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Angry People in the Sky: Air Rage and the Tokyo Convention

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ANGRY PEOPLE IN THE SKY: AIR RAGE AND THE TOKYO CONVENTION

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I. INTRODUCTION

IN ONE OF the final passages of Chinese Emperor Kang-He’s amplified instructions on *The Sacred Edict*, the Chinese Emperor Yoong-Ching wrote in 1724:

[W]hen anger rises in the bosom of a man, he should reflect, “If I let this anger out, by what means may it afterwards be put a stop to? Let me not become angry, lest that afterwards, I may not be able to rescue myself from the consequences, that would be dreadful indeed.”¹

In light of the repeated incidents of air rage in China,² it appears these prophecies have been lost to an earlier age of restraint. More often than not, an angry response or outburst by a member of the traveling public in response to prolonged flight delays, missing baggage, poor service, or generally unrealized expectations in the travel experience has a root cause that is understandably provocative. Such is the nature of “external response air rage.” Conversely, there is “internal response air rage,” which is unruly behavior that arises from a psychological or psychiatric impairment, excessive alcohol consumption, smoker’s withdrawal rage, or just general unsociable behavior.

This “anger in the skies or in the airport” is attendant upon the rise of the low cost carrier, cost cutting by the “high cost” carriers, shortcomings in airport infrastructure and air space management, and inflexible airport curfews. While neither form of air rage is condoned by legal or social norms, when airline

¹ EMPEROR KANG-HE, THE SACRED EDICT: CONTAINING SIXTEEN MAXIMS OF THE EMPEROR KANG-HE 298 (William Milne trans., 1817).
² See Tom Ballantyne, *Chinese Passengers Seeing Red*, ORIENT AVIATION, June 2013, at 20.

staff or members of the public are subjected to threatening physical or verbal abuse, the root causes behind “external response air rage” give rise to consumer protection regulation and oversight.

This article examines the rise in air rage, with a particular focus on China and selected common law jurisdictions such as Australia and the United States, and also the response generated by the International Civil Aviation Organization (ICAO) Diplomatic Conference (March–April 2014), assessing both the preexisting needs and the effectiveness of the responses generated by the Montreal Diplomatic Conference of 2014.

II. THE GLOBAL NATURE OF THE PROBLEM

Problems associated with the unruly and unacceptable behaviors that fall loosely under the banner of air rage are widespread and not confined only to a particular nationality, to a part of the world, to domestic flights, or to international flights.³ In 2010, the International Air Transport Association (IATA) reported that incidents of air rage worldwide rose by 29% between 2009 and 2010.⁴ Statistics from civil aviation authorities in this area tend to be elusive and understate the extent of the problem. IATA figures comparing the years 2007 through 2009 show a “six-fold increase in air rage cases.”⁵ Tekin Akgeyic reports significant increases in the United Kingdom (UK) (up by 28.9% from 2008 to 2009) and Australia (an increase from sixty-four incidents in 2007 to 461 incidents in 2009).⁶ In the 2011–2012 financial year, Australian Federal Police (AFP) “responded to more than 1000 alcohol-related incidents at [Australia’s] [ten] major airports.”⁷ A 2008 Australian Services Union (ASU) survey of airport workers in Australia reported that 81% of surveyed

³ See Don Champion, *Air Rage Incidents on the Rise*, ABC NEWS (Feb. 2, 2013, 2:38 PM), <http://www.thedenverchannel.com/news/local-news/air-rage-incidents-on-the-rise>.

⁴ See *id.*

⁵ Tekin Akgeyic, *Air Rage: Violence Toward Cabin Crew*, REV. BUS. RES. 1 (2011), available at <http://www.freepatentsonline.com/article/Review-Business-Research/272484930.html>.

⁶ *Id.*

⁷ Press Release, Australian Fed. Police, Disorderly Passenger Arrested at Brisbane International Airport (Jan. 31, 2013), available at <http://www.afp.gov.au/media-centre/news/afp/2013/january/media-release-disorderly-passenger-arrested-at-brisbane-international-airport.aspx>.

workers in customer service roles “ha[ve] experienced air rage” while at work in Australian airports.⁸

In the United States, the causes of air rage in part can be attributed to the behavior of the airlines themselves. For example, during the global downturn in 2008, American Airlines cut 8% of its workforce.⁹ Despite an upturn and American Airlines increasing its traffic by 2.7% in the last quarter, it is still employing 11% fewer staff than it did in 2006, and staff are being asked to do more with less resources.¹⁰ Cancellations by low cost carriers due to alleged “technical problems” are really based on numbers of passengers down, and the allegations amount to an excuse to cancel service.¹¹

Statistics from the UK prepared by the Civil Aviation Authority and the Department of Transport “revealed that alcohol consumption and smoking were the main factors in nearly 63% of reported incidents, and 78% of cases involved male passengers.”¹² It is also worth noting that the UK consciously decided to discontinue its annual report entitled *Disruptive Behaviour On Board UK Aircraft*.¹³ Even in Japan, where being civil, working cooperatively, and showing quiet dignity are highly valued, disruptive passenger behavior “increased 5.4 times between 1997 and 2000.”¹⁴ The growth of air rage incidents is occurring against the backdrop of unprecedented growth in air transporta-

⁸ LINDA WHITE, PRODUCTIVITY COMMISSION INQUIRY INTO THE ECONOMIC REGULATION OF AIRPORT SERVICES ISSUES PAPER, JANUARY 2011 6, available at http://www.pc.gov.au/_data/assets/pdf_file/0004/107797/sub026.pdf.

⁹ M.S., *Air Rage: Take This Flight and Shove It*, ECONOMIST (Aug. 11, 2010), http://www.economist.com/blogs/democracyinamerica/2010/08/air_rage.

¹⁰ *Id.*

¹¹ *Id.*

¹² Emmanuella Grinberg, *Air Rage: Passengers 'Quicker to Snap'*, CNN (June 1, 2012), <http://edition.cnn.com/2012/06/01/travel/air-rage>; see also Letter from Rick Chatfield, Info. Rights & Inquiries Officer, Civil Aviation Auth. (Feb. 7, 2013), available at <http://www.caa.co.uk/docs/1357/F0001463ReplyLetter.pdf> (where the Civil Aviation Authority has provided information on each incident reported between 2011 and 2012 through its “mandatory occurrence reporting scheme” in response to a Freedom of Information Act request).

¹³ See *Disruptive Behaviour on Board UK Aircraft*, DATA.GOV.UK, http://data.gov.uk/dataset/disruptive_behaviour_on_board_uk_aircraft (last visited Nov. 14, 2014).

¹⁴ Akgeyik, *supra* note 5 (citing a survey conducted by the Scheduled Airline Association of Japan (SAAJ)); see EIKO IKEGAMI, BONDS OF CIVILITY: AESTHETIC NETWORKS AND THE POLITICAL ORIGINS OF JAPANESE CULTURE 29–30 (2005); see also Linda Lowen, *Why Crisis Hasn't Shaken the Bedrock of Japan's Culture of Civility*, LINDALOWEN.COM (Mar. 17, 2011), <http://lindalowen.com/2011/03/17/why-crisis-hasnt-shaken-the-bedrock-of-japans-culture-of-civility>.

tion globally.¹⁵ Alejandro Piera observes that the “[a]irline industry expects 3.3 billion passengers by 2014—an increase of 800 million passengers from the 2.5 billion carried in 2009.”¹⁶ Piera also notes that IATA figures suggest there has been an alarming increase in air rage incidents from 2007 to 2009.¹⁷

III. RELEVANT JURISPRUDENCE

Any discussion on air rage cannot ignore the causal link between alcohol use and assaults in the sky. Anglin, Neves, Giesbrecht, and Kobus-Matthews state that informal estimates suggest that about 40% of air rage incidents are alcohol-related.¹⁸ In separate articles, Ginger and Karp have set out a number of cases considered by U.S. courts where the intoxication of a passenger resulted in unruly or abusive behavior.¹⁹

In *O’Carroll v. American Airlines, Inc.*, “a passenger became loud, drunk and boisterous during a flight . . . [and] the passenger warned the pilot that he would ‘help him fly the plane.’”²⁰ In *Harris v. American Airlines, Inc.*, “a female passenger of African-American descent was subjected to rude, obnoxious, and racist remarks by an intoxicated white passenger in the first class cabin,” and “despite the white passenger’s obvious state of intoxication, flight attendants continued to serve him alcohol.”²¹ *Von Hundertmark v. Boston Professional Hockey Ass’n, Inc.* involved a “flight attendant [who was] working on a . . . charter flight carrying the Boston Bruins hockey team.”²² Her blouse was torn open and she was fondled by a player “while another hockey player took a photograph of her breasts.”²³ The flight attendant “sued

¹⁵ See Alejandro Piera, *ICAO’s Latest Efforts to Tackle Legal Issues Arising from Unruly/Disruptive Passengers: The Modernization of the Tokyo Convention 1963*, 37 AIR & SPACE L. 231, 232–33 (2012).

¹⁶ *Id.*

¹⁷ *Id.* at 233.

¹⁸ Lise Anglin et al., *Alcohol-Related Air Rage: From Damage Control to Primary Prevention*, 23 J. PRIMARY PREVENTION 283, 288 (2003).

¹⁹ See Stephen R. Ginger, *Violence in the Skies: The Rights and Liabilities of Air Carriers when Dealing with Disruptive Passengers*, 23 AIR & SPACE L. 106–11 (1998); Judith R. Karp, *Mile High Assaults: Air Carrier Liability under the Warsaw Convention*, 66 J. AIR L. & COM. 1551 (2001).

²⁰ Ginger, *supra* note 19, at 112 (citing *O’Carroll v. Am. Airlines, Inc.*, 863 F.2d 11, 12 (5th Cir. 1989)).

²¹ *Id.* (citing *Harris v. Am. Airlines, Inc.*, 55 F.3d 1472, 1473 (9th Cir. 1995)).

²² *Id.* at 113 (citing *Von Hundertmark v. Bos. Prof’l Hockey Ass’n, Inc.*, No. CV-93-1369 (CPS), 1996 WL 118538, at *1 (E.D.N.Y. Mar. 7, 1996)).

²³ *Id.*

the Boston Bruins for negligent supervision of its players in permitting them to become intoxicated on an aircraft.”²⁴

Gee v. Southwest Airlines involved an Asian-American passenger who sued “Southwest Airlines for continuing to serve alcohol to a noisy wedding party that harassed her with racial slurs and ‘pantomimed cocking and shooting a gun at Gee and her companions’”²⁵

Langadinos v. American Airlines involved a passenger who “allegedly suffered injuries . . . when airline personnel continued to serve alcohol to an intoxicated . . . passenger who subsequently assaulted the passenger.”²⁶ In *Tsevas v. Delta Air Lines, Inc.*, a passenger “sued the airlines after she was physically and verbally assaulted by an intoxicated male passenger who was seated next to her.”²⁷ *Stone v. Continental Airlines* involved an intoxicated passenger punching another passenger in the face.²⁸

On this air rage issue, the IATA has suggested that “[t]he company may consider having a written policy that supports all employees in the enforcement of their specific Alcohol Policy. Some IATA Member airlines require Cabin Crew to attain *Responsible Service of Alcohol (RSA)* statements upon hiring (Australia).”²⁹ IATA’s suggestive approach is very limiting and should go further, but this remains part of a theme consistent with the view of Anglin et al. that the airline industry should have the powers and policies to punish the unruly and intoxicated passenger as opposed to curtailing the passengers from becoming intoxicated in the first place.³⁰ Karp suggests that the airlines need to do more:

To avoid liability for violent passenger behavior, air carriers must be proactive rather than reactive. Airlines must adopt a “zero tolerance” policy for assaults. Airlines should . . . implement new policies and procedures for identifying and responding to poten-

²⁴ *Id.*

²⁵ *Id.* at 114 (citing *Gee v. Sw. Airlines*, 110 F.3d 1400, 1403 (9th Cir. 1997)).

²⁶ Karp, *supra* note 19, at 1563 (citing *Langadinos v. Am. Airlines*, 199 F.3d 68, 69 (1st Cir. 2000)).

²⁷ *Id.* at 1562 (citing *Tsevas v. Delta Air Lines, Inc.*, No. 97C0320, 1997 WL 767278, at *1 (N.D. Ill. Dec. 1, 1997)).

²⁸ *See id.* at 1560 (citing *Stone v. Cont’l Airlines*, 905 F. Supp. 823, 824 (D. Haw. 1995)).

