

Passenger Related Risks in Civil Aviation as an Object of International Law - Historical View

Working paper

1. Introduction

The 33rd session of the Assembly of the International Civil Aviation Organization (ICAO) was held in Montreal between September 25 and October 5, 2001. Much of the session and its most significant resolutions were directed to security issues, including passenger related risks. Resolution A33-1 urged “all Contracting States to intensify their efforts in order to achieve the full implementation and enforcement of the multilateral conventions on aviation security, as well as of the ICAO Standards and Recommended Practices and Procedures (SARPs) relating to aviation security”. The Council was directed to call for a high-level, ministerial conference on aviation security in Montreal. The Council and the Secretary General of ICAO was directed “to act urgently to address the new and emerging threats to civil aviation”. Such act included the review of whether the existing aviation security conventions, the ICAO aviation security program and Annex 17 to the Convention were adequate.

The Assembly decided to carry on its existing work by publishing a consolidated statement of continuing ICAO policies. It's not that ICAO had been passive with aviation security, but now it was to emphasize the risks and make sure that all member states understood the seriousness of the business. The results of the strong wording were soon visible. Amendment of the SARPs relating to aviation security was amended on 7 December 2001 and were applicable starting 1 July 2002. It introduced various definitions and new provisions in relation to security issues, such as those to do with passengers and their baggage.

The ICAO Assembly directed the ICAO Secretary General to continue to update and amend the Security Manual. Its purpose was to provide aid in implementing the specifications and procedures related to civil aviation security. As a result, the global air passenger was to have her small liquid containers put to see-through zip lock plastic bags – among several other security measures. The Security Manual includes a list of such measures - the access to the document is restricted.

The Member States responsibility remained to implement the ICAO measures and stay “continuously vigilant”.

The view of ICAO Assembly was that “acts of unlawful interference against civil aviation” had become “the main threat to its safe and orderly development”. To this end, there was a “clear need for the strengthening of security to be applied to all phases and processes associated with the international carriage of persons, [and] their cabin and checked baggage”. ICAO advocated security measures as effective means to prevent acts of unlawful interference.

The reasons for the tightening grip were apparent. ICAO Assembly witnessed “the abhorrent terrorist acts which occurred in the United States on 11 September 2001, resulting in the loss of numerous innocent lives, human suffering and great destruction”. The assembly also recognized that “such terrorist acts ... constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law”. A new type of terrorist threat was recognized, requiring new efforts and policies of cooperation on the part of States. While the Assembly had earlier addressed the issues on acts of unlawful interference and terrorism (in resolutions A22-5, A27-9 and A32-22), now also the United Nations General Assembly has taken resolution (55/158) on measures to eliminate international terrorism. Even the United Nations Security Council has taken resolutions (1368 and 1373) on condemning and combatting international terrorism.

The tightened security measures that we all accustomed to as airline passengers during the first decade of the millennium are a result of the initiatives taken at the 33rd session. For a legal historian, the context of the birth of the rules is clear. The amendments to air law are results of the reaction of the community of nations to the new threat of terrorism. Such reaction builds on the previous generations of air law.

From the resolutions and outcomes of the ICAO's 33rd assembly, one can find layers of international air law. Such layers represent a development of a certain era of international law. The purpose of this paper is to map out the different eras and find out the relevant context of each of them. By pointing out the layers of international law that have developed in different contexts, we similarly gain a historical perspective to the trends that continue to affect civil aviation today.

The idea is to form an understanding on what kind of contexts have been influencing the treatment of passenger related risks over time. Passenger related risks refer to those security risks that aircraft's passenger may cause to the safe flight or public safety. In the terminology of air law, most of the passenger related risks are treated under the category of security, dealing with the protection from criminal acts against civil aviation. Passenger related risks are just one aspect of air law, but have gradually gained importance as the perception of risk in flying has changed. The present paper examines that change and how passenger related risks have been treated in different eras.

The history of international aviation law is well tied with the history of aviation, history of international law and the history of international politics. The relationship of aviation with arts, film, popular imagination and other areas of human culture has been studied. However, there remains a place for studies in the history of aviation and law. Using the analytical framework of legal history, this paper presents the contexts of the legal cornerstones of managing passenger related risk. To this end, it is important to examine the background and reasoning of the norm formation procedures in different historic eras. The paper has been done as a part of a larger study in the legal history of (Finnish) air law. The study is being done under the *Speeding* project. The research project seeks to study the connection between the developing transportation technologies and modernism in law.

