, a proper extradition system combined with the principle "aut dedere aut judicare". Furthermore, the offences under the Montreal Convention constitute offences under the Tokyo Convention, so that States which are parties to both can apply the powers of the commander to offences under the Montreal Convention. Therefore, ICAO favours supplementation of the Montreal Convention.[306] The Montreal Convention avoids the problems of extending jurisdiction merely under domestic law, since States agreed to jurisdiction of the State of landing under an international Convention. Therefore, this option would be the easiest way for a medium-term solution. The disadvantage is that even the Montreal Convention suffers from flaws, although less than the Tokyo Convention. In addition to that, amending the Montreal Convention will lead to a "disunification of law" due to different parties belonging to the Tokyo Convention, the Montreal Convention and the Amendment to the Montreal Convention. Therefore, an amendment will only be sensible, if the parties to it are or will become parties to the other two Conventions.

This should make apparent "that the pieces of the legal puzzle have to be collected and that the next step is to join them"[307], leading the way to a new international convention. In order to create an international standard for all crimes aboard aircraft, the best way is a new convention. It will combine the existing conventions, eradicate their mistakes and

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[306] ICAO-GA Report, supra note 210, Attachment B at 5.
[307] Emanuelli, supra note 206 at 511.

provide for international criminal law on board aircraft. Although States are always reluctant to accept international obligations, globalization and especially the global impact of aviation necessitate this remedy. Unfortunately, such a project will take a lot of time to reach consensus, since such a convention only has impact if it is applied nearly worldwide. With regard to unruly passengers, however, time is the essence, so that a new convention is only a long-term solution.

Chapter 2: Respective Passenger Rights

The legal discussion of unruly passengers has up to present times primarily focused on repressive action, in particular on how to punish the offenders and how to improve the legal system. The rights and legal remedies of fellow passengers who suffer from unruly passengers' actions have found little interest. Even less attention has been paid to the effects that such repressive, hardline policy has on the rights either of innocent passenger who "inadvertently fall into the legal net and suffer the indignity of imprisonment"[308], or of unruly passengers who are at the crew's mercy while on board the plane[309]. An important subject in this context is also the legality of banning unruly passengers from future flights. This chapter will describe the legal and regulatory issues of these topics.[310]

I. Rights of fellow passengers and crew

1) Air carrier's liability for actions of an unruly passenger

Of all the reported cases on unruly passengers, several incidents involved acts against fellow passengers such as assault[311] or sexual molestation[312]. The involvement of other passengers in unruly behaviour raises the question whether the airline can be held liable for such actions. At present, air carriers' liability on international flights is governed by

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[308] Kahn, supra note 25 at 144.
[309] See Guildhall Study, supra note 31 at 30.
[310] These subjects will be examined under international law and aspects. Therefore, air carrier's liability will only be examined for incidents on international flights. Only if necessary, reference will be made to U.S. domestic law and legislation.
[311] *Langadinos v. American Airlines*, Inc., 199 F.3d 68 (1st Cir. 2000).
[312] *Wallace v. Korean Air*, 214 F.3d 293 (2d Cir. 2000).

the Warsaw Convention[313]. However, this thesis will examine liability under the recently created Montreal Convention[314], which was drafted to correct the flaws of the Warsaw System and which will hopefully soon enter into force. For liability of the air carrier, Article 17 of the Montreal Convention 1999 provides:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

a) Accident?

Pursuant to this provision, the action of an unruly passenger against another passenger has to constitute an accident. Considering that the term "accident" is not defined under the Convention, "contemplating the meaning of the word 'accident' in Article 17 [...] is a metaphysical exercise roughly equivalent to contemplating the number of angels that may dance on the head of a pin"[315].

In the case of *Air France v. Saks*[316], the U.S. Supreme Court set a precedent of how to define the term "accident": "Liability under Article 17 [of the Warsaw Convention] arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied

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[313] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, ICAO Doc. 7838 (entered into force 13 February 1933). [hereinafter: Warsaw Convention] The Convention has been amended by several Protocols so that it is also known as the "Warsaw System".

[314] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, ICAO Doc. 9740 (not yet in force) [hereinafter: Montreal Convention 1999]. Since the requirements for liability are similar under both Conventions reference will be made to cases decided under the Warsaw Convention.

[315] L. Cobbs, "The Shifting Meaning of 'Accident' under Article 17 of the Warsaw Convention: What did the Airline know and what did it do about it?" (1999) XXIV Air & Sp. L. 121.

[316] *Air France v. Saks*, 470 U.S. 392, 404-405 (1985).

after assessment of all the circumstances surrounding a passenger's injuries."[317] In order to restrict the scope of this term, some lower courts made reference to the definition in Annex 13 to the Chicago Convention as an "occurrence associated with the operation of the aircraft"[318] or whether the injury is "a characteristic risk of air travel"[319]. Other authors demand a "causal connection between the cause of damage and the operation of the aircraft and/or the air travel"[320]. As a corollary, U.S. courts so far have found that passenger-to-passenger altercations do not constitute an accident, because they are not part of the normal operation of the aircraft.[321] In drastic contrast to this reasoning, the U.S. Court of Appeals for the second Circuit decided that sexual molestation by another passenger constitutes an "accident" because especially on over-night flights with the cabin lights dimmed this represents a typical risk of air travel.[322] This interpretation, however, is too vast, since it would result in obliging carriers to control all the behaviour of its passengers on a full-time basis, thus resulting in indeterminate liability. Such obligation is neither desirable concerning the rights of an individual and his self-determination nor is it feasible.