²⁹ GUIDANCE ON UNRULY PASSENGER PREVENTION AND MANAGEMENT 17 (1st ed. 2012) [hereinafter IATA GUIDANCE DOCUMENT], available at <http://www.iata.org/policy/Documents/2013-VI-PUBLIC-Guidance-on-Unruly-passenger-prevention-and-management.pdf>.

³⁰ Anglin et al., *supra* note 18, at 292–93.

tially disruptive passengers. Air carriers should curtail alcoholic beverage service to intoxicated passengers and limit alcoholic beverage service during delay periods. The courts have sent a clear message that serving alcohol is a sufficient link in the causal chain of responsibility for an Article 17 "accident."³¹

Likewise, Ginger considers that it is in the carriers' own interests to minimize liability: "Nevertheless, if an air carrier takes steps to establish reasonable procedures in dealing with unruly passengers, it will have an important safeguard against liability in the courts for disruptive passenger actions."³²

One of the dangers the carriers encounter when taking affirmative action against such passengers is the potential of receiving frivolous passenger claims where the "aggrieved" passenger alleges that they were somehow being discriminated against for being denied adequate alcohol services.³³ For example, in *McAuley v. Aer Lingus Ltd.*, the airline refused a passenger's request for four miniature bottles of wine at the start of a flight because the airline's policy was to serve only two drinks on the flight, which flew from Dublin, Ireland to Vilnius, Lithuania.³⁴ Allegedly, the passenger was intoxicated and verbally abused the flight attendants.³⁵ The airline's pilot "contacted the Lithuanian police and two . . . officers escorted the [passenger] from the aircraft."³⁶ The passenger filed an action for damages for slander and libel, malicious and/or negligent misstatement, injurious falsehood, mental suffering, and breach of the plaintiff's constitutional rights.³⁷ While the action was ultimately dismissed because the events giving rise to the claim were governed by Article 17 of the Montreal Convention, the case demonstrates the emotive position occasionally taken by passengers.³⁸

Based upon their research, Anglin et al. believe the primary prevention of air rage caused by alcohol is achievable and that the three areas for improvement in law, regulation and policy are: (1) liquor licensing and controls at airports; (2) legislation on alcohol consumption, promotion, sales, and service on airlines; and (3) research on effective alcohol policies for the air

³¹ Karp, *supra* note 19, at 1568.

³² Ginger, *supra* note 19, at 117.

³³ See *McAuley v. Aer Lingus Ltd.*, [2011] IEHC 89 (Ir.).

³⁴ *Id.*

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

travel industry.³⁹ In the late 1990s and early 2000s, the United States, Canada, Japan, Norway, Switzerland, and the United Kingdom all took proactive steps—some more successful than others—in attempts to curb air rage caused by alcohol use.⁴⁰ In 2009, the Australian carrier Qantas unilaterally introduced a policy to ban full-strength spirits and beer on flights serving mining areas in Western Australia.⁴¹ A spokesman for Qantas noted that mining corporations and the Flight Attendants Association were fully supportive of this step.⁴²

IV. THE ACUTE NATURE OF THE PROBLEM IN CHINA

China has been described by one commentator as “a nation beset by chronic delays and a rapidly expanding air travel industry [in which air rage] incidents have become common.”⁴³ While the number of passengers continues to grow, the number of security staff has remained the same as ten years ago.⁴⁴ The frequency of delays in the departure of aircraft appears to have (1) fueled the fires of passenger anger; (2) created reluctance on the part of security staff to exercise control over disruptive passengers; and (3) engendered passivity on the part of boarding staff.⁴⁵

In several incidents, such as the notorious temper tantrum of the Chinese mining executive Yan Linkun, security staff did not act to restrain or remove offending passengers.⁴⁶ In the YouTube recording of his destructive rampage, three individuals who appear to be security officials gather nearby but do not attempt to restrain or pacify Linkun.⁴⁷ Some commentators have suggested that the imperative within Chinese culture to maintain a harmonious society explains the reluctance of parties to

³⁹ See Anglin et al., *supra* note 18, at 292.

⁴⁰ *Id.*

⁴¹ See *Drunk Miners Force Full Strength Beer, Spirits Off Qantas*, WA TODAY (Oct. 30, 2009, 1:27 PM), <http://www.watoday.com.au/wa-news/drunk-miners-force-full-strength-beer-spirits-off-qantas-20091030-hpf3.html>.

⁴² *Id.*

⁴³ Anthony Dennis & Nathan Oliveri, *Alarm as Chinese Airport Aggro Flares*, THE-AGE.COM (Jan.13, 2013), <http://www.theage.com.au/travel/it-pro/alarm-as-chinese-airport-aggro-flares-20130112-2cmf0.html>.

⁴⁴ *Id.*

⁴⁵ See *id.*

⁴⁶ See Ballantyne, *supra* note 2, at 20.

⁴⁷ See Patrick Scally, *Official Suspended After Epic Kunming Airport Tantrum*, GOKUNMING (Feb. 25, 2013), http://www.gokunming.com/cn/blog/item/2913/official_suspended_after_epic_kunming_airport_tantrum.

directly address incidents involving offensive behavior.⁴⁸ Linkun's subsequent stage-managed apology arguably suggests a conservative approach to subjecting individuals of a certain status to the normal laws of the land.⁴⁹ This incident apart, the air rage problems that have emerged in China mainly relate to how China manages its domestic air market and how air space is allocated in that country.⁵⁰

Incidents of air rage in China often occur in and around the Chinese New Year.⁵¹ The new Kunming Changshui International Airport in the Yunnan Province of southwest China appears to have been a flashpoint for incidents of air rage.⁵² In January 2013, there were hundreds of flight cancellations that stranded many passengers.⁵³ In one incident, airport police were proactive in using pepper spray to subdue unruly passengers in the terminal who tried to break through a security gate.⁵⁴ News reports suggest that delayed passengers at Kunming Airport in January 2013 were responsible for assaults of forty employees, five smashed computers, fifteen damaged walkie-talkies, and twenty-one wireless cards thefts.⁵⁵

In response to a rash of recent, sometimes-bizarre incidents at Chinese airports, journalists have coined the term Chinese "terminal tantrums."⁵⁶ Ballantyne notes that incidents of air rage have become so common in flight and at Chinese airports that the expression "kong nu zu" or "air rage tribe" has been coined.⁵⁷

⁴⁸ Ballantyne, *supra* note 2, at 20.

⁴⁹ Linkun was a member of the Communist Party political advisory body in Yunnan, as well as the Chinese People's Political Consultative Conference. See Scally, *supra* note 47.

⁵⁰ See Ballantyne, *supra* note 2, at 21.

⁵¹ See *id.* at 22 (describing incidents occurring during the 2013 New Year including: (1) the Yan Lingun incident alluded to in the text above; (2) an incident at Beijing Airport where six business class passengers declined to fasten seatbelts and turn off mobile phones resulting in a return of the aircraft to the gate; and (3) an incident where two Chinese passengers on an Air France flight stole between seven and sixteen bottles of wine from a refreshment cart and then threatened another passenger who objected).

⁵² See Scally, *supra* note 47.

⁵³ *Id.*

⁵⁴ See Scally, *supra* note 47.

⁵⁵ Panda Walking, *A Deep Look into Chinese-Style Air Rage*, CHINA 15' (Jan. 31, 2013), <http://china15min.com/2013/01/31/a-deep-look-into-chinese-style-air-rage-2/> (last visited Nov. 14, 2014).

⁵⁶ See, e.g., Dennis & Oliveri, *supra* note 43.

⁵⁷ Ballantyne, *supra* note 2.

A. THE DELAY ISSUE

Frustration, engendered by excessive delays, has sparked incidents such as those described above. The sad reality is that the frequent and lengthy delays experienced in China are systemic. Traditionally, the military controls airspace in China and only narrow corridors, which represent 20% of Chinese airspace, are available for use by commercial aircraft.⁵⁸ It is appropriate to acknowledge that not all air rage issues in China are due to frequent delays, as alluded to above.

Two incidents at Shanghai Pudong Airport that were both in reaction to significant flight delays gained international notoriety. In April 2012, the first incident occurred after a sixteen-hour delay to a flight, when twenty disgruntled passengers stormed the airport's runway. Although they came within 200 meters of a jet arriving from the United Arab Emirates, each passenger was subsequently provided with compensation. Each passenger received 1,000 yuan, which is equivalent to about \$162 U.S. dollars, in compensation.⁵⁹

In July 2012, the second incident involved U.S. carrier United Airlines, which cancelled a flight from Shanghai to Newark, New Jersey, three times over a four-day period, from Wednesday to Saturday.⁶⁰

When the passengers finally were led to the other plane they took their seats only to find out that flight crew had also been on duty for too many hours, leading to another cancellation. While some furious passengers refused to leave their seats, their luggage was dumped off the carousels outside of the plane⁶¹

The unceremonious dumping of their luggage was the last straw for at least one of the passengers who rushed at the pilots.⁶² This passenger was restrained.⁶³ This incident, being associated with international carriage by air and coming under the Montreal

⁵⁸ Kazunori Takada, *With Flight Delays in China, a Rise in Air Rage*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/business/global/with-flight-delays-in-china-a-rise-in-air-rage.html>.

⁵⁹ Ballantyne, *supra* note 2.

⁶⁰ Jeff Stone, *Airline Passengers Revolt After Three-Day Delay in China*, INT'L BUS. TIMES (July 16, 2012), <http://www.ibtimes.com/airline-passengers-revolt-after-three-day-delay-china-723640>.

⁶¹ *Id.*

⁶² Rachel Quigley, *Angry Scenes as United Airlines Passengers Stage Revolt After Getting Stranded in China for THREE Days*, MAIL ONLINE (July 16, 2012, 8:54 AM), <http://www.dailymail.co.uk/news/article-2174320/Angry-United-Airlines-passengers-revolt-stranded-China-days.html>.

⁶³ *Id.*

Convention, raises issues regarding the proper role of compensation to passengers under Article 19 of the Montreal Convention and regulating the proper role carriers have in the prevailing circumstances. The airline belatedly compensated passengers for this exceptional delay by providing a full refund and offering them \$1,000 vouchers discounting a future flight with the carrier.⁶⁴ This did not occur until the delayed flight arrived in the United States at Newark, New Jersey.⁶⁵

A further incident serves to highlight issues associated with delays in China. At Hainan's Sanya Airport, in March 2013, a Hong Kong Airlines flight was grounded for six hours.⁶⁶ After four hours, an elderly man rushed into the first class cabin and physically attacked and verbally abused a female flight attendant.⁶⁷ Fellow passengers appeared to endorse the behaviour because they cheered while this happened.⁶⁸

B. GROWTH OF CHINESE MARKET DEMANDS MORE AIR SPACE BE ALLOCATED

In 2011, 270 million passengers flew on domestic routes in China.⁶⁹ The IATA predicts around 379 million passengers will be flying in China by 2014.⁷⁰ Large numbers of passenger movements, as well as the continual opening up of air flight to more and more of the population, are occurring against a backdrop of unrealistic passenger expectations about the service they will receive for their yuan.⁷¹ This is exacerbated by long delays, which are engendered by a system that is dependent upon military decision-making over air space allocation.⁷² The solution to this problem lies in increasing the allocation of air space to civil aviation in China.⁷³ Thus, for China, the military is a key player because military or strategic considerations outweigh civil avia-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Kate Whitehead, *Cheers as Passenger Attack Air Crew*, SOUTH CHINA MORNING POST (Mar. 26, 2013), <http://www.scmp.com/news/hong-kong/article/1199661/cheers-passenger-attacks-air-crew?page=all>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Takada, *supra* note 56.

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See* Ballantyne, *supra* note 2, at 21.

tion needs.⁷⁴ Equally, other interests involved include government, aviation regulators, passengers, pilots, air crew, airport staff, and civil society.⁷⁵

C. PASSENGER EXPECTATIONS

The focus of study in this area tends to be fixed quite strongly on passengers as the perpetrators of the “rage”—aberrant, angry, or violent behavior. At the same time, it should be acknowledged that a carrier’s decisions about seating, food, level of service, and quality of service impact passengers, sometimes placing significant expectations upon passengers’ coping skills. For example, passengers are currently expected to cope with computerized systems, including “e-ticketing” and obtaining baggage checks from automated systems with minimal or no help.⁷⁶ They are also variously expected to accept cramped seating, remain buckled up for long periods, remain deferential to the airline’s staff, stay calm in all circumstances, stay unaffected by a fear of flying or any other medical condition, and endure poor quality air when pilots turn off air packs to extend the fuel economy.⁷⁷

It appears that some airlines have also been restructured in a way that makes it difficult for passengers to lodge complaints.⁷⁸ A *Time* magazine report from 2009 suggests that with one U.S. airline, the only way for a passenger to log a complaint is through a website that allows the passenger to send an email detailing the complaint.⁷⁹ Placing a low value on customer service results in higher levels of passenger dissatisfaction.⁸⁰

In the past, television advertising of airlines focused heavily on creating expectations of high quality service, sometimes with relatively little or no differentiation between the first class and

⁷⁴ Anthony Kuhn, *Flight Delays in China Leave Travelers Feeling Squeezed*, NPR (July 31, 2014, 2:14 PM), <http://www.npr.org/blog/thetwo-way/2014/07/31/336869797/flight-delays-in-china-leave-travelers-feeling-squeezed>.