The second chapter of the present paper focuses on the first aviation treaty, by the 1919 Convention Relating to the Regulation of Aerial Navigation (Paris Convention). Then in chapter 3, attention is given to the 1944 Chicago Convention on International Civil Aviation (Chicago Convention). In chapter 4, the period that materialized the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention, 1963), and the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague Convention, 1970) is being examined. Chapter 5 turns to the birth of Annex 17 to the Chicago Convention. Analysis is provided in chapter 5.

2. Paris

The 1919 Convention Relating to the Regulation of Aerial Navigation was a treaty of "firsts" in aviation. It was the first legal instrument to enter into force in international aviation. It was the first legal instrument to determine some basic uniform technical standards as well as to provide the definition of aircraft. The 43-article Convention established Commission Internationale de la Navigation Aérienne (CINA) as an international agency – a first in its kind.

The significance of the Paris Convention comes mainly from its first article, recognizing "the complete and exclusive sovereignty over the air space above its territory". The general principles of the first chapter of the Paris Convention verbatim provided freedom of passage to the air space in the time of peace (Article 2).

However, such freedom was to be curtailed for military reasons or in the interest of public safety (Article 3). In practice, the Paris Convention established a rule, where an aircraft was not to cross a foreign border without an explicit prior consent. This opened the political and diplomatic negotiations for air routes between different capitals. International air services became a matter of international diplomacy. Air routes were soon set up through an official bilateral exchange of notes.

The Convention included a chapter on prohibited transport. First of all, a ban on transportation of explosives as well as “arms and munitions of war” was set up in Article 26. The signatory states were also granted a possibility to ban or regulate the carriage or use of “photographic apparatus” in aviation (Article 27). Thirdly, the member states were allowed to restrict the transport of other objects as a measure of public safety (Article 28). The measures were to be applied equally to national and foreign aircraft (Article 29).

The prohibitions in international aerial transportation of course reflected the contemporary fears of aviation. For the previous ten-fifteen years, flying had penetrated the western imagination. The positive imaginaries included those of the aviation’s unifying and pacifying force and how it served the new future. The negative ones became apparent in the Great War, where aviation served the purposes of death, devastation and nationalism. Thus, the particular articles of the Paris Convention were solutions to the controversies of the newly emerged air age. Allowing states’ further regulations reflected the fear of using aviation in military or revolutionary purposes. On the other hand, the need for a convention in civil aviation derives from the positive aspects attached to flying. In other words: if the parties of the Paris Convention had not seen aviation as positive and promotable phenomenon, it would have made no sense in putting up the effort for negotiating it.

Both the general principles of chapter I and the prohibited transport articles of chapter VI reflected the general spirit of the Convention. It was the balancing measure between the national sovereignty of the winners and the freedom of aviation. Whereas Paris Convention was needed to promote the future of aviation, restrictions to the freedom of flying were necessary from the viewpoint of national security. Although strongly reflecting the interests of the winners of the Great War, it has been counted among the few (legal) accomplishments of the League of Nations.

The ban on transportation of explosives and munitions of war can be seen as means of national security against revolts and military pressure by foreign forces. Aviation made borders fast and easy to cross. In the post-bellum turbulent Europe where new small countries changed the political balance, such ability caused fears. The ability to photograph defense structures was one of the most important uses for aviation in the beginning of the Great War. Thus it was feared that growing amount of international air routes would leave armies vulnerable to espionage.

The making of the treaty coincided with the new age of international law. The Great War brought the old power dealings of the Concert of Europe to its end. The exiting period had commenced in the Congress of Vienna (1814-15). The new era begun in the Versailles castle. There the diplomats from different countries came to create the new international legal order. The result was the Versailles Treaty of 1919, League of Nations and smaller treaties to serve the purpose of peace building and world order. The inter-war period was “the most vibrant and exciting era in the history of the discipline [of international law] up to that time (and perhaps since)”.

Like the Versailles Treaty, the Paris Convention was an instrument of winners' right. The French were concerned over safeguarding Paris from surprise attack from the air – thus absolute air sovereignty of Article 1. The British demanded the right of innocent passage for civil air transportation for their overseas territories – thus it was provided in Article 2. Thirdly the Paris Convention excluded Germany and the war time axis from the benefits of the treaty (Articles 41 – 42).

In this environment, the Paris Convention received its form. The treaty structure allows states to create their own approaches. The ban on arms and camera transportation didn't have much effect on the passenger risk management. There was a variance of the national rules governing passenger security. The first aviation convention did not create a uniform approach to managing passenger risks. The legal foundation was left open in this respect. Thus, the first generation of international aviation law didn't much affect the average air traveler's experience. In the 1920's and well into 1930's, air travel was an exception reserved for the wealthy but most of all for the brave. It was not the fear of security concerns but the fear of flying being technologically unreliable, that kept people from flying. In 1919, the passenger itself was not considered a source of risk. Rather, it was the new form of transportation that created new risks of surprise attacks and espionage.