As often, the best way to go between to extreme positions is a compromise: "As air rage becomes more common, its conceptual differences from the hijacking and terrorism cases that have been considered covered accidents under Article 17 diminishes"[323], and "an intoxicated passenger potentially endangers the safety of other passengers, as well as

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[317] Ibid.
[318] J.D. Holding, "Air rage: the unruly passenger" (2000) 4:1 Aviation Quarterly 11.
[319] B.I. Rodriguez, "Recent Developments in Aviation Liability Law" (2000) 66 J. of Air L. 27 at 48.
[320] E. Giemulla, et al., *Warsaw Convention*, loose-leaf, (The Hague: Kluwer Law Int., 1997) Art.17 at 13.
[321] *Potter v. Delta Air Lines*, 98 F.3d 881, 883-884 (5th Cir. 1996); *Stone v. Continental Airlines*, 905 F.Supp. 823 (D. Haw. 1995); *Price v. British Airways*, 23 Avi 18.465 (S.D.N.Y. 1992), U.S. Dist. LEXIS 9581 online: LEXIS (LEXSEE); Cobbs, supra note 315 at 125.
[322] *Wallace v. Korean Airlines*, supra note 312 at 299-300.
[323] Cobbs, supra note 315 at 125.

innocent third parties on the ground"[324]. Under these premises, courts have started to acknowledge liability of carriers for their involvement in passenger-to-passenger altercations. Already in *Potter v. Delta Air Lines* the court denied such altercation to be an "accident" partially on the basis that no airline personnel was involved.[325] In the case of *Tsevas v. Delta Airlines* the court held that sexual molestation by an intoxicated passenger who was continuously served alcohol constitutes an "accident" because the plaintiff was refused to be moved to a different seat after requesting.[326] The refusal to be re-seated was considered to be an unusual, unexpected event on the side of the carrier external to the passenger. Finally, in *Langadinos v. American Airlines*[327] the airline was held liable for continuing to serve alcohol to an intoxicated passenger who then assaulted the plaintiff. The court stated that not every tort committed by a fellow passenger is an "accident" and that where the airline personnel played no causal role in the commission of the tort there is no "accident".[328] "On the flip side, courts have found Warsaw "accidents" where airline personnel play a causal role in a passenger-on-passenger tort".[329] Therefore, under the notion of *Oliver v. Scandinavian Airlines*, where the event of a drunken passenger who was continually served alcohol fell and injured a fellow passenger was considered to be an "accident"[330], and under the flexible application of the *Saks* definition, the court in *Langadinos* recognized that over-serving alcohol to an

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[324] C.S. Bowe, "'May I offer you something to drink from the beverage cart?': A close look at the potential liability for airlines serving alcohol" (1989) 54 J. of Air L. 1013 at 1015.
[325] *Potter v. Delta Airlines*, supra note 321.
[326] *Tsevas v. Delta Air Lines, Inc.*, [1997] U.S. Dist. LEXIS 19539 (N.D. Ill. E.D.) online: LEXIS (GENFED, COURTS).
[327] *Langadinos v. American Airlines, Inc.*, supra note 311 at 68.
[328] Ibid. at 71.
[329] Ibid. citing: *Schneider v. Swiss Air Trans. Co.*, 686 F.Supp. 15, 17 (D. Me. 1988).
[330] *Oliver v. Scandinavian Airlines, Sys.*, 17 Avi 18.283, 18.284 (D. Md. 1983), [1983] U.S. Dist. LEXIS 17951 online: LEXIS (MEGA, MEGA).

apparently intoxicated passenger can constitute the causal link between airline personnel and the injury.[331] However, the court required proof that the airline's service of alcohol to the assailant was a proximate cause of his injury.[332] As a result, this requirement incorrectly places the burden on the plaintiff to show some causal role on the part of the carrier.[333] If analyzed properly, the "accident" does not lie in the excessive serving of alcohol, but in the actions of the unruly passenger. The serving of alcohol only creates a necessary connection between the airline and the "accident" so that the airline can be held liable. The plaintiff therefore has to prove that the airline served excessive alcohol to the offender. Having done so, the plaintiff has fulfilled his burden of proof. Any further requirement would deny the known effects of alcohol, especially at high altitude[334]. Furthermore, requiring proof of causation first confuses the requirements of "accident" and "causation" and second, the system of the Montreal Convention 1999. The burden of proof for this is with the carrier pursuant to Article 21 (2) (b) of the Convention. Such exoneration is only possible for claims over 100,000 Special Drawing Rights (SDR). Furthermore, how can someone prove that it was the alcohol which caused the perpetrator to act? Under the known influence of alcohol on the human body, it should be clear that alcohol always plays a contributing role, so that this requirement demanded by the court has to be rejected.

The necessary connection can also be seen in the violation of a duty an airline owes to its passengers as a common carrier. In the case of *O'Leary v. American Airlines* the court found that an airline, as a common carrier, owed a common law duty to its passenger to

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[331] *Langadinos v. American Airlines*, supra note 311 at 72.
[332] Ibid. at 71; Rodriguez, supra note 319 at 50.
[333] Ibid.
[334] See pages 10, 13, above.

exercise reasonable care for known or reasonably anticipated risks.[335] Considering the known effects of alcohol, the carrier "breaches the duty to ensure the safety of it passengers"[336] by serving alcohol to an intoxicated passenger. This is strongly supported by the general principle that "a seller or server of alcohol is liable if the service of alcohol creates a foreseeable and unreasonable risk of injury"[337]. Under this principle, an employer in Canada was found liable for serving alcohol at a Christmas party which caused the crash of one of his employees driving home after having insisted to do so.[338] However, this argument is contestable because it is the consumption and not the service of alcohol which is the proximate cause of any injuries.[339] Nevertheless, the airline can be regarded to be under the common law duty to refrain from further serving alcohol to an apparently intoxicated passenger[340], so that a breach of this duty creates the necessary link.

b) Bodily Injury or Death

Another requirement of Article 17 is that the accident caused "bodily injury or death"; subsequently there must be a physical injury or a physical manifestation of injury.[341] Apart from the problems with psychic injuries[342], which shall not be governed here, the threshold to prove this condition is not very high. The court in *Langadinos* held that "excruciating pain" in the groin area by grabbing someone's testicles represents a

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[335] *O'Leary v. American Airlines*, 475 N.Y.S.2d 285, 288 (N.Y. App. Div. 1984), [1984] N.Y. App.Div. LEXIS 18103 online: LEXIS (MEGA, MEGA).
[336] Bowe, supra note 324 at 1023.
[337] Ibid. at 1032.
[338] T. McLaughlin, "Boss found liable for boozy crash" *The Globe and Mail* (6 February 2001) A4.
[339] *O'Leary v. American Airlines*, supra note 335 at 290.
[340] Bowe, supra note 324 at 1037.
[341] Rodriguez, supra note 319 at 56.
[342] See instructive Shawcross and Beaumont, supra note 121 at VII (521)

physical injury.[343] Subsequently, the effect of unruly behaviour to cause "bodily injury" does not place a high burden of proof on the plaintiff.

c) Exoneration

The airline has the chance to exonerate itself under Article 20 of the Convention in the case of contributory negligence by the claiming person. However, under the different incidents of unruly behaviour this case will not be of great importance, since the injured passenger is unlikely to be the cause of unruly behaviour.