⁷⁵ JOYCE HUNTER, *ANGER IN THE AIR: COMBATING THE AIR RAGE PHENOMENON* 41, 64 (2009).

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *See id.*

⁷⁹ Richard Zoglin, *The Airlines’ Customer-Complaint Lines: No Answer*, TIME (Sept. 3, 2009), <http://www.time.com/time/business/article/0,8599,1920121,00.html>.

⁸⁰ *See id.*

economy experience.⁸¹ While some airlines are addressing the need to reshape advertisements in such a way to avoid engendering unrealistic expectations by focusing on different aspects other than service, the traditional approach emphasizing service on board the aircraft persists. For example, in a recent advertisement, Chinese Airlines emphasized a high level of service with beautiful female flight attendants smiling and bowing to customers while providing quality service in a calm environment.⁸² Chinese Airlines also has a first class flight advertisement that features high-quality food being served, personal attendance to a child, and the close attention from a beautiful female flight attendant.⁸³ Such advertisements tend to raise passenger expectations, which may lead to disappointment and anger when the reality does not match the image.

V. AIR RAGE FROM THE AIRLINES' PERSPECTIVE

As already indicated, the financial imperative has caused many air carriers to reduce the quantity and quality of service provided. In a context where carriers fly a large number of passengers, it is a truism that they operate with very low profit margins. This makes carriers acutely vulnerable to changes in market circumstances.⁸⁴ Heavy competition in a deregulated environment, as in the U.S. domestic marketplace, has forced airlines to "adopt a variety of cost-saving measures."⁸⁵

Katrina Hunt argues that because of the potential of air rage instances creating a negative perception of the airline, there is a tendency among some airlines to not report instances of air rage.⁸⁶ Brown, quoting Thomas, asserts that the airlines' un-

⁸¹ See, e.g., *Vintage Airline Commercials Remember When? (VIDEOS)*, HUFFINGTON POST (Feb. 12, 2013, 5:19 PM), http://www.huffingtonpost.com/2012/10/22/vintage-airline-commercials_n_1987830.html.

⁸² See Bobbyleeproductions, *China Airlines – "Customer Service" Ad Remix (2011)*, YOUTUBE (Jan. 21, 2011), <http://www.youtube.com/watch?v=TORrGMjVX0Y>.

⁸³ See Bobbyleeproductions, *China Airlines – "First Flight" Ad Remix (2011)*, YOUTUBE (Jan. 21, 2011), http://www.youtube.com/watch?v=UwdwnQ0_KiY.

⁸⁴ See Richard Posner, *Why is Airline Service So Bad?*, BECKER-POSNER BLOG (Apr. 21, 2008, 8:59 PM), <http://www.becker-posner-blog.com/2008/04/why-is-airline-service-so-bad-posner.html>.

⁸⁵ *Id.*

⁸⁶ Katrina Brown Hunt, *The 24 Worst Celebrity Air Rage Incidents*, BUS. INSIDER (Jan. 23, 2013 6:07 PM), <http://www.businessinsider.com/worst-celebrity-air-rage-incidents-2012-12> ("The airlines' unstated policy . . . is to get this passenger the hell out of here—and then let it go.").

stated policy with the vast majority of incidents is to off-load passengers and not report the incident.⁸⁷

Significant financial pressures caused a reduction in service levels, especially in the case of the traditional, main carriers.⁸⁸ However, air carriers also feel the burden of protecting their staff from verbal abuse and attacks by irate, drunken, drugged, or mentally unstable passengers.⁸⁹ The dichotomy the air carriers face is that, on one hand, they do not want to lose any reputational advantages they have in the marketplace, but on the other hand, they want the problem of air rage to diminish.⁹⁰ Some of their concerns are met by the submissions or representations of carrier organizations, such as the IATA.⁹¹

A. INTERNATIONAL AIR TRANSPORT ASSOCIATION "GUIDANCE" DOCUMENT

IATA's Guidance on Unruly Passenger Prevention and Management (IATA Guidance Document), which was first published in December 2012, gathers key existing documents produced by IATA and ICAO, and in so doing, attempts to provide a higher level of guidance for airlines.⁹² Building on the definition of a disruptive passenger in Annex 17 of the Convention on International Civil Aviation (Chicago Convention), the IATA Guidance Document presents a non-exhaustive list of "unruly/disruptive" behaviors on board an aircraft.⁹³ While not prescriptive in its

⁸⁷ *Id.*

⁸⁸ THE IMPACT OF LOW COST CARRIERS IN EUROPE 2 (2003), available at http://www.icao.int/sustainability/CaseStudies/StatesReplies/Europe_LowCost_En.pdf.

⁸⁹ IATA GUIDANCE DOCUMENT, *supra* note 29, at 6.

⁹⁰ *See id.*

⁹¹ IATA's 240 member airlines represent 84% of total world air traffic. See Tony Tyler, *Turbulent Times – Commentary*, in THE HINDU ANNUAL SURVEY OF INDIAN INDUSTRY (2012), available at <http://www.iata.org/pressroom/Documents/oped-turbulent-times-april2012.pdf>.

⁹² *See* IATA GUIDANCE DOCUMENT, *supra* note 29, at 3.

⁹³ The unruly/disruptive behaviors outlined include: (1) illegal consumption of narcotics; refusal to comply with safety instructions (examples include not following cabin crew requests, e.g., instructions to fasten a seat belt, not smoke, turn off a portable electronic device, or disrupting the safety announcements); (2) verbal confrontation with crew members or other passengers; (3) physical confrontation with crew members or other passengers; (4) uncooperative behavior (examples include interfering with the crew's duties and refusing to follow instructions to board or leave the aircraft); (5) making threats (includes all types of threats, whether directed against a person, e.g., a threat to injure someone, or intended to cause confusion and chaos, such as statements referring to a bomb threat, or simply any threatening behavior that could affect the safety of the crew, passengers, and aircraft); (6) sexual abuse/harassment; and (7) other type of

approach, the document emphasizes the need for airlines to develop coherent policies and procedures.⁹⁴ The IATA Guidance Document suggests that such a policy may address issues of preventing air rage, training and periodic training, handling problematic passengers, categorizing incidents, pilot-in-command responsibilities, prosecution, and communication.⁹⁵ It also envisages the possibility of airlines adopting a “zero tolerance” policy.⁹⁶

The IATA Guidance Document serves as an indirect acknowledgement that the disruptive passenger is not singularly responsible for an air rage incident. For example, with respect to possible external response air rage incidents caused by delays, IATA suggests that “[i]nternally the airline may consider . . . [e]nsuring a smooth operation . . . [by] diffusing the frustration that occurs over long waiting lines, the flight being overbooked, delays, lack of information, [and] technical deficiencies.”⁹⁷ Notwithstanding this comment by IATA, it is apparent that it is primarily focused on managing the reacting passenger as opposed to what the passenger may be reacting to. It may be the case that IATA is taking a cautious approach and setting out robust guidance on managing delay, in view of its opposition to the European Union’s Regulation (EC) No. 261/2004.⁹⁸ In so doing, it arguably seeks to avoid the suggestion that carriers, through their actions, are contributing to the occurrence of air rage. EC Regulation 261/2004 is a regulation “establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.”⁹⁹

In 2010, the U.S. Department of Transportation (DOT) adopted rules to protect passengers in the event of tarmac delays, titled “Enhancing Airline Passenger Protections,” which became effective on April 29, 2010.¹⁰⁰ The European Union, through EC Regulation 261/2004, also introduced in 2010 con-

riotous behavior (examples include screaming, annoying behavior, kicking, and banging heads on seat backs/tray tables). *See id.* at 9–10.

⁹⁴ *See id.* at 3.

⁹⁵ *See id.* at 15.

⁹⁶ *See id.* at 14.

⁹⁷ *Id.* at 19.

⁹⁸ Regulation 261/2004, 2004 O.J. (L 046) (EC).

⁹⁹ *Id.*

¹⁰⁰ *See* 14 C.F.R. § 259 (2014).

sumer protection measures to penalize carriers for delays.¹⁰¹ There is no such delay-specific legislation in Australia.¹⁰²

B. THE ROLE OF THE AIR CREW

Cabin crews are often affected by incidents of air rage occurring in flight. As Michaelides observes, “[c]abin crew and pilots are increasingly being pushed, punched, bitten, grabbed, scratched, sworn at, and in one case, even stabbed, by increasingly aggressive passengers.”¹⁰³ At the same time, airline staff are the victims of airline policy when it comes to cost cutting.¹⁰⁴ Their working conditions evaporate as they are asked to do more with less.¹⁰⁵

In the post-9/11 era, the industry has responded to the need for training by providing more staff training related to dealing with unlawful interferences.¹⁰⁶ In some states, aviation operators now provide appropriate staff training to deal with physical threats that may occur in the context of terrorist activity or incidents of air rage.¹⁰⁷ This can be done under the umbrella of Annex 17 of the Chicago Convention, which provides in Section 3.3.1 that “[e]ach [c]ontracting [s]tate shall require operators providing service from that [s]tate to establish and implement a written operator security programme appropriate to meet the requirements of the national civil aviation security programme of that [s]tate.”¹⁰⁸ In Australia, this requirement is elaborated

¹⁰¹ Regulation 261/2004, art. 16, 2004 O.J. (L 046).

¹⁰² See *Flight Delays and Cancellations Air Passenger Rights for Australian Domestic Flights*, GLOBAL TRAVEL MEDIA (Sept. 4, 2013), <http://www.eglobaltravelmedia.com.au/flight-delays-and-cancellations-air-passenger-rights-for-australian-domestic-flights>.

¹⁰³ Sofia Michaelides, *Unruly Passenger Behaviour and the Tokyo Convention*, 6 COVENTRY L.J. 38 (2001).

¹⁰⁴ Francine Parnes, *For Flight Attendants, Stress Comes With the Job*, N.Y. TIMES (Aug. 12, 2003), <http://www.nytimes.com/2003/08/12/business/business-travel-for-flight-attendants-stress-comes-with-the-job.html>.

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., AIR LINE PILOTS ASS'N, INT'L, AVIATION SECURITY: 10 YEARS AFTER THE 9/11 ATTACKS 2, available at http://www.alpa.org/portals/alpa/pressroom/inthecockpit/alpaissueanalysis_10yearsafter9-11attacks.pdf.

¹⁰⁷ See, e.g., Alison Griswold, *Should 'Knee Defender' Fights and Drunk Women Really Divert Airplanes?*, NAT'L POST (Sept. 4, 2014, 2:00 PM), <http://news.nationalpost.com/2014/09/04/should-knee-defender-fights-and-drunk-women-really-divert-airplanes>.

¹⁰⁸ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, Annex 17, *Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, § 3.3.1 (14th ed. 2014).

and imposed as an obligation on operators in Sections 13 and 14 of the Aviation Transport Security Act 2004.¹⁰⁹

Harry Kern suggests that there is a lack of training of both airline personnel and the flying public, which contributes, in a causal sense, to the occurrence of air rage.¹¹⁰ He argues that "[t]he lack of training of airline personnel may impede their ability not only to diffuse potentially disruptive or dangerous situations involving passengers but also to recognize, before boarding, passengers who could pose a threat."¹¹¹ Arguably, this view is no longer wholly accurate as many airlines in the post-9/11 era have developed programs for self-defense and for dealing with terrorist threats.

A recent press report from Hong Kong shows that the Hong Kong Airlines' staff received training in basic self-defense techniques in Wing Chun martial arts since 2011.¹¹² However, the problem persists for the airline as the same press report noted that this airline experiences three incidents of disruptive passengers per week.¹¹³

At times, the capricious behavior of an air crew has played a causal role in arguably unnecessary diversions, such as in *Eid v. Alaska Airlines*.¹¹⁴ Equally, the public meltdown of JetBlue flight attendant Steven Slater suggests there is a pressure cooker environment on board aircraft.¹¹⁵ Slater, after arguing with a passenger who refused to remain seated after landing, activated an emergency slide and used it to exit the aircraft.¹¹⁶

Air rage is distinct from terrorist activity and is not per se a national security issue, but because it relates to law and order on the plane and the safety of civil aviation, the line between the two phenomena, particularly in the post-9/11 period, has become quite blurred at times.