The major significance of the Paris Convention is in its heritage of the predecessor of the present aviation treaties. Coinciding with the major changes in international law and aviation technology, the Convention created a foundation for the subsequent generation of air law.

3. Chicago

The similarity to the previous generation of air law is highly visible in 1944 Chicago Convention on International Civil Aviation Convention. Materially, it continued the Paris Convention's material restrictions on passenger cargo: "No munitions of war or implements of war" were allowed (Article 35) and each state was able to prohibit or regulate "the use of photographic apparatus" (Article 36). The Chicago Convention allowed additional member state regulations and prohibitions "for reasons of public order and safety" (Article 36). The convention set the minimum level for the security in the international aviation quite low.

The Chicago Convention was – and is – widely joined by the nations and has therefore gained strong authority as the legal basis for international civil aviation law. 96-article Convention was that it founded the International Civil Aviation Organization (ICAO). ICAO became a United Nations Specialized Agency, thus joining the UN structure. The aims and objectives of ICAO were determined in Article 44 of the Convention. It was to "develop the principles and techniques of international air navigation and to foster the planning and development of international air transport" so as to develop different aspects of aviation (Article 44).

The Chicago Convention created the "Chicago System" in global international civil aviation. The term relates to the air transport as an industry: a highly regulated, non-competitive and nationally protected area of economy. However, the Chicago Convention covered all the relevant aspects of civil aviation that were in the post-WWII visions.

The Chicago Convention established the current system of SARPs (Chapter VI). Each contracting state agreed to collaborate in securing a degree of uniformity in aviation regulations, standards, procedures and organization (Article 37). ICAO, in turn, was authorized to adopt SARPs that were necessary to this goal and were related to one of the twelve named issues on a list in Article 37, "and such other matters concerned with the safety, regularity and efficiency of air navigation as may from time to time appear appropriate". ICAO's ability to provide rules thru the SARPs mechanism has been called the Quasi-Legislative function. It

is not legislative function, for the member states are not obliged to follow the rules and recommendations are recommendations. Also, no effective sanctions for breaking the rule or failing to notify a difference were included in the Convention.

The wording of the Article 37 leaves room for development of civil aviation. ICAO was given a powerful role to systemize aviation that was still taking its form. While the system of SARPs covered mostly technical issues (such as air worthiness and competency of personnel in Article 41 and 42), in theory the door was open to a wide variety of other standards. It was up to ICAO to determine, if it appeared appropriate to adopt new rules. The member states participated in the rule making procedure according to the provisions of the Convention. They were obliged to comply with the rules (Article 37) or explain why they chose to derive from the rule (Article 38).

Aviation security became institutionalized within the system of ICAO. Already the preamble of the Convention made one realize the new security concerns: "the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security". In addition to the international law on security being merely copied from the Paris Convention, it was also non-binding and of a minimum significance. However, there was now a meaningful (even powerful) international organization that had the capacity to produce new rules on security. The nations had shared the security concerns.

With the Chicago Convention allied and neutral states were building up a new world order as the collapse of fascist regimes seemed inevitable. International civil aviation had gradually become more popular before the war, but had been devastated by the war. As the change of the international political climate was apparent, new international mechanisms were planned in many areas of life. Aviation was certainly one of the things to be controlled.

In addition to the political realities, the understanding of capabilities and the performance of aircraft was different in 1944 than in 1919. Although the jet age was still unrealistic, the long-range bombing missions and other war efforts of WWII had proven the admired capabilities of the 1930's everyday business. Serial production of airplanes had reached new heights, and plane types such as DC-3 were easily converted to civilian use. The potential of aviation was great in a world where much of infrastructure was in ruins. This meant that there was a strong incentive to create political arrangements to support the international air travel. The November 1944 initiative for a convention was British and a meeting in Chicago was called into being by US president Roosevelt.

The Chicago Convention was finalized with the war still raging, but it can be periodized together with the boom in international law-making that followed the world burn. Much of the earlier international law was codified in the following years and UN began to coordinate such process thru its processes and agencies. The international law making touched multiple areas of life "from monetary policy to civil aviation, from human rights to environmental protection, from atomic energy to economic development...". The attempt was to "weld the world together". Number of international organizations, different resolutions, protocols and other sophisticated mechanisms of international interaction grew substantially. International law – and international aviation law – became a complex issue.