For damages of more than 100,000 SDR, the carrier can also invoke the exoneration of Article 21 (2) (b) stating that the damage was solely due to the negligence or other wrongful act or omission of a third party. This clause ostensibly seems to be important for passenger-to-passenger altercations, since the damage is caused by the unruly passenger. First, however, this clause is only applicable for claimed damages over 100.000 SDR so that for lower claims the carrier will stay liable. Second, in the case of alcohol related accidents, the argument why there was an "accident" denies invocation of this clause; the reason, why there was an "accident" was due to the airline's excessive serving of alcohol. Consequently, the damage was not solely due to the action of the unruly passenger.

In conclusion, an airline can be held liable for unruly behaviour of one of its passengers if excessive serving of alcohol was in play. Alcohol serves as a contributing factor and thereby establishes the link between the unexpected event and a breach of duty by the flight crew. Since unruly behaviour starts to become "a characteristic risk of air travel"

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[343] *Langadinos v. American Airlines*, supra note 311 at 71.

and the carrier is thought to be in the best position to control the risk, alcohol induced behaviour with the airline's contribution has to be recognized as constituting an "accident". However, cases without any involvement from the airline's side cannot and should not be regarded as such. Although this construction makes the exoneration of Article 21 (2) (b) redundant in theses cases, it creates a fairly balanced system. Otherwise the airline would be liable for all unruly behaviour damaging fellow passengers irrespective of the airline's involvement and the exoneration clause could only be invoked for claims of damages over 100.000 SDR. Consequently, this construction limits the airline's liability to cases where it contributed to the damage. As in the case of the drunken employee, who crashed with her car[344], alcohol was only one cause contributing to the unruly behaviour. Therefore, as a remedy for the airlines, they could try to take recourse from the unruly passenger himself.

The open question for the future will be, how are courts going to take other causes of unruly behaviour into account? Bad cabin air, cramped seating and stress caused by delay are factors that the airline can control. Consequently, they could be regarded as creating links from the airline to the "accident". In order to establish liability for these factors, however, the causes of unruly behaviour have to be subject to further intensive study.

2) Liability of an unruly passenger to fellow passengers/crew

The Montreal Convention 1999 does not cover liability of an unruly passenger to a fellow passenger or to the flight crew and there is no other international instrument governing this subject. Due to the absence of any contractual relation between the unruly

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[344] McLaughlin, supra note 338.

passenger and the plaintiff, these acts will be subject to domestic tort law. The question of which domestic law will be applicable is decided by the "choice of law rules".[345] Since liability in this case does not involve aspects of international law, it shall not be dealt with at this point.[346]

II. Rights of an unruly passenger

1) Air carrier's liability for unlawful treatment on board

A recent incident[347] gives rise to the question of what remedies an unruly passenger has if the crew or other passengers overextend their powers given under the Tokyo Convention: On a Southwest Airlines flight, a passenger tried to enter the cockpit of the airplane, hitting other passengers and pounding on the locked cockpit door. It needed as many as eight passengers to subdue him. After being removed from the plane this passenger died. The autopsy report classified his death a homicide, because it resulted from intentional actions by another individual or individuals. According to a witness, one person climbed onto an aisle seat and leaped repeatedly onto the subdued passenger's chest.[348] However, the U.S. Attorney's office did not file charges against these passengers claiming that the death of the subdued passenger was an act of self-defence by frightened passengers. In another case, an inebriated sailor was tied by staff members

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[345] See Firak & Schmaltz, supra note 11 at 27ff.
[346] For details on this problem: Firak & Schmaltz, supra note 11.
[347] "Fellow travellers 'killed passenger'" *Gulf News* (18 September 2000) 1.
[348] G. Vanderburg, "Fatal beating of passenger not self defence – witness" *Edmonton Journal* (20 September 2000) online: Edmonton Journal <http://www.edmontonjournal.com> (date accessed: 13 May 2001)

for being violent and by the time the plane landed, he was dead.[349] Investigations into the case showed he had been beaten while tied up and had died of internal bleeding.

Generally, measures taken by the crew or passengers in conformity with the Tokyo Convention will be covered by Article 10, the immunity clause, so that no legal remedies can be taken against them. However, excessive use or misuse of these powers are no longer covered by the immunity clause, so that the crew and participating passengers can be held liable. Apart from criminal charges, it is questionable whether in such a case the mistreated passenger could claim damages under Article 17 of the Montreal Convention 1999.

a) Accident?

In order to be liable under this provision the treatment of the passenger which was inconsistent with the Tokyo Convention has to constitute an "accident". As elaborated above, an "accident" is an unusual or unexpected event or happening that is external to the passenger.[350] If applied literally, excessive use of power is an event external to the passenger. The question is whether it is also unusual or unexpected. It is the passenger who causes the crew to interfere with his unruly behaviour, so that this reaction could not be designated as unusual or unexpected. However, the expectation of reactions to such a behaviour include that the measures taken on such a passenger would be proportional and within the limits of the Tokyo Convention. Consequently, actions exceeding these limits are neither usual nor expected so that such actions would constitute an "accident". Contrary to this finding, in the case of *Levy v. American Airlines, et al.*, the Court argued

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[349] B. Vohra, "Sorry, but we have to offload you!!" The Middle East Aviation Journal (July 1996) 31.
[350] See page 78ff., above.

that actions from the crew are in response to the conduct of the unruly passenger and were completely independent of the operation of the aircraft.[351] The same reasoning was made in the case of *Grimes v. Northwest Airlines*[352], where an altercation between a passenger and the crew resulting in the passenger's arrest was not considered an accident, because the measures were taken as a result of the passenger's own behaviour including his refusal to leave the plane.[353] The results achieved by the courts in the *Grimes* and the *Levy* cases can also be underlined by arguing that measures taken in accordance with the Tokyo Convention do not constitute an accident, because they were covered by the immunity clause, thus making the measures taken to be usual or expected. It would not even make a difference whether the immunity clause would deny an "accident" to have taken place, or whether it would bar or pre-empt a claim under Article 17, because the result would be the same.

Nevertheless, this problem has to be resolved for the use of excessive power. The courts reasoned in the abovementioned cases that there is no accident because the passenger's behaviour caused the reactions; therefore, the event was not external to the passenger. This might be right for actions within the limits of the Tokyo Convention. However, in *Carey v. United Airlines*[354] the court held that a verbal argument with a flight attendant, involving insults and profanity, constitutes an "accident", although the passenger caused this argument with his behaviour. The court rests on the argument that the event was external to the passenger because it was an action from the flight attendant.