¹⁰⁹ *Aviation Transport Security Act 2004* (Cth) ss 13–14 (Austl.).

¹¹⁰ Harry Kern, *The Faces of Air Rage*, FBI L. ENFORCEMENT BULL., Aug. 9, 2003, at 7, available at <http://leb.fbi.gov/2003-pdfs/leb-august-2003>.

¹¹¹ *Id.*

¹¹² See Whitehead, *supra* note 64.

¹¹³ See *id.*

¹¹⁴ *Eid v. Alaska Airlines*, 621 F. 3d 858, 864 (9th Cir. 2010).

¹¹⁵ See Scott Mayerowitz, *Steven Slater, JetBlue Flight Attendant Out on Bail*, ABC NEWS (Aug. 10, 2010), <http://abcnews.go.com/US/steven-slater-jetblue-flight-attendant-bail-emergency-slide/story?id=11367793>.

¹¹⁶ *Id.*

VI. THE PERTINENT LAW

In 1997, ICAO established a Secretariat Study Group to examine the rapid increase in reported unruly and disruptive passenger behavior.¹¹⁷ Over time, the Study Group developed model legislation on certain offenses committed on board civil aircraft to be incorporated by ICAO member states into the national legislation, and in 2002, ICAO published the ICAO Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers (Circular 288/2002), which included the model legislation.¹¹⁸ According to Piera, at the time that Circular 288 was being studied, only the United Kingdom, Australia, the United States, and Canada had domestic legislation to extend jurisdiction to fill the jurisdictional gap under the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention).¹¹⁹

In the United States, verbal and physical threats, intimidation, and assault of a crewmember are felonies.¹²⁰ In Australia, the Crimes (Aviation) Act 1991 has been decisive in a number of cases, including *Donovan v Wilkinson*¹²¹ and *Lilico v Meyers*.¹²² The *Donovan* case involved a flight from Singapore to Brisbane that diverted to Darwin to offload a disruptive passenger.¹²³ The offending passenger's "[behavior], which continued over a substantial period of time, [made] other passengers on the aircraft concerned for their safety."¹²⁴ "Eventually, the pilot of the aircraft approached the passenger and told him that, if he did not modify his behaviour, the aircraft would [divert] to Darwin and he would be put off there."¹²⁵ After initially appearing to calm down, the passenger "became extremely loud and aggressive and said to the pilot 'I'll take youse [sic] on.'"¹²⁶ The passenger was held to be in breach of Section 15(1)(b)(ii) of the Crimes (Aviation) Act 1991.¹²⁷ The Court required the offending pas-

¹¹⁷ See Piera, *supra* note 13, at 240.

¹¹⁸ See IATA GUIDANCE DOCUMENT, *supra* note 27, at app. G.

¹¹⁹ See Piera, *supra* note 13, at 242.

¹²⁰ FAA Air Traffic and General Operating Rules, 14 C.F.R. § 91.11 (2014).

¹²¹ *Donovan v Wilkinson* [2005] NTSC 8 (Austl.).

¹²² *Lilico v Meyers* [2003] QCA 16 (Austl.).

¹²³ *Donovan*, [2005] NTSC 8, [5]–[6].

¹²⁴ *Id.* at [5].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at [1].

senger to reimburse Singapore Airlines the cost of the diversion, and the decision was affirmed on appeal.¹²⁸

The *Lilico* case involved an oral threat by a passenger who said he intended to pull a knife out and hijack the plane.¹²⁹ This was held to be contrary to Section 24(2)(b) of the Crimes (Aviation) Act 1991.¹³⁰ Interestingly, the court noted the broad reach of the Act in creating a range of offenses.¹³¹ These include hijacking, acting violently toward crew members or passengers, prejudicing the safe operation of the aircraft or endangering its safety, carrying dangerous goods, making threats, acting violently at airports, and making false statements that infer an intention to cause damage to the aerodrome.¹³²

In *Lilico v Meyers*, the court noted that the Civil Aviation Regulations 1988 also created two offenses of relevance to the proceedings: Regulation 256 (boarding an aircraft while intoxicated) and Regulation 256AA (offensive and disorderly behaviour on an aircraft).¹³³ The court imposed a short, custodial sentence based on the circumstances of the case.¹³⁴ The judgment provides a useful analysis of previous decisions in this jurisdiction relating to passenger misconduct on aircraft.¹³⁵ The justice observed that:

Other than by the courts imprisoning offenders such as Mr. Lilico, the airlines could eradicate the problems caused by intoxicated passengers by refusing to allow the intoxicated to board any aircraft. Likewise, the airlines could stop serving alcohol to passengers, just as cigarette smoking has been stopped; or serve a limited quantity per passenger.¹³⁶

¹²⁸ *Id.* at [9], [36].

¹²⁹ See *Lilico v Meyers* [2003] QCA 16, [5] (Austl.).

¹³⁰ *Id.* at [1].

¹³¹ See *id.* at [21].

¹³² See *id.* (citing the *Crimes (Aviation) Act 1991* (Cth) ss 13, 14, 19, 21, 22, 23, 24, 26, 28(2)(b) (Hijacking—life imprisonment; Act of Violence towards crew or passengers—fourteen years imprisonment; Prejudice of safe operation of aircraft—fourteen years imprisonment; Assault crew—fourteen years imprisonment; Endanger safety of aircraft—seven years imprisonment; Carry dangerous goods [includes any weapon] onto aircraft—seven years imprisonment; Threats or false statements endangering safety of aircraft—two years imprisonment; Violence at Airports—fifteen years imprisonment; and False Statement reasonably inferring intent to cause damage to aerodrome)).

¹³³ See *id.* at [22].

¹³⁴ *Id.* at [32].

¹³⁵ See *id.* at [38].

¹³⁶ *Id.* at [49].

Despite the various hotchpitches of national laws that the parties to the Tokyo Convention have in place, there is still no uniformity in the approach adopted, and the majority of member states have not implemented ICAO Circular 288.¹³⁷ Circular 288's purpose was to lay out model laws to deal with issues that may be adopted or legislated at the national level.¹³⁸ Subsequently, at its 33rd Session, the ICAO Assembly adopted Resolution A33-4, calling on member states to pass national laws based on the Circular 288 Model laws.¹³⁹ Piera suggests that one way to modernize the Tokyo Convention is to include Circular 288 into the terms of the Tokyo Convention so that Circular 288 is more than just "guidance materials."¹⁴⁰

In this context, it is worth noting that the Circular, as a model law, lays down three types of offenses.¹⁴¹ The first is "Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft," which includes behaviors "such as assault, threat and intimidation of crew, [and] refusal to follow instructions."¹⁴² A second offense is "Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board Civil Aircraft," which includes "assault or intimidation of [other] passengers, damage or destruction of property, [and] consuming alcoholic beverages or drugs resulting in intoxication."¹⁴³ A third type of offense defined in Circular 288 is "Other Offences Committed on Board a Civil Aircraft," and this category includes behaviors such as "smoking in [the] lavatory, tampering with a smoke detector, or operating an EPD."¹⁴⁴ If states were to have recourse to Circular 288 or similar model law and were able to resist the temptation to undertake a rewriting exercise, as too frequently occurs (especially in the case of China), the result would be more uniform laws throughout all jurisdictions.

¹³⁷ Piera, *supra* note 13, at 244.

¹³⁸ *See id.* at 240–41.

¹³⁹ *Id.* at 240.

¹⁴⁰ *See id.* at 244.

¹⁴¹ *See* Int'l Civ. Aviation Org. [ICAO], *Report of Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Passengers*, at A4-18, ICAO Doc. LC/SC-MOT (May 22–25, 2012).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ EPD refers to an electronic portable device. *Id.*

VII. PILOT EMPOWERMENT UNDER CHINA'S
CIVIL AVIATION LAW

Consonant with the Chicago Convention and its Annexes and the Tokyo Convention, under the Civil Aviation Law of the People's Republic of China (Chinese Civil Aviation Law), the pilot-in-command is extended a suite of powers to deal with incidents occurring on board the aircraft.¹⁴⁵ The pilot-in-command is empowered by Article 46 of the Chinese Civil Aviation Law to take measures to deal with incidents of air rage.¹⁴⁶ Article 46 provides that:

The pilot-in-command has the right to take necessary and appropriate measures in flight, under the prerequisite of ensuring flight safety, against any acts which may destroy . . . interfere with the order on board and jeopardize the safety In case of extraordinary circumstances in flight, the pilot-in-command shall have authority as to disposition of the civil aircraft so as to ensure the safety of the aircraft and the persons therein.¹⁴⁷

While this provision is consonant with the Tokyo Convention's Article 6, it lacks the specificity of Article 6(2), which permits the commander to require or authorize the assistance of other crew members and passengers.¹⁴⁸ Article 48 of the Chinese Civil Aviation Law, in expressing the right of the commander to authorize crew and passengers to act, appears to have limited this to situations of distress and arguably, may be read quite narrowly because of the general words used in its construction.¹⁴⁹ For example, it lacks the clarity of Article 6(2) of the Tokyo Convention, which categorically authorizes restraint of offending individuals.¹⁵⁰ The Chinese Civil Aviation Law prefers the "all necessary measures" formula from the Warsaw Convention over the "reasonable grounds" and "reasonable preventive measures" used in the Tokyo Convention.¹⁵¹

¹⁴⁵ See Civil Aviation Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Mar. 1, 1996) (China).

¹⁴⁶ See *id.* art. 46.

¹⁴⁷ *Id.*

¹⁴⁸ Compare *id.*, with Convention on Offences and Certain Other Acts Committed On Board Aircraft art. Sept. 6, 20, 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

¹⁴⁹ See Civil Aviation Law, art. 48.

¹⁵⁰ See Tokyo Convention, *supra* note 148 art. 6(2).

¹⁵¹ Compare Civil Aviation Law, art. 48, with *id.* art. 6, and Convention for the Unification of Certain Rules Relating to International Carriage by Air, art. 20, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

The "all necessary measures" formulation is incorporated in the Warsaw Convention's Article 19 and can be found in Article 126 of the Chinese Civil Aviation Law, making the carrier liable for delay unless it establishes that it took "all necessary measures."¹⁵² In application, the criterion of reasonableness is still applicable. In the context of Article 20 of the Warsaw Convention, which also uses the "all necessary measures" formulation, the court in *Goldman v. Thai Airways* observed that the necessary measures should be those considered necessary by the reasonable man.¹⁵³

There is an argument that the drafters of the Chinese Aviation Law, in redrafting the Tokyo Convention's Article 6 as Articles 46 and 48, have lost an important part of its meaning. A comparison with the approach taken in the Hong Kong Special Administrative Region (SAR) reveals significant differences in drafting; Hong Kong's Aviation Security Ordinance (1996) section 4, which opts for the Tokyo Convention wording, expressly permits the commander of the aircraft to "take with respect to that person such reasonable measures, including restraint"¹⁵⁴

In Australia, under Regulation 309 of the Civil Aviation Regulations (1988), the pilot-in-command, with "such assistance as is necessary and reasonable," may remove "a person from the aircraft or [place] a person under restraint or in custody by force."¹⁵⁵ This includes the power of arrest under Regulation 309(2).¹⁵⁶ The wording of both the Australian and the Hong Kong provisions are closely based on the wording from Tokyo Convention. The People's Republic of China's propensity to remodel the wording takes away from the uniformity sought by the international regime, especially where it tampers with the test that applies to the aircraft commander's actions.

In the United States, incidents of air rage may result in significant penalties with passengers potentially liable for up to \$25,000 and imprisonment for up to twenty years.¹⁵⁷ While superficially providing a strong penal edge to the legal regime,

¹⁵² See Civil Aviation Law, art. 126.

¹⁵³ *Goldman v. Thai Airways*, [1983] 3 All ER 693 (C.A.) (Eng.).

¹⁵⁴ Compare Aviation Security Ordinance, No. 494, (1997) 362 O.H.K., § 4(2)(b) (H.K.), with Tokyo Convention, *supra* note 148, art. 6.

¹⁵⁵ *Civil Aviation Regulations 1988* (Cth) reg 309(1)(a) (Austl.).