In the post-WWII world, the system of international law and international relations became more complex. In aviation, the structure emerging around the use of SARPs meant that the law was able to adapt more quickly to new problems and issues. Such structure is tied to the formation of the UN as an arena shared between nations.

For a passenger, the security procedures still remained different in each state. For now, the passenger as an individual was still not seen as a major source of risk. However, soon the number of international passengers grew. When the jet age begun, the older prop planes became utilized in charter flights. Despite CINA's quasi-legislative powers, when problems with security escalated, there was still a need for traditional conventions between the states.

4. From Tokyo and Hague to Montreal

The 1960's and 70's saw an increase in passenger related risks. There were two major reactions to this risk. First of all, specialized conventions were being made in addition to Chicago Convention. Second of all, aviation security was brought within ICAO's system of SARPs with the introduction of Annex 17 to the Chicago Convention.

Three conventions of the 1960's and 1970's form the basis of body of law known as (international) criminal air law, aimed at protecting civil aviation from acts of unlawful interference. The Convention on Offences and Certain Other Acts Committed on Board Aircraft (the Tokyo Convention, 1963) provides rules on deciding appropriate national jurisdiction in case of criminal acts committed on board. The Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention, 1970) formed the rules to cope with hijacking situations. Finally, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention, 1971) was drawn up to deal with other unlawful acts against aviation safety.

First of the objectives of the 26 Articles of the Tokyo Convention was to determine the applicable penal law in offences that were committed above territories not belonging to a particular state. It secondly defines the rights and obligations of the aircraft commander in controlling offences committed on board. Thirdly, it defines the rights and obligations of the authorities of the place where the aircraft lands after the safety jeopardizing offence or act.

The matter of jurisdiction in penal air law had been under a debate since the early days of aviation. The solutions were sought from territorial, national, mixed, state of departure and state of landing theories. The Tokyo Convention guarantees that there is at least some jurisdiction that can address the air crimes – the law of the state of registration of the aircraft (Article 3). The choice of jurisdiction is non-exclusive, as the territorial or national theory may as well prevail (Article 3, 4). The reason for the need for a new convention was in the changing reality of passenger aviation. The legal cases with drunken, fighting passengers or unlawful narcotics possessions created case law that was not feasible to solve the problem. Even more worrying was the growing frequency of unlawful seizure (hijacking) of aircraft beginning at the late 1940's.

The Hague Convention is also known as the Sabotage Convention. It creates a legal foundation for dealing with international hijacking and sabotages. Most importantly, it contains the provisions on the pursuit and punishment of hijackers.

The need for the Hague Convention rose first of all from the vulnerability of the aircraft of the jet age. In case of a hijacking or its attempt, flight could cause a loss of control, weapons could cause fatal damage, collisions may result, fuel shortage or some other unwanted consequence may occur. The negative phenomenon of hijacking became unnecessary familiar in the Middle East and Caribbean regions, and continued to become more usual in the end of the 1960's. Criminalization of such activity was an effort to halt the development.

Tokyo and Hague Conventions concerned exclusively offences committed onboard aircraft. Thus, they concentrated essentially in controlling the passenger risk. International criminalizations through treaties were to guarantee that hijackings and violent onboard situations would be punished. As with other criminalization, this is believed to prevent crimes from happening.

While targeting specific problems in a regulation-like form, conventions were routinized responses of international law to the known security issues in aviation. Other conventions in the area of security include the Montreal Convention of 1971, the Protocol of the Tokyo Convention of 1988 and the Plastic Explosions Convention of 1991. They created even more elaborated system of international law. Equally importantly, this era saw the development of Annex 17 to the Chicago Convention. Annex 17 to Chicago Convention (Security – Safeguarding International Civil Aviation Against Acts of Unlawful Interference) became the second legal foundation of managing the passenger risks. It was adopted on 22 March 1974 and was applicable from 27 February 1975.

5. Analysis

The first era of international aviation law was marked by the 1919 Paris Convention. The hay day of high level diplomacy gave the trade its surviving legacy. International aviation became an issue that was issued among national states and their flag carriers. According to this legacy, the negotiations around ICAO remain a matter of international politics and diplomacy.

The 1944 Chicago Convention marks the beginning of the second era of international aviation law. Adapting to the trend in international law, international aviation was attached to a UN special agency. It became highly institutionalized matter and the Conventions reached a wide number of signatories.

The third era began in the 1960's and continued well into the 1970's. The Tokyo, Hague and Montreal Conventions created a new layer of international treaty law. The special treaties were responses to particular needs in technologically new era of aviation. In addition, the development of ICAO led to wider use of the SARPs as a means to control passenger related risks. Hierarchical structure of ICAO and its quasi-legislative potential enabled the fast implementation of security norms.