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[351] *Levy v. American Airlines, et al.*, 24 Avi 17581, 17585 (S.D.N.Y. 1993), [1993] U.S. Dist. LEXIS 7842 online: LEXIS (MEGA, MEGA).
[352] *Grimes v. Northwest Airlines*, [1999] U.S. Dist. LEXIS 11754 (E.D. Pa.) online: LEXIS (LEXSEE).
[353] Ibid. at *3.
[354] *Carey v. United Airlines*, 77 F.Supp.2d 1165, 1170 (D. Or. 1999).

The same is true for the excessive use of power: the measures taken are external to the passenger, because they were taken by other people. Even if one considers from a legal point of view that actions according to the Tokyo Convention are not external to the passenger because he provoked them, this cannot be valid for the excessive use of those powers. Actions taken in conformity with the Tokyo Convention can be considered usual and expected. However, as these actions become unexpected and unusual when they exceed their limits, the same must be valid for the externality of the event. The unruly passenger might cause reactions of the crew or fellow passengers, but he only gives rise to actions taken within the limits of the Tokyo Convention (and therefore proportional ones). Any other argumentation would relinquish the limits of self-defence, since it would allow for disproportional measures under its cover. Finally, as discussed above, the airline as a common carrier owes a duty of care to its passengers.[355] Subsequently, an "accident" can result from a flight crew's breach of such a duty.[356] Injuring a passenger using disproportionate measures, thereby exceeding one's powers under the Tokyo Convention, doubtlessly constitutes breach of that duty.

The second argument used in the *Levy* case, that the measures taken by the crew or other passengers have no connection to the normal operation of the flight, needs further examination. First, this argument can be countered with the fact that unruly behaviour becomes more common, thus becoming a characteristic risk of air travel thereby creating a connection to the operation of the flight. Second, the actions were taken on the basis of the Tokyo Convention and by the crew so that this could constitute the connection. Third,

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[355] See page 82, above.
[356] Rodriguez, supra note 319 at 53.

one could refer to the use of excessive powers creating the missing link. But in the author's opinion this is inappropriate, because the abuse of power is less characteristic to air travel than the lawful use of such powers. And already the lawful use has been declared not to be such a characteristic. Finally, there is a decisive argument why the excessive use of power should have to have the necessary connection, thus constituting an "accident": without an "accident" having occurred, the victim of excessive use of force would have no claim under the Montreal Convention 1999. Coinciding with the ruling of the U.S. Supreme Court in *El Al Israel Airlines, Ltd., v. Tseng*[357], this situation becomes untenable. This judgement declares that Article 17 of the Warsaw Convention is the exclusive cause of action for events within its scope, thus pre-empting state law causes of action.[358] The Convention seeks to achieve uniformity of liability rules governing claims arising from international air transportation and therefore tries to balance the interests of passengers and those of the carriers. "Allowing a passenger to pursue a state law claim for incidents within the scope of Article 17 would upset this careful balance".[359] Due to the similarity of liability this ruling will be valid for Article 17 of the Montreal Convention 1999, as soon as it supersedes the Warsaw Convention. The result is that the definition of "accident" triggers the carrier's exclusive liability to the passenger; in other words, no accident, no payment.[360] Hence, without excessive use of power constituting an "accident", the passenger will be left without any (civil) legal remedy. Subsequently, for civil claims, Article 10 of the Tokyo Convention would be redundant. Consequently, the excessive use of power has to constitute an "accident"

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[357] *El Al Israel Airlines, Ltd.*, v. Tseng, 525 U.S. 155 (1999).
[358] Rodriguez, supra note 319 at 44.
[359] Ibid. at 45.
[360] Cobbs, supra note 315 at 127.

under Article 17 in order to keep the balance between the rights of the airline and the rights of an unruly passenger.

The last problem to be solved in this context is whether there was an "accident" if it was only fellow passengers taking actions against the unruly one. Arguing that a necessary link to the carrier or the normal operation of the flight is necessary, liability in this case could be rejected. However, under Article 6 (2) (1) of the Tokyo Convention, the commander can authorize passengers to take actions against an unruly person. Acting under such authorization would create the link between the actions taken and the carrier/the operation of the aircraft. Otherwise, this would offer a comfortable option to circumvent the carrier's liability: the commander could authorize passengers to take measures without any of the crew members acting. Nevertheless, under Article 6 (2) (2) passenger can even take reasonable preventive measures without such authorization. In this case it appears doubtful whether this link can be established. On the one hand, the passengers can act completely independent under their own discretion. The situation is similar to the one where actions are taken by the crew with the slight difference that passengers are not employed by the carrier and thus do not have a special duty of care to other passengers. This speaks against a connection to the operation of the flight. Moreover, the situation is also similar to a fight between passengers without the airlines involvement, which is not considered to be an "accident".[361] Liability of the air carrier is not even necessary, because the mistreated passenger could claim damages from the passenger having taken the excessive actions. On the other hand, the passengers could act to secure the operation of the flight, which is threatened by an unruly passenger, thus

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[361] See supra note 321.

acting somewhat "on behalf" of the carrier. Together with the crew and the commander they are given the same powers under the Tokyo Convention, creating a close tie to the carrier and the operation of the aircraft. The argument that liability of the carrier is unnecessary does not succeed in this situation, because it could as well be applied to excessive actions by the crew.

As the arguments are very equal in weight, it is hard to tell whether there is an "accident" or not in such a situation. However, the task to find a solution to this problem shall be left to the courts, especially since this situation is not very likely to happen. The usual situation is that the crew tries to cope itself with the passenger and then, only as the last option, requests fellow passengers to help solve the problem. The request for help creates the necessary link to the carrier/operation, thus establishing liability.

b) Bodily injury?