¹⁵⁶ *Id.* reg 309(2).

¹⁵⁷ Bryan Robinson, *Flight Attendants Say Air Rage Ignored*, ABC NEWS (July 6, 2013), <http://www.abcnews.go.com/US/story?id=92907&page=2>.

airline workers have argued that the penalties alone are not sufficient and that the penalties need to be drawn more effectively to the attention of passengers more effectively before they embark on their journeys.¹⁵⁸

VIII. CHINA'S AVIATION LAW

Runway incursions by passengers, assaults of gate and airline staff, damage to property, unruly crowd behavior, and disruptive behavior in flight all focus attention on the nature and reach of China's aviation laws. China's aviation laws include the Regulations on Security Protection in Civil Aviation,¹⁵⁹ Civil Aviation Law of the People's Republic of China,¹⁶⁰ the Criminal Law of the People's Republic of China,¹⁶¹ and the Regulations on Administrative Penalties for Public Security.¹⁶²

The Civil Aviation Law of the People's Republic of China makes pertinent references to behavior on board aircraft in flight and disruptive behavior in airports.¹⁶³ Within airports, Article 198 provides that "[a] person who assembles a crowd to disturb the order of a civil airport shall be investigated for his criminal responsibility in accordance with the provisions of . . . of the Criminal Law."¹⁶⁴ The Criminal Law of the People's Republic of China provides a generic provision covering crowds in a number of public places.¹⁶⁵ Under it, offenders are subject to up to five years in prison.¹⁶⁶ It provides as follows:

Where an assembled crowd disturbs order at stations, wharves, civil airports, marketplaces, public parks, theatres, cinemas, exhibition halls, sports grounds or other public places, or an assembled crowd blocks traffic or undermines traffic order or resists or obstructs public security administration personnel of the state

¹⁵⁸ *See id.*

¹⁵⁹ Regulations on Security Protection in Civil Aviation (promulgated by the State Council of the People's Republic of China, July 6, 1996, effective July 6, 1996) (Lawinfochina) (China).

¹⁶⁰ Civil Aviation Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, effective Mar. 1, 1996) (China).

¹⁶¹ Criminal Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) (China).

¹⁶² Regulations on Administrative Penalties for Public Security (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1986, effective as amended May 12, 1994) (China).

¹⁶³ Civil Aviation Law, art. 192.

¹⁶⁴ *Id.* art. 198.

¹⁶⁵ Criminal Law, art. 291.

¹⁶⁶ *Id.*

from carrying out their duties according to law, if the circumstances are serious, the ringleaders shall be sentenced to fixed-term imprisonment of not more than five years, criminal detention, public surveillance or deprivation of political rights.¹⁶⁷

Article 192 of the Chinese Civil Aviation Law prohibits the use of force on the persons aboard a civil aircraft in flight which imperils air safety and permits prosecution under Article 105 of the Criminal Law.¹⁶⁸

Article 16 of the Regulations on Security Protection in Civil Aviation relates to conduct at an airport.¹⁶⁹ It states a number of express prohibitions, namely:

- (1) climbing over, passing through or damaging protective rails and other security facilities in the airport;
- (2) hunting, grazing livestock, drying grain in the air or sun, or teaching driving within the airport control areas;
- (3) entering the airport control area without a pass;
- (4) wantonly going across the aircraft runways or taxiing paths;
- (5) boarding or occupying aircraft by force;
- (6) falsely reporting dangers to make disturbance; and
- (7) committing other actions disturbing the order in the airport.¹⁷⁰

Article 16(3) and 16(4) cover the situation of a tarmac invasion while Article 16(1) and 16(7) cover incidents like the Yan Linkun temper tantrum and its associated damage to equipment.¹⁷¹ It is arguably sufficiently broad to also encompass assaults against airport staff.

The rash of recent air rage incidents at airports in China raises the issue of what law applies to disturbances in airports. Interestingly, Article 34 of the Regulations on Security Protection in Civil Aviation prescribes that any violation of Article 14 (personnel and vehicles in the aircraft moving area and the maintenance area), Article 16, Article 24(1), Article 24(2), and Article 25 (including smoking, fighting, and stealing) are punishable under the Regulations on Administrative Penalties for

¹⁶⁷ *Id.*

¹⁶⁸ Civil Aviation Law, art. 192.

¹⁶⁹ Regulations on Security Protection in Civil Aviation (promulgated by the St. Council, July 6, 1996, effective July 6, 1996), art. 16 (Lawinfochina) (China).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*; Scally, *supra* note 47.

Public Security.¹⁷² The Regulations on Administrative Penalties for Public Security reflect an interaction between the criminal and civil laws of China according to the seriousness of the alleged act by providing in Article 2 that:

Whoever disturbs social order, endangers public safety, infringes upon a citizen's rights of the person and encroaches upon public or private property, if such acts constitute a crime according to the Criminal Law of the People's Republic of China, shall be investigated for criminal responsibility; if such acts are not serious enough for criminal punishment but should be given administrative penalties for public security, penalties shall be given according to these Regulations.¹⁷³

It seems that there is considerable discretion in how the law is applied because Articles 4 and 5 of the Regulations on Administrative Penalties for Public Security—though according with a mediated approach—seem to amount to a significant watering down of the penal sanctions.¹⁷⁴ Article 4 provides that “[i]n dealing with those who violate the administration of public security, public security organs shall adhere to the principle of combining education with punishment.”¹⁷⁵ Article 5 provides that “acts caused by civil disputes which violate the administration of public security, such as brawling and damaging or destroying another person's property, if the adverse effects are minor, may be handled by public security organs through mediation.”¹⁷⁶ Under Article 6, the penalty options include (1) warning, (2) a fine ranging from a symbolic one yuan to a maximum of 200 yuan, or (3) detention ranging from a minimum of one day to a maximum of fifteen days.¹⁷⁷ A literal application of Article 12 seems inappropriate for civil aviation because it provides that “[a]n intoxicated person who may cause danger to himself or who threatens the safety of others due to his drunken state shall be restrained until he returns to a sober state.”¹⁷⁸ Comparatively, in

¹⁷² Regulations on Security Protection in Civil Aviation, art. 34 (“reselling for profits certificates for purchasing tickets, passenger tickets or valid certificates of an air transport enterprises”; and (2) “booking tickets or going on board with other's identity certificate.”).

¹⁷³ Regulations on Administrative Penalties for Public Security (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 5, 1986, effective as amended May 12, 1994), art. 2 (China).

¹⁷⁴ *See id.* arts. 4, 5.

¹⁷⁵ *Id.* art. 4.

¹⁷⁶ *Id.* art. 5.

¹⁷⁷ *Id.* art. 6.

¹⁷⁸ *Id.* art. 12.

the United States or Australia, someone who threatens the safety of others, in either an airport or on board an aircraft, would likely be subject to more substantial punishment.

Where an assault or battery takes place, Article 22 of the Regulations on Administrative Penalties for Public Security comes into play.¹⁷⁹ For striking another person, the perpetrator, where not deemed serious enough for criminal punishment, "shall be detained for a maximum of fifteen days, fined . . . or given a warning."¹⁸⁰ It would seem that the soft approach of the People's Republic of China's regulations belongs to a past era and that, arguably, a more rigorous approach is necessary to discourage inappropriate behavior.

IX. THE POSITION UNDER THE AVIATION LIABILITY CONVENTIONS

Article 19 of the Montreal Convention, under which the air carrier's liabilities to passengers is determined, expressly deals with delay.¹⁸¹ It provides that "[t]he carrier is liable for damage occasioned by delay" unless "the carrier proves that its . . . agents took all measures that could reasonably be required to avoid the damage or that it was impossible for them to take such measures."¹⁸² This obligation relates to international carriage by air, not domestic carriage per se, unless the domestic law is closely based on the international legal regime.¹⁸³

A distinction needs to be drawn here between complete non-performance of the contract and delayed performance. *Weiss v. El Al Israel Airlines* stands for the proposition that complete non-performance of a contract does not come under the Montreal Convention of 1999.¹⁸⁴ If there is damage from delay, Article 22 specifies that the liability of the carrier for each passenger is capped at 4,150 SDR.¹⁸⁵

In the Canadian case of *Lukacs v. United Airlines*, the plaintiff argued that the defendant had not taken all necessary measures to avoid his delay because the carrier should have had other

¹⁷⁹ *Id.* art. 22.

¹⁸⁰ *Id.*

¹⁸¹ Convention for the Unification of Certain Rules for International Carriage by Air art. 19, May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

¹⁸² *Id.*

¹⁸³ *Id.* art. 1.

¹⁸⁴ *Weiss v. El Al Israel Airlines*, 433 F. Supp. 2d 361 (S.D.N.Y. 2006).

¹⁸⁵ See Montreal Convention, *supra* note 181, art. 22.

flights available, and the carrier failed to timely endorse his ticket so that he could travel on the alternate Northwest flight.¹⁸⁶ The court held that the defendants had not established that they had taken all measures that “could reasonably be required to avoid the damage sustained by the plaintiff arising from delay.”¹⁸⁷

X. THE DAMAGE PROBLEM UNDER ARTICLE 19

The Montreal Convention does not define damage, so it is left to national law to define the term and to establish which kind of damage must be compensated.¹⁸⁸ The problem of what constitutes a delay can torment courts, as it is not possible to apply a rigid formula. Basically, that leaves the courts to consider the facts of each case to determine whether a delay under the convention occurred. Where a delay has taken place, the resultant damage might typically involve the cost of the following items: accommodation and transportation in the event of a missed connecting flight; and additional expenses (e.g., the purchase of a first class ticket) in order to reach the destination via a different flight.¹⁸⁹

XI. THE EUROPEAN UNION APPROACH TO DELAY

Compensation for denied boarding and cancellation or long delay of flights, as previously alluded to, is provided in European Union States under Council Regulation 261/2004.¹⁹⁰ This regulation prescribes a number of standardized measures in the event of a canceled flight.¹⁹¹ For example, the passengers may receive reimbursement of their ticket price or be rerouted.¹⁹² While waiting for a later flight, the air carrier is required to offer adequate care to the passengers, which may consist of accommodation, meals, and telephone calls.¹⁹³ “Finally, where the flight is cancelled without notice or with very short notice and there are no extraordinary circumstances, passengers also have the right to a flat-rate compensation, the amount of which varies depend-

¹⁸⁶ *Lukacs v. United Airlines, Inc.*, [2009] MBQB 29, paras. 21–22 (Can.).

¹⁸⁷ *Id.* at para. 47.

¹⁸⁸ See generally Montreal Convention, *supra* note 181.

¹⁸⁹ See WARSAW CONVENTION: SUPPLEMENT 13 (Elmar Giemulla & Ronald Schmid eds., 2000).

¹⁹⁰ Council Regulation 261/2004, art. 5, 2004 O.J. (L 046) (EC).

¹⁹¹ *Id.*

¹⁹² *Air Passenger Rights*, EU FOCUS, Jan. 2011, at 8.

¹⁹³ *Id.*

ing on the distance of the scheduled flight.”¹⁹⁴ The European Court of Justice (ECJ) has given judicial consideration to the Regulation in the case of *Sousa Rodriguez v. Air France SA* in 2011.¹⁹⁵

XII. THE MODERNIZATION OF THE TOKYO CONVENTION

On September 14, 1963, at the International Conference on Air Law, which convened in Tokyo, Japan, under the auspices of ICAO, the text of the Convention on Offences and Certain Other Acts Committed On Board Aircraft (Tokyo Convention) was signed.¹⁹⁶

The Tokyo Convention was established to provide a uniform approach to deal with unlawful acts committed on board an aircraft.¹⁹⁷ In particular, the Tokyo Convention provides a framework to address “offences against penal law”¹⁹⁸ and “acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board,”¹⁹⁹ which have been committed or done “on board any aircraft registered in a [c]ontracting [s]tate, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.”²⁰⁰

What constitutes an offense under Article 1(a) varies depending on the subject state’s domestic laws.²⁰¹ In addition, Article 2 provides that no provision of the Convention will be interpreted as “requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.”²⁰²

“The Tokyo Convention . . . entered into force on [December 4, 1969,] and [is] one of the most widely ratified international

¹⁹⁴ Press Release, Court of Justice, Judgment in Case C-83/10 Aurora Sousa Rodríguez v Air France SA, European Union Press Release N. 111/11 (Oct. 13, 2011).

¹⁹⁵ Case C-38/10, *Sousa v. Air France SA*, 2011 E.C.R. 1.

¹⁹⁶ Tokyo Convention, *supra* note 148.