Even though the 1990's saw the economic aspects of the Chicago System shake, the basic structure of air law has remained. We have already seen how the September 11 attacks changed security aspect of aviation dramatically. The actions taken to accommodate aviation to the post-9/11 world are shaped by the historical legal foundations. There is now new substance in every existing layer. As in the pioneering years of aviation, it still is a matter of international diplomacy, as proven by the High Level Ministerial Conference that the Council was directed to call for in resolution A33-1, was held on 19 – 20 February 2002. It adopted several recommendations as a guidance to follow up action. As since the 1940's, international aviation is still being coordinated within the ICAO. In the center of the post-2001 security efforts was an aviation security program (AVSEC) that sought to implement international security standards while leaving room for flexibility. In line with ICAO's established practices, regional and sub-regional programs were encouraged,

and a call for a ICAO Aviation Security Plan of Action was made in addition to set up of different indicators, security audit programs and technical cooperation projects. Practical recommendations included locking the flight deck doors and maintaining the highest level of security on the ground. As in the 1960's and 70's, new treaties have been signed, as the 2010 Beijing Diplomatic Conference on Aviation Security approved a supplement to the 1970 Hague Convention. ICAO also continues to renew Annex 17 and the accompanied Aviation Security Manual, providing the most visible and direct means of changing the international rule. In addition to the international norms, states are continuously applying national regulation, some of which may derive from the international standards.

What has changed throughout the times is the rise of the passenger related risks to a central role in aviation law. The portrait of a passenger and his luggage as a risk to aviation has changed much over time. Before the 1960's, the conception of passenger risk in international conventions was rather abstract. As the jet age begun, the caricature of a risk passenger changed from rebel-smuggler or spy to a drunken passenger or a terrorist. In general, passengers as individuals are now considered major risks. Currently, the Aviation Security and Facilitation Policy (SFP) Section of the Aviation Security Branch of ICAO is responsible for the management of three different programs of aviation security.

While today the most significant security risk is that of "act of unlawful interference", a hundred years ago other types of risks were considered. The notion – and means of control – of the most significant risks have changed along the development of aviation technology and international law. Issues such as machine-readable travel documents, biometric identification and passenger name records continue to shape the Conventions as well as Annex 17 and other SARPs. The material content and nature of treaties in turn highly affect the reality of air transport systems.

Abeyratne has distinguished three eras in the history of the ICAO. The first phase, modernist era, commenced in the signing of the Chicago Convention, and concentrated on sovereign national states as the actors in the international arena. It was a widely accepted view in this era, that civil aviation can create peace and understanding between nations, but its abuse can be a threat to the society – as the preamble to Chicago Convention notes. The state was able to overrule the international community's considerations, if they were against the national interest of the state. The second, post-modern, phase began to recognize individuals as subjects of the international law. The 1960's and 70's raised the global citizen's interest to the level of or above of that of a state's. Abeyratne visions the post 9/11 aviation as neo-post modernist approach. Approach "admits of social elements and corporate interests being involved with States in an overall effort at securing world peace and security. The role of ICAO in this process is critical..."

As always, problems remain in international air law. Most significantly cases such as Lockerbie and 9/11 have occurred - regulation has not stopped risks from materializing. Secondly, conventions and protocols are not being signed and applied internationally. For future study of these and other problems, four concluding hypotheses are being presented.

First of all, international law requires high-level state participation. Although in exceptional circumstances (such as the fall of 2001) quick decisions can be taken, many of the Conventions can be left unsigned or unratified for years. Thus the first hypothesis is that the mechanisms of international law make norm production in air law highly rigid.

The most important action mechanism against the rigidity of international air law is the mechanism of SARPs utilized by ICAO. Their use, however, require supportive action such as monitoring programs,

partnership programs, implementation promotion and aviation security conferences. Thus the second hypothesis: flexible, regulation-like norms such as Annex 17 create more room for interpretation.

As UN special agency, ICAO has been active in its role as an international arena, a norm producing agency and an aviation promoter. However, many of the initiatives of ICAO have originated from the industry actors, such as the International Air Transport Association (IATA). Third hypothesis: more flexible organizations supersede ICAO's policy formation capability. In other words: the rules of international air law are born organically in the everyday practice of aviation.

Deriving slightly from Abeyratne's periodization, this present article has introduced four fundamental eras in international aviation law. The main outcomes of the three first eras each provide a layer to the current air security law. Thus the fourth hypothesis: path dependency strongly affects the norm production as well as format and content of air law. It makes changing the system more complicated.