The accident has to cause bodily injury or death. In the incidents referred to above[362] this condition is met. However, an action often taken under the Tokyo Convention is to restrain an unruly passenger, e.g. to handcuff him.[363] The question arises, whether the excessive use of restraint, or that the requirements of the Tokyo Convention are not met or misinterpreted by the crew, be it that the limit of time is exceeded, constitutes "bodily injury". Therefore, restraint has to cause some kind of "physical injury or physical manifestation of injury". Should the passenger subsequently get injured while being restrained, this condition will be met. If he is restrained without any injury, it is questionable whether only the measure of keeping him restrained an unduly long time

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[362] See page 86ff., above.
[363] Prew, supra note 13 at 6.

could result in physical injury. As shown in the *Langadinos* case, the threshold of physical injury is not very high.[364] If the passenger is inflicted pain because of being restrained for a long time, this pain could meet the threshold set by the court in the *Langadinos* case. However, courts should be cautious with the limit of "bodily injury", since the damages claimable depend on domestic law.[365] Although Article 29 stipulates that only compensatory damages may be awarded, national courts will have the power to determine how far the scope of liability is going to be. Setting the level for "bodily injury" very low but denying compensation in the absence of any damage will "disunify" the system. Taking a cautious approach towards "bodily injury" does not contradict the argument used to guarantee civil liability of the persons using excessive powers by constituting it an "accident", because the situation here is different: without an "accident" there would be no liability at all, although there is need for it in order to compensate the passenger for damages sustained. If he did not sustain any "bodily injury", however, there is no damage he could be compensated for so that there is no need for liability.

c) Exoneration

Again, the carrier has the possibility to exonerate itself under Article 20 of the Convention. However, for the same reasons used in the discussion whether there was an accident since the unruly passenger himself made it necessary to take measures against him, the defendant cannot claim under Article 20 that the damage was caused by contributory negligence: such argumentation would prevent the airline's liability for any

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[364] *Langadinos v. American Airlines*, supra note 311 at 71.
[365] See Matte, supra note 112 at 403.

claims from mistreated unruly passengers thus, leaving them unprotected in case of death or bodily injury.

2) Blacklisting on international flights

Since the incidents involving unruly passengers have risen to a high degree, demands to "blacklist" those people have grown louder.[366] The demand for "blacklists" involves a database containing relevant information about unruly passengers and subsequently the right to deny carriage to a passenger in the future based on that data. The question arises on what legal grounds such an action could be based.

a) Contractual Discretion of the Air Carrier

The answer to this question depends principally on the contractual position.[367] Most of the conditions in the contract of carriage follow the form set out in IATA Recommended Practice 1724.[368] Under Art VIII (1) the carrier may refuse carriage of any passenger for reasons of safety, or if, in the exercise of its reasonable discretion, the carrier determines that the passenger's conduct or physical state is such as to cause discomfort or make himself or herself objectionable to other passengers, or involve any hazard or risk to other persons or to property.[369] Consequently, a carrier may refuse boarding of any passenger apparently drunk or offensive, thus creating a safety risk on board the aircraft. This contractual provision enabling airlines to unilaterally determine whether a passenger

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[366] "Bar Violent Passengers from U.S. Airlines, says Bethune", supra note 16 at 23; "Prevention is better than cure", supra note 19 at 36.
[367] Balfour & Highley, supra note 2 at 198.
[368] Compare 49 U.S.C. § 44902 (b) stating "an air carrier or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety". The term "might be" is rather vague with regard to future bans.
[369] Balfour & Highley, supra note 2 at 198.

poses a security risk gives rise to potential abuse of this discretion.[370] Although such a provision gives airlines broad discretion and subsequently is "decidedly expansive, it is not unfettered"[371]. There are, however, only generalized regulatory guidelines to limit this discretion.[372] The standard for reviewing the airline's exercise of discretion is simply whether the decision was arbitrary, capricious or irrational, and whether it was premised on a valid concern for the safety of the flight and the individuals on that flight.[373] Consequently, a carrier who uses the safety issue as a sham in order to accomplish another purpose will not be insulated from liability[374] and the refusal of carriage can give rise to a claim by the offended passenger for damages.[375]

However, a ban on future flights can hardly be justified under this provision[376], since it will be difficult to argue that there is an inherent safety risk for future flights. How can an airline claim that one incident, possibly not even criminal, determines the risk level of a passenger for the rest of his life?[377] This would imply that the person is a living time-bomb. Taking into account the variety of factors that have to coincide to cause unruly behaviour, this allegation cannot be upheld. Subsequently, banning a passenger based on past incidents will serve more for punishment purposes rather than immediate safety concerns.[378] Nevertheless, under Canadian law, a carrier has the right to ban a passenger from flights in the future if the carrier's tariffs clearly set out a graduate system of

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[370] K. Warner, "You can't get there from here: Travel Restrictions and Airlines" (1992) 58 J. of Air L. 345 at 369.
[371] W. Mann, "All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky" (2000) 65 J. of Air L. 857 at 880.
[372] Warner, supra note 370 at 367.
[373] *Adamsons v. American Airlines, Inc.*, 444 N.E.2d 21, 24-25 (N.Y. 1982), [1983] U.S. LEXIS 758 online: LEXIS (MEGA, MEGA).
[374] Ibid.; see also *Cordero v. CIA Mexicana De Aviacion, S.A.*, 681 F.2d 669, 671 (9th Cir. 1982).
[375] Schaeffer v. Cavallero, supra note 127 at 352.
[376] Balfour & Highley, note 2 at 199.
[377] Mann, supra note 371 at 885.
[378] Ibid.

sanctions to be taken against unruly passengers with the sanctions imposed being consistent with the severity of the incident.[379] Interestingly enough, this is justified with the danger the passenger poses for the safety of the flight, passengers or crew.[380] For these reasons, one might doubt whether the practice to "blacklist" passengers is in conformity with substantial passengers' rights, since airlines and federal legislative bodies must ensure that individual rights are not trampled in this search for safety.[381]

b) Constitutional "Right to Travel"?

Many States have implemented a right to travel in their constitutions which is reflected by its recognition as an elementary Human Right.[382] However, due to sovereignty over customs and immigration regulations, these constitutional rights apply only to travel within the territories of the respective countries. Otherwise it would give aliens unlimited access to the territory of foreign countries. Nevertheless, especially in the context of issuing passports District of Columbia Circuit Court acknowledged that the "right to travel" also includes the "right to exit" the country, "because of the importance of freedom to travel to national values"[383] and because the "right to exit" is a personal right

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[379] Canadian Transportation Agency, Press Release, "New Canadian Transportation Agency Decision Reconfirms Air Carriers' Right to Ban Unruly Passengers" (31 January 2001) online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/A/C/48-C-A-2001_e.html> (date accessed: 8 March 2001).