¹⁹⁷ *See id.* at 222.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² *Id.*

instruments ever developed under the auspices of ICAO”²⁰³ with 185 state parties.²⁰⁴ Notwithstanding this success, following noticeable increases over time in incidents of unruly passenger behavior, at the 34th Session of the ICAO Legal Committee in 2009, the IATA tabled a report proposing to form a Secretariat Study Group to consider whether or not the Tokyo Convention should be revised²⁰⁵ to provide redress because (1) it “does not provide an adequate deterrent to unruly and disruptive behaviour on board aircraft”; (2) there are “gaps in the current text of the Convention”; and (3) there is a need to eliminate “inconsistent interpretation” of its key provisions.²⁰⁶

At the 35th Session of the Legal Committee of the ICAO held in Montreal in May 2013, the main item considered by the Legal Committee was the issue of “[a]cts or offences of concern to the international aviation community and not covered by existing air law instruments,”²⁰⁷ which in layman’s terms means the consideration of the merits to modernize the Tokyo Convention. In response to the draft protocol to amend the Tokyo Convention 1963, IATA undertook an analysis of unruly passenger incidents during the period from January 2007 to June 2010.²⁰⁸ The IATA’s findings are contained in an ICAO working paper (LC/35-WP/2-2) from the 35th Session of the Legal Committee held from May 6–15, 2013.²⁰⁹

In pointing to a “jurisdictional lacuna” in the Tokyo Convention, the IATA emphasized the need for modernization of the text.²¹⁰ The problem lies in the fact that, under the Tokyo Con-

²⁰³ Alejandro Piera, *Report of the Rapporteur of the Special Sub-Committee on the Preparation of an Instrument to Modernize the Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963* 4 (Int’l Civil Aviation Org., Working Paper No. LC/SC-MOT-WP/1, 2012).

²⁰⁴ See *Current List of Parties to Multilateral Air Law Treaties*, http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf (last visited Nov. 7, 2014).

²⁰⁵ Piera, *supra* note 201, at 1.

²⁰⁶ *The International Air Transport Association’s Views on the Modernisation of the Tokyo Convention 1963 and the Emerging Problem of Unruly and Disruptive Passengers* 1 (Int’l Civil Aviation Org., Working Paper No. LC/SC-MOT-WP/2, 2012) [hereinafter *IATA on the Modernisation of the Tokyo Convention*].

²⁰⁷ *Agenda Item 2: Acts or Offences of Concern to the International Aviation Community and Not Covered by Existing Air Law Instruments* 1 (Int’l Civil Aviation Org., Working Paper No. LC/35-WP/2-1, 2013).

²⁰⁸ *IATA on the Modernisation of the Tokyo Convention*, *supra* note 206, at 2.

²⁰⁹ See *Comments of the International Air Transport Association (IATA) on LC/35-WP/2-1 and the Legal Aspects of the Issue of Unruly Passengers* 1 (Int’l Civil Aviation Org., Working Paper No. LC/35-WP/2-2, 2013) [hereinafter *Comments on the IATA Working Paper*].

²¹⁰ *Id.*

vention, jurisdiction over offenses committed on board the aircraft is afforded to the state of registration of the aircraft.²¹¹ There is no automatic prosecution by the competent authorities at the place of landing.²¹² In the 1995 Hong Kong court of appeal case *R. v. Remy Martins Duggam*, the court noted the absence of state of landing jurisdiction in the following terms: "I express the hope that signatories to the Tokyo Convention will be astute in seeking the extradition for prosecution of those who commit offences aboard their registered or controlled aircraft. Failing this, 'crime' committed aboard aircraft may go unchecked."²¹³

There are examples of violent passengers being delivered to the appropriate authorities at the place of landing only for those authorities to conclude that the incident occurred over the high seas, involved a national of another country, and occurred on board an aircraft registered in another state.²¹⁴ Thus, the prosecutory authorities at the place of landing conclude that they did not have jurisdiction, and consequently, the perpetrator of the violence on board the aircraft was neither detained nor prosecuted.²¹⁵

The IATA submission notes that some states have amended their domestic laws to provide for national courts to "exercise . . . jurisdiction . . . over events that occur on board foreign aircraft which land in their territory."²¹⁶ The IATA submission also notes that some states are reluctant to act in the absence of express coverage under a treaty.²¹⁷ "[I]n the absence of a

²¹¹ *Id.*

²¹² *Id.*; see also Margaret P. Fogg, *Air Rage: Is It a Global Problem? What Proactive Measures Can Be Taken to Reduce Air Rage, and Whether the Tokyo Convention Should Be Amended to Ensure Prosecution of Air Rage Offenders?*, 7 ILSA J. INT'L & COMP. L. 511, 533 (2001) (noting that "[i]f the landing state chooses not to extradite or prosecute the offender, the state must set him free and let him continue to the destination of his choice as soon as possible."); R.I.R. Abeyratne, *Attempts at Ensuring Peace and Security in International Aviation*, 24 TRANSP. L.J. 27, 41-42.

²¹³ *The Queen v. Remy Martins Duggam*, [1995] 2 H.K.C.L.R. 137, 142 (C.A.). The court acknowledged in a majority decision that while Section 1(3) of the Tokyo Convention provides for jurisdiction, it does not create any territorial offense under the law in force in Hong Kong for a flight in which the carrier was not Hong Kong flagged (Qantas). Although the acts that occurred on board the aircraft would have amounted to an offense if they occurred in Hong Kong, they were not subject to Section 17(1) of the Theft Ordinance, and consequently, were a nullity. See *id.*

²¹⁴ Piera, *supra* note 15, at 235.

²¹⁵ *Id.*

²¹⁶ *Comments on the IATA Working Paper*, *supra* note 209, at 2.

²¹⁷ *Id.*

mandatory [s]tate of landing jurisdiction provision, it may be difficult to convince national legislators of the importance of modifying their applicable domestic law.”²¹⁸

The IATA submission argues for “[a] mandatory [s]tate of landing jurisdiction” and a mandatory “State of the operator” jurisdiction.²¹⁹ The “[s]tate of the operator” jurisdiction caters to modern practice with airlines leasing around forty percent of all aircraft in 2012.²²⁰ This is predicted to rise to around 50% by 2015.²²¹

Interestingly, the IATA also supports further voluntary bases of jurisdiction derived from the “nationality and habitual residence” of the operator.²²² These are suggestive of jurisdictions available under Article 33 of the Montreal Convention of 1999, namely “the domicile of the carrier or . . . its principal place of business.”²²³

The ICAO proposal also seeks to provide a clear definition of what constitutes an offense.²²⁴ Where the Tokyo Convention leaves this to the state taking jurisdiction, ICAO advocates a more explicit approach.²²⁵ It suggests that police become reluctant to prosecute when they are uncertain about how the behavior fits in with their domestic law.²²⁶

Currently, the “[Tokyo] Convention only applies when the aircraft is ‘in flight.’”²²⁷ The IATA argues for greater uniformity with the approaches adopted in the Warsaw and Montreal Conventions and the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation Convention (Beijing Convention) of 2010.²²⁸ The Beijing Convention’s Article 2(a) provides that “an aircraft is considered to be in-flight at any time from the moment when all its external doors are closed

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Montreal Convention, *supra* note 181.

²²⁴ *Comments on the IATA Working Paper, supra* note 209, at 2–3.

²²⁵ *See id.*

²²⁶ *Id.* at 3 (providing that “[p]olice or prosecution authorities, in practice, will often not pursue an unruly passenger at all because they are not certain how the conduct complained of fits into the scope of their domestic criminal law. In many cases, authorities simply prefer to release the passenger to his or her onward journey”).

²²⁷ *Id.*

²²⁸ *See id.* at 4.

following embarkation until the moment when any such door is opened for disembarkation.”²²⁹

When aircraft commanders find it necessary to divert and discharge unruly passengers, the IATA submits that a right of recourse needs to be provided to airlines so that they may recover the costs of any such diversion.²³⁰ In this context, a proposed Article 18 *bis* provides as follows: “[W]hen the aircraft commander disembarks or delivers a person pursuant to the provisions of Articles 8 or 9 respectively, the [o]perator shall not be precluded from recovering from such person any damages incurred by the [o]perator as a result of such disembarkation or delivery.”²³¹ In this context, it is pertinent to note that in some jurisdictions, courts make orders for unruly passengers to compensate the air carrier for the cost of diversion to offload them.²³² For example, in Australia, unruly passenger Francis Macaskill was fined \$3,500, received a suspended sentence of four months in jail, and ordered to pay Qantas \$18,245, which represented the cost of the aircraft’s diversion to Melbourne.²³³

The Report of the Legal Committee outlined the position of ICAO member states, as expressed during the thirty-fifth session, on the expansion of jurisdiction of the Tokyo Convention as follows:

A majority of [s]tates opined that the addition of new jurisdictions, in particular those of the [s]tate of the operator and of the [s]tate of landing, would strengthen the regime set up by the Tokyo Convention. A good number of those [s]tates would favour mandatory jurisdictions so as to avoid the possibility of unpunished acts, while others would prefer such jurisdictions to be optional, one of them mentioning that its own statistics in fact demonstrated a decrease of unruly behaviours in recent years. A handful of [s]tates expressed their doubts about incorporating such jurisdictions, as other possible non-penal avenues to deter disruptive acts had not been sufficiently explored. One [s]tate

²²⁹ *Id.* at 3.

²³⁰ *Id.* at 4.

²³¹ *Id.*

²³² *Air Rage Granny to Fined and Banned*, N.Z. HERALD (June 6, 2012, 5:30 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10811058.

²³³ *Id.* The aircraft, which was on a flight to Wellington, New Zealand, was diverted back to Melbourne to off-load Macaskill, who was in a drunken state, behaved in a disorderly manner, and had punched another passenger. *Id.*

also raised the issue of addressing the matter of concurrent jurisdictions if additional jurisdictions were to be established.²³⁴

A. BACKGROUND OF THE PROTOCOL TO AMEND THE
CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS
COMMITTED ON BOARD AIRCRAFT (TOKYO
CONVENTION PROTOCOL)

The Diplomatic Conference to Consider Amending the Tokyo Convention of 1963 took place between March 26 and April 4, 2014.²³⁵ Because its Legal Bureau oversees the development of drafts for new treaties and the amendment of existing treaties, the ICAO occupies center stage when it comes to international lawmaking as a response to the air rage phenomenon.²³⁶

The ICAO Legal Committee saw fit in its thirty-fifth session to include the “in-flight security officer” (IFSO) in its Option 1 version of Article 6, essentially conferring the powers provided to the aircraft commander also to the IFSO.²³⁷ This was a very deliberate decision to include the IFSO in the convention. The Friends of the Chair Working Group on IFSOS included in Appendix F of the Report of the 35th Session of the ICAO Legal Committee an outline stating that one of the purposes of this inclusion is “to align the power of the IFSO with the aircraft commander.”²³⁸

The definition of IFSO proposed to be added to the Tokyo Convention was included in Appendix F of the thirty-fifth session with further options read as follows:

- (b) “in-flight security officer” means a [government employee]/[person] who is specially selected, trained and authorized by the government of the [s]tate of the operator [and]/[or] the government of the [s]tate of registration to be deployed on an aircraft, pursuant to a bilateral or multilateral [agreement (and/or) arrangement], with the purpose of
- (*Option A*) protecting that aircraft and its occupants against acts of unlawful interference[].

²³⁴ ICAO, *Report of the 35th Session of the Legal Committee*, at 2-1, ICAO Doc. 10014-LC/35 (May 6–15, 2013) [hereinafter *ICAO Legal Committee Report*].

²³⁵ See *Event Information: International Conference on Air Law – Diplomatic Conference to Consider Amending the Tokyo Convention of 1963*, http://www.icao.int/Meetings/AirLaw/_layouts/mobile/dispform.aspx?List=e610dc34-46ce-47eb-bd75-73e62958c428&View=0bcf5894-ec9a-4c07-8a60-bc685434d8a5&ID=1 (last visited Nov. 13, 2014).

²³⁶ *ICAO Legal Committee Report*, *supra* note 234, at 1.

²³⁷ *Id.* at F-2.

²³⁸ *Id.* at F-1.

(Option B) protecting that aircraft and its occupants against any offence or act contemplated in Article 1 paragraph 1.

(Option C) protecting the safety of that aircraft, or of persons or property on board.²³⁹

The IATA submissions cited several cases, including the U.S. Court of Appeals for the Ninth Circuit case, *Eid v. Alaska Airlines*, which indicated that the issue of the reasonableness of the aircraft commander's actions fell within the purview of the court.²⁴⁰ In the case, during a flight from Vancouver, Canada to Las Vegas, United States, a report from a flight attendant to the effect that she had "lost control of the first-class cabin" prompted a diversionary landing in Reno.²⁴¹ *Eid* was the first U.S. case to interpret the application of the Tokyo Convention.²⁴² In that case, the 2-1 majority opinion cites the U.S. delegate to the Tokyo Diplomatic Conference, which observed that:

Within the general concept of United States law, the phrase "reasonable grounds" would give the impression that the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief to the effect that a person had committed or was about to commit the kind of act under consideration.²⁴³

The court noted with interest that the then-President of the United States, President Johnson, emphasized in his message to the Senate the relevance of the reasonableness criterion as a measure of the commander's conduct.²⁴⁴ The court concluded that "viewing the evidence in the light most favorable to the plaintiffs, a fact finder here could conclude that Captain Swanagan did not have reasonable grounds to believe that plaintiffs posed a threat to the security or order of the aircraft."²⁴⁵ The pilot, upon being informed by a member of the cabin crew that she had lost control of the first-class cabin, had neither asked questions nor looked into the cabin through the cockpit window.²⁴⁶ The IATA submission, acknowledging that there is some

²³⁹ *Id.* at F-4.

²⁴⁰ See *Comments on the IATA Working Paper*, *supra* note 209, at 5 (citing *Eid v. Alaska Airlines, Inc.*, 621 F. 3d 858 (9th Cir. 2010)).

²⁴¹ *Eid*, F.3d at 862-64.

²⁴² *Id.* at 866.

²⁴³ *Id.* at 867.

²⁴⁴ See *id.*

²⁴⁵ *Id.* at 869.

²⁴⁶ See *id.*

divergence in the case law, asserted “that the commander is in an imperfect position to assess conditions in the passenger cabin from behind the cockpit door.”²⁴⁷ The IATA argued for an amendment of Article 10 of the Tokyo Convention to assess the commander’s actions “in light of the facts and circumstances . . . known to him or her at the time that those actions were taken.”²⁴⁸

The irony of *Eid* is that its facts provide a good argument for pilots personally investigating instances of passenger misconduct. On the other hand, the very act of leaving the security of the cockpit may have negative implications for the safety of the aircraft. As observed some years ago by Captain Stephen Luckey of the Airline Pilots Association (ALPA):

With two-pilot cockpit aircraft in widespread and growing use today[,] . . . sending a pilot into the passenger cabin to help resolve a dispute seriously diminishes the safety of flight. This is particularly so in the event of an altercation, which could [potentially] result in an incapacitated pilot and a resulting one-pilot aircraft.²⁴⁹

Alaska Airlines’ petition for certiorari was denied by the U.S. Supreme Court on May 2, 2011, notwithstanding the amicus briefs filed in support by airline associations (the Transport Association of America and IATA), pilot associations (ALPA and International Federation of Air Line Pilots Association), and eminent international aviation law academics, including Professor Paul Dempsey, the Director of the Institute of Air and Space Law and Tomlinson Professor of Law in Global Governance in Air and Space Law at McGill University, and Professor Pablo Mendes de Leon, the Director of the International Institute of Air and Space Law at the University of Leiden, The Netherlands, and President of the European Air Law Association.²⁵⁰ This was an opportunity lost for ascertaining a definitive interpretation of the rights and obligations of the relevant actors under the terms

²⁴⁷ *Comments on the IATA Working Paper*, *supra* note 209, at 6.

²⁴⁸ *Id.* at 6.

²⁴⁹ *Passenger Interference with Flight Crews and the Carry-on Baggage Reduction Act of 1997: Hearing Before the Subcomm. on Aviation Comm. on Transp. & Infrastructure* (1998) (statement of Captain Stephen Luckey, Chairman, Nat’l Sec. Comm., Airline Pilots Ass’n).

²⁵⁰ See *Alaska Airlines, Inc. v. Eid*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/alaska-airlines-inc-v-eid> (last visited Nov. 7, 2014), to view the U.S. Court of Appeals decision, the petition for certiorari, all amicus briefs, and the brief in opposition.

of the Tokyo Convention by the highest court in the United States.

B. THE CONTENT OF THE NEW PROTOCOL

In a press release at the conclusion of the Diplomatic Conference, the ICAO Council President, Dr. Olumuyiwa Benard Aliu, drew attention to two of the most significant initiatives embedded in the new Protocol.²⁵¹ These are recommended by both the ICAO and IATA as follows: (1) the recognition of the role of the IFSO and (2) the expansion of state jurisdiction over offenses to include both the state of the operator and the state of landing.²⁵²

Interestingly, the method adopted by the Conference is for the Protocol to be expressed as amendments to or replacements of particular provisions of the Tokyo Convention.²⁵³ To facilitate this process, the Conference adopted a consolidated text of the Tokyo Convention as amended by the new Protocol.²⁵⁴

Some of the more notable amendments of the Tokyo Convention included the following:

An alignment of the Tokyo Convention with the Beijing Convention's definition of "in flight" is made under Article 2 of the Protocol, which amends the Tokyo Convention definition in Article 1, paragraph 3.²⁵⁵ As with the Beijing Convention, the aircraft is considered to be "in flight . . . from the moment when all its external doors are closed."²⁵⁶ The prior position under the Tokyo Convention was that an aircraft was not in flight until "power [was] applied for the purpose of take-off."²⁵⁷ Equally, the flight would end at the "moment when the landing run ends."²⁵⁸

²⁵¹ See Press Release, Int'l Civil Aviation Org., ICAO Diplomatic Conference Delivers New Protocol Addressing Disruptive Passengers (Apr. 7, 2014), *available at* <http://www.icao.int/Newsroom/Pages/ICAO-Diplomatic-Conference-delivers-new-Protocol-addressing-disruptive-passengers.aspx> [hereinafter ICAO Press Release].

²⁵² *Id.*

²⁵³ See ICAO, *Draft Final Act of the International Conference on Air Law Diplomatic Conference to Consider Amending the Tokyo Convention of 1963*, DCTC Doc. No. 35 (2014).

²⁵⁴ See *id.*

²⁵⁵ ICAO, *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, at 2, DCTC Doc. No. 34 (2014) [hereinafter ICAO Protocol].

²⁵⁶ *Id.*

²⁵⁷ Tokyo Convention, *supra* note 148, 704 U.N.T.S. at 222.

²⁵⁸ *Id.*

Hence, under the new formulation, the convention remains applicable to the period after the doors are closed but before the power is applied; upon landing, the period while taxiing to the jet bridge, and before the external doors are open for disembarkation.²⁵⁹

Article 2 of the Protocol also solves any problems that may potentially occur if the state of the operator is different from the state of registration. It does so by declaring that “the term ‘the State of registration’, as used in Articles 4, 5, and 13 of the Tokyo Convention shall be deemed to be the State of the operator.”²⁶⁰

The Protocol, as flagged by the President of ICAO’s Council, reshapes the Tokyo Convention’s jurisdictional provisions.²⁶¹ The methodology of the Tokyo Convention was to provide for a flag-state jurisdiction (the state of registration of the aircraft) over criminal offenses committed on board under Article 3 with some exceptions.²⁶² Those exceptions were outlined in Article 4.²⁶³ In the consolidated text of the Convention, Article 4 is left intact, leaving the contracting states with exceptions in the following cases:

- a) the offence has effect on the territory of such State;
- b) the offence has been committed by or against a national or permanent resident of such State;
- c) the offence is against the security of such State;
- d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State; [and]
- e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.²⁶⁴

However, as previously alluded to, the Protocol adds an important primary jurisdictional option: the State of landing. This is provided for under an expanded Article 3 of the consolidated text by virtue of the Protocol’s Article 4 replacing the prior Arti-

²⁵⁹ See *ICAO Protocol*, *supra* note 255, at 2.

²⁶⁰ *Id.*

²⁶¹ ICAO Press Release, *supra* note 251.

²⁶² Tokyo Convention, *supra* note 148, 704 U.N.T.S. at 222–24.

²⁶³ *Id.* at 224.

²⁶⁴ ICAO, *Consolidated Text of the Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, 1963) and the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Montreal, 2014), at 3, DCTC Doc. No. 33 (2014) [hereinafter *Consolidated Text*].

cle 3 in full.²⁶⁵ The inclusion of the State of landing jurisdiction, along with the state of the operator jurisdiction, was not without resistance from certain states.²⁶⁶ In particular, early in the conference, Germany outlined a range of objections.²⁶⁷ Among other arguments, Germany suggested that:

The State of landing and the State of the operator do not appear to be more effective in terms of dealing with the typical cases of unruly behaviour than the State of registration. This is because of the probably very large number of cases of unruly behaviour where the crew, the offender and the witnesses live in different countries and also not necessarily in the State of landing.²⁶⁸

Germany further argued on practical grounds that the new jurisdiction would lead to additional problems and expenses, such as (1) expenses associated with legal assistance translations and (2) the obligation on the part of crew to miss connecting flights in order to remain available to give testimony.²⁶⁹

Significantly, a further option is preserved in the original text's Article 7(1)(c) where, although the aircraft lands at, for example, an agreed stopping place, the person under restraint may agree "to onward carriage under restraint."²⁷⁰ Perhaps there are indeed some prison systems to be avoided.

C. THE IN-FLIGHT SECURITY OFFICER

A major initiative of the new Protocol is the inclusion of the IFSO, the in-flight security officer, within the protection of the convention. The Protocol's Article 7 replaces the old Article 6, which iterates the powers of the aircraft commander.²⁷¹ Article 6 now includes paragraphs 2, 3, and 4, which extend to the aircraft commander the power to "request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person whom he is entitled to restrain."²⁷² The criterion of reasonableness continues to apply to such actions. However, if under Article 6(3) the IFSO is "deployed pursuant

²⁶⁵ See *ICAO Protocol*, *supra* note 255, at 3.

²⁶⁶ See, e.g., ICAO, *Proposal for Amendments to the Reference Text (Presented by Germany)*, at 2, DCTC Doc. No. 8 (2014) [hereinafter *Germany Proposals*].

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Tokyo Convention, *supra* note 148, 704 U.N.T.S. at 226–28.

²⁷¹ See *ICAO Protocol*, *supra* note 255, at 4.

²⁷² *Id.*

to a bilateral or multilateral agreement or arrangement between the relevant Contracting States,” the IFSO

may take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft or persons therein from an act of unlawful interference, and, if the agreement or arrangement so allows, from the commission of serious offences.²⁷³

Conversely, Article 6(3) provides that there is no obligation for a state party to establish an IFSO program or to agree for such arrangements to operate in that state.²⁷⁴ The final wording of this provision is likely a direct consequence of the significant support for the incorporation of the IFSO, and at the same time, the significant opposition to the inclusion of protection for this role.

Japan, in support of the inclusion of the IFSO in the new Protocol to amend the Tokyo Convention, maintained that:

The principal mission of the in-flight security officers (hereafter “IFSOs”) is to prevent or otherwise cope with serious offences such as terrorism including hijacking, which may jeopardize the safety of persons on board the aircraft. This is in fact the scope of mission for IFSOs in most States deploying them, pursuant to a bilateral or multilateral agreement or arrangement, including Japan, and this limited scope should be maintained.²⁷⁵

The Latin American Association of Aeronautical and Space Law (ALADA) argued that the presence of the IFSO was justified by the increase in cases of “undisciplined passengers” who posed a serious risk to security on flights.²⁷⁶ Its submission referenced that incidents can arise quickly and outside the purview of the aircraft commander, and even the crew at times.²⁷⁷ It argued that the speed of action of the IFSO in these circumstances can be critical in securing the safety of the aircraft.²⁷⁸ Additionally, ALADA referenced

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ ICAO, *Comments on the Draft Text of the Protocol to the Tokyo Convention of 1963 (Presented by Japan)*, at 1, DCTC Doc. No. 10 (2014) [hereinafter *Japan Comments*].

²⁷⁶ ICAO, *Comments on the Projected Protocol Text Submitted by the ICAO Legal Committee During Its 35th Meeting Period (Presented by the Latin American Association of Aeronautical and Space Law—ALADA)*, at 1, DCTC Doc. No. 11 (2014).

²⁷⁷ *Id.* at 2.