[380] *Abed vs. WestJet* (31 January 2001), 48-C-A-2001 (C.T.A.), online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/media/communique/2001/010131_e.html> (date accessed: 8 March 2001): "[If clearly provided in the tariffs] the air carrier has the ability to refuse or remove an unruly passenger on a one-time basis when this passenger's behaviour is a threat to the safety of that passenger or other passengers, the air crew or the aircraft".

[381] Mann, supra note 371 at 889.

[382] *Universal Declaration of Human Rights*, Art. 13 (1), GA Res. 217(III), UN GAOR, 3d Sess., Supp. No.13, UN Doc. A/810 (1948) 71 [hereinafter: UDHR];
International Covenant on Civil and Political Rights, Art. 12 (1), G.A. Res. 2200A (XXI), UN GAOR, 21st Sess., Supp. No.16, UN Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 March 1976) [hereinafter: ICCPR].

[383] *Kent v. Dulles*, 357 U.S. 116, 125-127 (D.C. Cir. 1958).

included within the word "liberty" as used in the Fifth Amendment.[384] Finally, States have recognized that the "right to travel" includes the "right to exit" and implemented it as a fundamental Human Right.[385] Since under this right no person must be hindered in leaving any country, including his own, the question arises whether "blacklisting" can be legal in light of this right.

The ICCPR states that the "right to travel" and the "right to exit" can only be restricted under special conditions.[386] Such a restriction has to be provided by law, must be necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and has to be consistent with the other rights recognized in the ICCPR. Although the text does not completely clarify if a restriction has to be provided by law and for protection, or if only one of this conditions has to be fulfilled, a comparison to other Articles of the ICCPR suggests the former meaning. As Nowak comments on Article 12 (3), "restrictions must be set down by legislature itself"[387]. Therefore, "blacklisting" can be possible under legal regulation. In addition, this regulation has to serve one of the permissible purposes for interference. Since the advocates of "blacklisting" justify it with the safety of the crew and other passengers, "blacklisting could be possible under the "necessity of rights and freedoms of others". Under this condition a restriction of the freedom of movement of persons who represent a threat to the public can be justified in the interest of the rights of others when it is

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[384] Ibid. at 129.
[385] UDHR, Art. 13 (2) and ICCPR, Art. 12 (2), supra note 382.
[386] ICCPR, Art. 12 (3), supra note 382.
[387] M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, (Arlington: Engel, 1993) at 208.

necessary, proportional and not discriminatory.[388] Consequently, "blacklisting" would be possible under these conditions.

c) Violation of the "right to travel"

In order to "activate" these conditions, the "right to travel" must be infringed by "blacklisting" a passenger. If a passenger gets "blacklisted" by only one airline he (usually) is free to choose another carrier with which to fly. Even if this airline would be the only one available for the passenger's demands, one could argue that there are other means of travel, since there is no constitutional right to the most convenient form of travel.[389] Therefore, "burdens on a single mode of transportation do not implicate the right to interstate travel".[390] This argument would even justify the case of the demanded international "blacklist"[391], resulting in denial of carriage to known offenders across the industry for specified periods of time, although a complete ban on air travel is obviously more prohibitive than a restriction on only one airline.

The reality of modern life, however, is such that air travel is often the only viable means of travel.[392] Consequently, airlines have the capability, while not possessing the government's ability to preclude all travel, of seriously curtailing access to their service.[393] The power and impact airlines have towards the right to travel can be illustrated by comparing the airlines' power to the situation of denying a passport to a citizen[394]: if a person gets "blacklisted" by one airline he remains free to obtain other

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[388] Ibid. at 217.
[389] *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982).
[390] *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999).
[391] "Prevention is better than cure", supra note 19 at 36.
[392] Warner, supra note 370 at 348.
[393] Ibid. at 346.
[394] See ibid. at 347.

transportation to carry him to the desired destination, if such is available, while a person without a passport cannot leave the country at all. Nevertheless, the decision taken by the airline will often be taken within a short period of time without in-depth inquiry into the true degree of danger the passenger poses to the safety of the flight, whereas the denial of a passport stretches over a period of months and allows careful investigation and administrative review. Moreover, the decision to deny a passport is subject to procedural due process whereas the passenger is left with no opportunity to challenge the determination of the airline's decision. The restrictions on travel imposed by the airline may not be as far reaching as governmental restriction, yet the effect on individuals without a viable travel alternative may be the same.[395] For this impact of "blacklisting" and for the importance of air travel one can therefore make a strong argument that such a restriction completely barring travel by air would violate the "right to travel".

d) The "common carrier" principle

For the case that "blacklisting" is not considered as a violation of this right, e.g. a passenger gets "blacklisted" by only one airline, common carrier implications do come into play.[396] Airlines offer their service to the public. As a result, when a carrier holds itself out as open to serve the public, it presents an offer that is accepted at the moment a passenger tenders the usual fare, and the contract is breached if the carrier refuses to serve the passenger.[397] Under this reasoning courts have recognized that airlines fall

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[395] Ibid. at 367.
[396] Mann, supra note 371 at 869.
[397] Ibid. at 886.

under the common law as "common carriers".[398] Except for the authority of permissive refusal given by the government, this duty compels airlines to provide passage to all persons who pay the required fare.[399] In civil law, States often have implemented an obligation to contract with a passenger.[400] Even under these circumstances, "blacklisting" by only one airline is illegal, as the mere status as a "common carrier" or the obligation to contract prevent an airline from banning passengers from future flights. As outlined above[401], the IATA contractual clause does not allow for "blacklisting", even more since "blacklisting" is not for the purpose of safety but for the purpose of punishment and deterrence. Airlines can only refuse transportation if permitted by government. Subsequently, the obligation as a "common carrier" necessitates a governmental regulation that allows "blacklisting" so that, right now, there is no legal ground for "blacklisting" a passenger. Consequently, today's practice, which in some areas like Canada[402] "simply requires the airline to follow whatever policy it set for itself"[403] in order to "blacklist" passengers, must be declared illegal.

In conclusion, governmental regulations are needed for "blacklisting" passengers, be it on the grounds of infringing the liberty of "movement" or be it because of colliding with the "common carrier" principle. In case that governments contemplate such regulation, it

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[398] *Casteel v. American Airways*, 88 S.W.2d 976 (Ky. Ct. App. 1935), [1935] Ky. LEXIS 748 online: LEXIS (MEGA, MEGA); *Austin v. Delta Airlines, Inc.*, 246 So.2d 894, 896 (La. Ct. App. 1971), [1971] La. App. LEXIS 6162 online: LEXIS (MEGA, MEGA).

[399] Mann, supra note 371 at 889.

[400] See R. Schmid, "Hooligans der Lüfte: Unbotmäßiges Verhalten an Bord von Flugzeugen und die Rechtsfolgen" in M. Benkö & W. Kröll, ed., *Air and Space Law in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel* (Cologne: Carl Heymans Verlag, 2001) 181 at 196.

[401] See page 93ff., above.

[402] See *Abed v. WestJet*, supra note 380.

[403] Warner, supra note 370 at 348.

again appears doubtful whether this regulation violates the right to travel, since this regulation then has to comply with constitutional standards. "The availability of access to air travel is almost essential to functioning in today's society. The inability to travel by air may not totally preclude travel [...] but it can seriously hamper or endanger an individual who is stranded in a country far from home."[404] Therefore, in today's lightening-quick world, one can consider that air travel is the only "practical" route of transportation if one is to participate actively in society.[405] Moreover, the reasons for unruly behaviour should be taken into account in such regulation in order to provide for proportional treatment. "Without a balance between security for all passengers and the individual's right to travel, the fear of some unsubstantiated danger may overwhelm the freedom to travel by air."[406] Under these premises, airlines and governments should give thorough consideration to if and to what extent "blacklisting" can be legalized in their specific countries without violating the right to travel.

III. Passenger Rights and Prevention of Unruly Behaviour

"The best solution to air rage is prevention."[407] Airlines should look more closely at the causes of air rage and, instead of reacting to air rage with bans that would hurt everyone, try to make the skies safer by taking measures to snuff out air rage before it starts.[408] Until now, the discussion about unruly passengers has only focussed on repression of this problem, but seldom on preventing it. This has resulted in comments like "so far, the

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[404] Ibid. at 366.
[405] Mann, supra note 371 at 870.
[406] Warner, supra note 370 at 408.
[407] Firak & Schmaltz, supra note 11 at 15.
[408] Mann, supra note 371 at 890.

aviation industry's reaction to air rage has been nothing short of knee-jerk."[409] Rigorous law enforcement and restraint training of cabin crews only strengthens a hardline approach to deal with unruly passengers. This hardline approach merely tackles the symptoms of the problem by hunting down people that are airline customers.[410] "Too much of the focus on passenger misconduct has been on regulation, punishment and education of the passenger."[411] Little effort has been spent on researching the real causes of unruly behaviour; sometimes the airlines even refuse to recognize that there is problem the roots of which have to be researched in order to prevent it.[412]

Noteworthy, there is a passenger rights movement pressing the airlines to improve its relation to its customers and treat them as such. This movement has already been taken up by the European Commission[413] and resulted in a dialogue between the EU and the airlines[414]. Passenger rights are mainly concerned with improving the service of airlines and to strengthen the position of the passenger if something goes wrong.[415] The US[416] as well as the EU[417] have already enacted regulations for the case of "passenger-dumping" because of overbooked flights. However, at no point in the discussion about passenger rights has there been an attempt to connect such rights to the reasons of unruly behaviour.

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[409] Kahn, supra note 25 at 143.
[410] Ibid.
[411] J. Aubry, "Blame airlines for rise in air rage: author" *The Gazette* (30 July 2001) A10.
[412] T. Branigan, "Airlines refuse to help research on killer blood clots" *The Guardian* (11 June 2001) online: Guardian Unlimited <http://www.guardianunlimited.co.uk/print/0,3858,4201684,00.html> (date accessed: 14 June 2001)
[413] EC, Commission, Communication from the Commission to the European Parliament and the Council: Protection of Air Passengers in the European Union (Brussels: EC, 2000), online: EC, Commission <http://www.europa.eu.int/comm./transport/themes/air/french/library/prot_passenger_en.pdf> (date accessed: 14 June 2001) [hereinafter: EC Communication]
[414] European Civil Aviation Conference, *ECAC/EU Dialogue with the European air transport industry: Air Passenger Rights* (2001) [hereinafter: ECAC Proceedings].
[415] See "The Airline Passenger Service Commitment", ibid. at 64.
[416] See 14 C.F.R. § 250.2a, b.
[417] See EC, *Council Regulation 295/91 of 4 Feb. 1991 establishing common rules for a denied boarding compensation system in scheduled air transport*, [1991] O.J. L. 036/5.

"We now refer to people as passengers, customers, users, load factors and even passenger-kilometres, but rarely as real persons, with needs and wants, emotions and feelings".[418] The possible nexus between a bad service environment in the airline industry and unruly passengers could be an important key to prevent the problem. As explained in the beginning of this thesis, it is not clearly established what exactly causes unruly behaviour but it seems obvious that it is a mixture of different things. With regard to cabin environment, the EC communication at least takes into account the possible influence of cabin environment on unruly behaviour, but claims that further research and study is needed.[419] Regulations on alcohol, on the other side, are not considered at all, although such regulations have been demanded since several years.[420]

This brings up the question whether under the notion of passenger rights such factors could be regulated in order to prevent unruly behaviour. One author is of the opinion that several of the possible causes for unruly behaviour "cannot for practical reasons be entirely eliminated. The economics of modern passenger air carriage require high-density seating, with resultant crowding, and reduction in standards of comfort and service"[421]. Another fear is that "standardisation of the 'aviation product' could result in a reduction of competition between airlines"[422]. This is right insofar that a regulation to improve passenger service would demand investments by the airlines thereby raising their prices and thus decline their competitiveness. Ostensibly, airfares are still the single most

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[418] ECAC Proceedings, supra note 414 at 16.
[419] EC communication, supra note 413 at 21.
[420] See B. Reukema, "Drinking and Flying: Why the two do not mix well on U.S. carriers" (1984) X Ann. Air & Sp. L. 133 at 145.
[421] Holding, supra note 318 at 14.
[422] O. Rijsdijk, "EC Aviation Scene" (2000) XXV Air & Sp. L. 184 at 196.

important factor in choosing an airline.[423] Subsequently, any regulation demanding airlines' investment decreases their ability to compete on the global market. However, where is the difference to any other standard established for safety or passenger health?