²⁷⁸ *Id.*

that such a figure is not new in the international regulations of civil aeronautics, as it was incorporated in Annex 17 of the Chicago Convention. Consequently, if it was adequate for the purpose of such Annex, it would be contradictory not to adopt it in this new Protocol because it is a matter directly related to security and proper prevention.²⁷⁹

The support and ultimate inclusion of the IFSO was not without levels of dissent among conference delegations. In a submission to the conference, Qatar argued in favor of leaving the IFSO issue to a bilateral agreement between states rather than specifically including recognition of the IFSO in the new Protocol.²⁸⁰

D. THE INTERRELATIONSHIP BETWEEN ARTICLES 6 AND 10 IN THE CONSOLIDATED TEXT

The new Article 6 wording in the consolidated text provides the aircraft commander with a range of powers if he has “reasonable grounds to believe that a person has committed, or is about to commit, . . . an offence.”²⁸¹ Under this provision, the aircraft commander can take reasonable measures, such as restraint.²⁸² In doing so, the commander may also authorize the assistance of crew members or even request and authorize, but not require, the IFSO to restrain a passenger.²⁸³ Where there is a bilateral or multilateral agreement that authorizes the deployment of the IFSO, he or she may also exercise powers similar to the commander and act to restrain individuals based on his or her reasonable belief.²⁸⁴ While a court may consider the legitimacy of the action taken,²⁸⁵ the new Article 10 now contains immunity from prosecution for the commander, crew, or IFSO with respect to their treatment of the restrained individual.²⁸⁶ It now reads as follows:

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, any in-flight security officer, the owner or operator of the

²⁷⁹ *Id.*

²⁸⁰ See ICAO, *Comments and Observations on the Draft Proposed Text of the Tokyo Protocol of 1963 (Presented by Qatar)*, at 1, DCTC Doc. No. 12 (2013).

²⁸¹ *Consolidated Text*, *supra* note 264, at 4.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See, e.g., *Eid v. Alaska Airlines*, 621 F.3d 858, 872 (9th Cir. 2010).

²⁸⁶ *Consolidated Text*, *supra* note 264, at 5.

aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.²⁸⁷

This text was provided to the conference by the Friends of the Chair working group toward the end of the conference and was likely the result of heavy lobbying and intense negotiation between states in favor of and those opposed to this innovation.²⁸⁸ The views of states and organizations in favor of this extra layer of protection are captured in Conference Document 15, which was presented by the United Arab Emirates, the IATA, the International Federation of Air Line Pilots' Associations (IFALPA), and the International Union of Aerospace Insurers (IUAI).²⁸⁹ They argued collectively that "protection from legal proceedings for the airline and its employees under Article 10 is critical if crews are to have the confidence to deal with any challenge to safety and security on board an aircraft."²⁹⁰ As a counterpoint, it is worth noting that the Convention also referenced the concerns of some states that once delivered up, contracting states "have regard for due process and fair treatment" of the offending individuals.²⁹¹

It is noteworthy that the Protocol does not extend immunity to passengers acting to restrain individuals. In the past, there have been incidents where collective action by passengers has resulted in the death of the offending individual.²⁹² In the

²⁸⁷ *Id.*

²⁸⁸ ICAO, *Report of the Friends of the Chair on In-Flight Security Officer Provisions*, at 1, DCTC Doc. No. 31 (2013).

²⁸⁹ ICAO, *Amendment to Article 10 of the Tokyo Convention 1963 (Presented by the United Arab Emirates (UAE), the International Air Transport Association (IATA), the International Federation of Air Line Pilots' Association (IFALPA) and the International Union of Aerospace Insurers (IUAI)*, at 1, DCTC Doc. No. 15 (2014).

²⁹⁰ *Id.* at 2.

²⁹¹ *Consolidated Text*, *supra* note 264, at 8.

²⁹² A 1998 incident involved Mikaelin Peterson, a Finnish national, travelling on a Malov Airlines flight between Bangkok and Budapest. Peterson had harassed passengers, punched a pilot, and tried to choke a flight attendant. When crew and passengers tied him to his seat, a doctor on board injected him with a tranquilizer. Sadly, Peterson died as a result of the mixture in his blood, which consisted of the tranquilizer along with alcohol or drugs. On landing in Istanbul, the crew was taken into custody along with the doctor and five passengers. See Blair J. Berkley, *Warsaw Convention Claims Arising From Airline Passenger Violence*, 5 UCLA J. INT'L L. & FOREIGN AFF. 499, 527-28 (2002). Another incident involved a flight from Las Vegas to Salt Lake City, where it appears that passengers in restraining a passenger who had attempted to storm the cockpit exercised excessive force killing the person involved. The prosecutory authorities declined to take action

United States, § 44903 of the Aviation and Transport Security Act provides immunity to passengers acting under a reasonable belief to thwart an act of criminal violence or piracy.²⁹³

Another significant addition to the Tokyo Convention comes in the form of Article 15 *bis*, which has been inserted to add clarity to the type of offenses against crew that fall within the scope of the Convention.²⁹⁴ This article encourages states “to take such measures as may be necessary to initiate appropriate criminal, administrative or other forms of legal proceedings against any person who commits . . . an offence” on board.²⁹⁵ Article 15 *bis*, specifically in (1)(a) and 1(b), references “a) physical assault or a threat to commit such assault against a crew member; or b) refusal to follow a lawful instruction given by or on behalf of the aircraft commander for the purpose of protecting the safety of the aircraft or of persons or property therein.”²⁹⁶ Article 18 *bis*, which was inserted into the Tokyo Convention by the Protocol’s Article 13, preserves the right of the airline “to seek recovery [of damages,] under national law, . . . from a person disembarked or delivered pursuant to Article 8 or 9 respectively.”²⁹⁷

E. THE EFFECTIVENESS OF THE NEW PROTOCOL

Several states at the Diplomatic Conference were critical of the softening of the impact of Article 15 *bis* for using the word “encouraged” in its text.²⁹⁸ Argentina, for example, argued that the text of Article 15 *bis* “should be modified so that it contains a mandatory provision.”²⁹⁹ This tends to suggest that, despite the significant extent of the problem, states are reluctant to submit themselves to mandatory law-making requirements. The authors acknowledge this view, which in itself suggests the unending debate about the need to mandate extradition, but at the same time feel that the provision serves to emphasize the need for

against those involved. See *Unruly Passenger Killed by Others on Flight, Report Says*, CHI. TRIB. (Sept. 17, 2000), http://articles.chicagotribune.com/2000-09-17/news/0009170277_1_passengers-burton-flight.

²⁹³ Aviation and Transportation Security Act, 49 U.S.C. § 44903(k) (2012).

²⁹⁴ See *Consolidated Text*, *supra* note 264, at 7.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 8.

²⁹⁸ See, e.g., ICAO, *Diplomatic Conference to Adopt the Proposed Draft Text of the Protocol to the Tokyo Convention of 1963 (Presented by Argentina)*, DCTC Doc. No. 25 (2014).

²⁹⁹ See *id.* at 5.

legal protection of air crew through the creation of specific offenses under each state's national laws.

A suggestion, alluded to earlier in this article by Piera, that one aspect of modernizing the Tokyo Convention was to include Circular 288 as part of the Convention, has to some extent been taken up by the Diplomatic Conference, which refers to Circular 288 in the Final Act of the Conference as a resolution.³⁰⁰ The resolution is entitled "Relating to Updating Circular 288—Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers."³⁰¹

Piera suggested that one way to modernize the Tokyo Convention could be to include Circular 288 into the terms of the Tokyo Convention so that the Circular 288 has more effect than being just "guiding material."³⁰² Noting the importance of states enacting a full range of offenses and that the Protocol does not attempt to do so, the Diplomatic Conference in this resolution urged the ICAO to include in Circular 288 "a more detailed list of offences . . . as well as to make consequential changes to ICAO Circular 288 arising from the adoption of the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*."³⁰³ The Resolution further invited "all Member States to include in their national laws and regulations . . . elements of the updated Circular."³⁰⁴ While some commentators may see this as a relatively soft option, states that take on the creation of a full range of offenses will facilitate the effectiveness of the other steps taken in the Protocol. In particular, the inclusion of the state of landing as a jurisdictional option, when coupled with a clearly defined comprehensive range of offenses, will lead to the development of stable law and give states an impetus to deal properly with offenders delivered into custody at the aircraft's place of landing.

Given the onerous duties already resting on the shoulders of the aircraft commander, the inclusion of the IFSO within the regime, although not as a compulsory element, is another advancement and achievement of the Protocol.

³⁰⁰ See ICAO, *Final Act of the International Conference on Air Law Diplomatic Conference to Consider Amending the Tokyo Convention of 1963*, DCTC Doc. No. 36 (2014) [hereinafter *Final Act*].

³⁰¹ See *id.*

³⁰² See Piera, *supra* note 15, at 241–42.

³⁰³ *Final Act*, *supra* note 300, at 7.

³⁰⁴ *Id.*

Hopefully, history will prove that the new Protocol represents a valuable contribution to dealing with problems that require all parties to work together to effect change. The contribution of the IATA, through its guidance documents and through the many submissions made to the Diplomatic Conference, shows that it undertook a valuable leadership role. At the same time, its constituent membership needs to take up the issue of alcohol consumption on board aircraft and needs to further argue for amendment of existing laws or for the IATA carriers simply to unilaterally agree to severely limit the availability of alcohol on board their aircraft. In the views of the authors, the IATA needs to persist in pushing for an industry-wide resolution to this problem. Although there is hope that individual states may act to prohibit or limit the availability of alcohol, it is realistically doubtful that the political will to do so exists. This is especially true where legislatures see alcohol licensing and taxes on consumption as a valuable revenue stream.

XIII. GENERAL CONCLUDING COMMENTS

In order to deal with systemic problems similar to those experienced in China (although not as severe), the United States introduced the FAA Modernization and Reform Act of 2012 under the Obama administration.³⁰⁵ Empowered by this Act, the Department of Transportation required carriers to implement a contingency plan for lengthy tarmac delays.³⁰⁶ A feature of the approach that was adopted is that passengers are to be deplaned within four hours, unless the delay is due to a safety-related or security-related reason.³⁰⁷ It also required passengers to be provided food and water within two hours, to be notified regarding the status of the delay, and to receive updates every thirty minutes.³⁰⁸ In an ideal world, this would provide a model for China to follow in devising its own laws, regulations, and policies. However, the fact that delays in China are wedded to the military's preemption of control and use of air space means that China really needs to undertake a fundamental reevaluation of how it handles and allocates air space between military and civilian uses. The authors of this article understand that China is consid-

³⁰⁵ FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (to be codified at 49 U.S.C. § 44701).

³⁰⁶ See 14 C.F.R. § 259.4(a) (2014).

³⁰⁷ See *id.* § 259.4(b).

³⁰⁸ See *id.*

ering introducing this kind of law, in part, to exert pressure on the military to forego some of its eighty percent occupancy of all airspace in order to assist civil aviation in its quest to reduce the lengthy delays that clog the system. The writers sympathize with the position of the government of the People's Republic of China in dealing with an intransigent military apparatus. Reforms to the aviation laws of China are first predicated upon dealing with the issue of allocation of air space. The price of doing business in China should not be chronic delays in aircraft arrivals and departures. China's civil society deserves better than to be subject to chronic, systemic, and lengthy delays. Equally, at an international level, it needs to be recognized both inside and outside China that what happens in China no longer has an effect only in China.

More generally, there is a need in China to deal with incidents where air carriers' staff and the airports' gate and counter staff are subject to assaults. The Yan Linkun incident raises issues that go beyond the ordinary due to his status as holder of a political position in China.

The authors acknowledge that a lack of education about the laws and rules applicable to the passenger is not purely a Chinese phenomenon. Criticism in the United States concerning the lack of knowledge of the applicable laws to carriage by air on the part of the flying public suggests more broadly that there is a need to educate the flying public. In China's case, the country is well-placed to educate the public through all forms of media. It is also well-placed to take decisive action to actually enforce the existing law.

Overall, the future for the Protocol looks positive. First, its long term success will likely be measured by the number of states that become parties to the Protocol. Second, the propensity of states to enact appropriate laws will be pivotal as will the willingness of states to take jurisdiction over incidents as the State of landing. To date, its future looks bright with twenty-six states signing the Protocol,³⁰⁹ eighty-six states signing the Final Act,³¹⁰ and many states (not including the United States) indicating support for the Protocol in their concluding remarks.³¹¹

³⁰⁹ See *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, ICAO, http://www.icao.int/secretariat/legal/List%20of%20Parties/Montreal_Prot_2014_EN.pdf (last visited Nov. 7, 2014) (listing signatories to the Protocol).

³¹⁰ *Final Act*, *supra* note 300.

³¹¹ See, e.g., *Japan Comments*, *supra* note 275.