Comparing the situation with other industries reveals that the different companies compete by offering a different service within the same price category. In the aviation industry instead, airlines offer better service only for an incredible increase in airfares. They compete in price wars, eager to offer the lowest fare available. The only reason why the consumer does not refuse to fly is that he does not have that choice. Airlines have a monopoly on long-distance travel, sometimes even on shorter distances, so that in order to get from point A to point B the passenger must fly. This results in a situation where all airlines share a common level of low service which they can keep without the fear of losing customers, because there is no competition on service. Therefore, the 'aviation product' is already standardised. Furthermore, regulation on service would apply to all EU carriers with the US having a comparable passenger rights movement, so that, eventually, there would be no decrease in competitiveness. Therefore, generally, service standards could be set by regulation. However, airlines strongly resist any mandatory regulation[424] so that in the EU only a voluntary passenger service commitment has been achieved.[425] Regulations on passenger service would not be necessary if the airlines would react to voluntary commitments, but the problem of such voluntary agreements is that only airlines abide to it that are willing to do so. Unwilling

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[423] F. Fiorino, "Passengers Enraged, But Does Industry Care?" online: AviationNow <http://www.aviationnow.com/content/ncof/ncft12.htm> (date accessed: 12 June 2001)

[424] J.D. Salant, "Airlines Fighting Passenger Bills" *Associated Press* (3 May 2001) online: <http://dailynews.yahoo.com/fc/US/Air_Rage_and:Passenger_Rights> (date accessed: 8 May 2001).

[425] EC, Press Release IP/01/1039, "The European Commission and the airlines promote voluntary agreements to improve the treatment of passengers" (19 July 2001).

airlines could circumvent this standard, thereby putting the abiding airlines under pressure. Apart from that, the example in the U.S. shows that airlines do not stick to voluntary commitments.[426] Consequently, factors that can be influenced by the airline, constitute an improvement in passenger rights and are likely to be one cause of unruly behaviour, e.g. cramped seating and bad cabin air[427], should be regulated in the context of passenger rights. A Canadian working group on unruly passengers has suggested making crew training in the prevention and management of unruly behaviour mandatory[428], so that the crew is able to respond in a proper way. However, crew training should be addressed cautiously, because crew response to difficult passengers has never been the subject of a scientific study.[429] Therefore, intensive crew training could backfire if crew members, knowing that they have the backing and support of the airline, may feel encouraged to escalate a simple customer service problem to dangerous proportions.[430] Concerning the service of alcohol, restriction or control of service is the solution widely promoted.[431] Recently, a proposal to restrict the limit of drinks has been introduced in the US Senate, but it is controversial.[432] Information at least should be issued to clarify the effect alcohol has on the body while flying. Such measures would not prevent passengers from drinking at the airports, but it would at least prevent excessive service of alcohol on the plane, thus also reducing airlines' liability.

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[426] M. Adams, "Senate soon puts fliers' rights to vote: Bill would force airlines to help out stranded passengers" *USA Today* (7 May 2001) B1; D. Freedman, " Fed-up Congress pushes air-passenger bill of rights" *Seattle Post* (4 May 2001) B2.

[427] Aubry, supra note 411.

[428] Transport Canada, *Working Group on Prohibition against Interference with Crew Members - Report* online: Transport Canada <http://www.tc.gc.ca/en/mediaroom/vigilance/pasrep_e.htm> (date accessed: 13 July 2001).

[429] Guildhall study, supra note 31 at 30.

[430] Ibid.; see for examples Kahn, supra note 25 at 145-146.

[431] Luckey, supra note 48; Bowe, supra note 324 at 1013; Reukema, supra note 420 at 145.

[432] T. Hatcher, "Senator wants two-drink limit on planes" (27 July 2001) online: <http://www.cnn.com/2001/Travel/ News/07/25/inflight.drinking/index.html> (date accessed: 2 August 2001).

In conclusion, there is a link between passenger rights and unruly passengers with both having roots in the poor service environment within the airline industry. With regard to prevention of unruly behaviour, possible causes have to be analyzed and airlines must be forced to minimize those that are under its control. Otherwise the airline should bear responsibility in cases where it did not minimize the chances of unruly behaviour. Although prevention is more expensive than repression, it seems to be the better way, especially in order to make air travel a pleasure again and not to treat every passenger as a "potential terrorist"[433].

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[433] Aubry, supra note 411.

Conclusions

The introductory chapter shows that there is no reason in particular for passengers to become unruly. It is rather a mix of different circumstances and events which make a passenger forget his civility, since unruly behaviour is not restricted to "air rage" but is also becoming more common as "road rage". Its importance in aviation stems from the fact that such behaviour can be far more dangerous in an aircraft. The complexity of coinciding elements causing this problem illustrate that there is not just one measure to be taken in order to extinct the problem.

On the one hand, the existing legal system has to be improved. Aged provisions not intended to deal with this phenomenon, confusion about jurisdiction and insufficient law enforcement do not correspond to the severity of the problem for the airline industry. Therefore, rules have to be implemented that govern all forms of unruly behaviour and give jurisdiction to the State that is in the best situation to prosecute offenders – usually the State of landing. Jurisdiction of the State of landing, however, does not come without difficulties under international law, subsequently, there should not be single measures by different States but a consolidated approach by the international community. Hence, the best way to go would be to draft a new international Convention as a long-term solution and amend domestic law as a short-term one – but only under a common consent.

On the other hand, civil liability should be recognized for those that contribute to the causation of unruly behaviour, especially the airlines. Ostensibly, several factors to prevent unruly behaviour are controllable by the airlines, in particular the serving of alcohol. If airlines, although being aware that their service can cause unruly behaviour,

keep on acting that way, they have to be responsible for their actions. They must not become guarantors for all the behaviour of their passengers but have to take responsibility for the treatment of their customers. In order to clarify civil liability for unruly passengers, closer examinations of possible causes of air rage have to be conducted.

One factor noted in this thesis is the role of States. They have to contribute their share as well to prevent unruly behaviour by improving the infrastructure. Today, air travel tries to be a way of mass transit but does not meet the requirements. The weaknesses in infrastructure and the problems with international travel create bottlenecks that make air travel uncomfortable. Such obstacles have to be removed.

Apart from that, the situation must also be examined from the point of view of an unruly passenger. A strict approach to unruly passengers by enacting criminal law is justified, as long as the person could control his actions. However, it is not appropriate for cases in which psychological reasons like fear of flying cause the person to become uncontrollable. Therefore, not every action to every extent against unruly passengers is automatically justified, but there are rights that the passenger possesses as a human being and as an airline passenger. Airlines must not trample on these rights in a desperate attempt to eradicate the problem by repressing it. The solution to deal with unruly passengers therefore lies in prevention.

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