

The Need for Modernization of the Tokyo Convention(1963) on the Issue of Unruly Passengers and the Inadequacy of Korean Domestic Legal Approaches*

기내 난동승객관련 도쿄협약의 개정필요성과
한국국내법적 접근의 한계

Bae, Jong-In(배종인)** · Lee, Jae-Woon(이재운)***

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** Alternate Representative of the ROK to the ICAO Council(ICAO 대한민국대표부 참사관)

*** Manager, Legal Affairs Department, Korean Air(대한항공 법무실 과장)

I . Introduction

In 2011, approximately 2.8 billion people flew on 38 million flights (30 million jets, 8 million turboprops), and the 2011 global accident rate (measured in hull losses per million flights of Western built jet aircraft) was 0.37, which is equivalent to one accident for every 2.7 million flights.¹⁾ Indeed, according to the IATA (International Air Transport Association), 2011 was the safest year in terms of the global accident rate.²⁾ Along with the progress in aviation safety, aviation security has been significantly improved since 9/11. Incidents of terrorist interference with aircraft operations causing a high number of casualties remain few and far between, and indeed have steadily decreased since 9/11.³⁾

Both safety and security have a common goal: to protect passengers, crew, cargo, and aircraft from harm. The main difference, however, is that safety focuses on preventing unintentional harm, while security focuses on intentional harm.⁴⁾ Although both aviation safety and aviation security have been improving, which has made air transportation more reliable, the international aviation community has witnessed a steady increase in the number of unruly passenger incidents.

IATA statistics show that there were over 4,000 unruly incidents in 2010.⁵⁾ This is equal to more than 0.7 incidents per 1000 flights in 2010, which is a shocking surge compared to 0.1 incidents per 1000 flights in 2007.⁶⁾ More importantly, it is presumed that there are many more unreported cases.⁷⁾ Even when some commentators

1) International Air Transport Association, Press Release, "Global Accident Rate Reaches New Low Regional Challenges Remain" (Mar. 6, 2012), available at http://www.iata.org/pressroom/pr/Pages/2012_03_06_01.aspx

2) Tony Tyler, CEO of IATA, Remark at ICAO(International Civil Aviation Organization) Air Transport Symposium, Montreal, 18 April 2012.

3) Alejandro Piera & Michael Gill, "Unruly and disruptive passengers: do we need to revisit the international legal regime?", 35 AASL, 2010, pp 356-357 (Piera & Gill).

4) Paul Stephen Dempsey, *Air Law*, McGill University Institute of Air & Space Law, 2008, pp 236-237 (Dempsey).

5) Michael Gill, "Tokyo Convention 1963: Adapting to new challenges for security and safety on board aircraft", ICAO Legal Seminar Seoul 2012.4.24.

6) Ibid

have expressed serious concerns about the reliability of data used to record and analyse these incidents, due to the absence of a ‘commonly accepted methodology’, the escalating trend seems to be irreversible.⁸⁾

Arguably, these unruly passenger incidents ‘continue to be a concern, and a lasting solution needs to be found by addressing the root cause of the problem.’⁹⁾ It is obvious that ‘a minor infraction which may be inconsequential on the ground can produce disastrous effects in the air. For this reason, offences on board aircraft merit special attention.’¹⁰⁾

This article discusses 1) how the current legal regime deals with the unruly passenger issue, 2) how existing shortcomings make loopholes in the current regime, 3) how Korean legal approaches deal with the unruly passenger issues, and 4) how the ICAO is preparing to modernize the Tokyo Convention

II. The Tokyo Convention (1963) And Its Shortcomings

1. Background

Under international law, while international conventions relating to aviation security have proven to be an effective tool in combatting terrorism including hijacking, sabotage and similar forms of unlawful interference against civil aircraft, these conventions are not specifically designed to deal with other, less serious types of offences committed by unruly passengers.¹¹⁾ A significant number of ICAO Member

7) Ibid

8) Alejandro Piera, “ICAO’s Latest Efforts to Tackle Legal Issues Arising from Unruly / Disruptive Passengers: the Modernization of the Tokyo Convention 1963”. *Air & Space Law* 37, no. 3 (2012), p. 213.

9) ICAO, AVSECP/20 Rep., Conclusion 5.3.1. (d).

10) See ICAO, C/WP/11066.

States are party to the following applicable international conventions:

- a) The Convention on Offences and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September 1963 (the “Tokyo Convention 1963”);¹²⁾
- b) the Convention for the Suppression of Unlawful Seizure of Aircraft signed at The Hague on 16 December 1970 (the “Hague Convention 1970”);¹³⁾
- c) the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation signed at Montreal on 23 September 1971 (the “Montreal Convention 1971”)¹⁴⁾
- d) the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation signed at Montreal on 24 February 1988 (the “Montreal Protocol 1988”);¹⁵⁾
- e) the Convention on the Marking of Plastic Explosive for the purpose of Detection signed at Montreal on 1 March 1991 (the “Montreal Convention 1991”)¹⁶⁾

None of the international conventions expressly deal with unruly passengers. Although the Tokyo Convention, too, was not expressly designed to deal with unruly passengers, all unruly conduct on a flight is covered by the Tokyo Convention. Indeed,

11) ICAO, *Guidance Material on Legal Aspects of Unruly/Disruptive Passengers*, ICAO Cir. 288, LE/1 (June 2002) [ICAO Circular 288].

12) See *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, (14 September 1963), ICAO Doc. 8364 [Tokyo Convention]. As of 4 May 2012, 185 States were party to this convention. See ICAO website: online

13) See *Convention for the Suppression of Unlawful Seizure of Aircraft*, (16 December 1970) ICAO Doc. 8920 [Hague Convention]. As of 4 May 2012, 185 States were party to this convention. See ICAO website: online

14) See *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, (23 September 1971), ICAO Doc. 8966 [Montreal Convention]. As of 4 May 2012, 188 States were party to this convention. See ICAO website: online

15) See *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Done at Montreal on 23 September 1971, (24 February 1988), ICAO Doc. 9518 [Montreal Protocol]. As of 04 December 2009, 169 States were party to this convention. See ICAO website: online

16) See *Convention for the Marking of Plastic Explosives for the Purpose of Detection* (1 March 1991) ICAO Doc. 9571 [Montreal Convention]. As of 4 May 2012, 147 States were party to this convention. See ICAO website: online

the Tokyo Convention stipulates that it applies to offences against penal law and acts which may jeopardize the safety of the aircraft.¹⁷⁾ Hence, it is safe to say that the Tokyo Convention is applicable to unruly passenger issues.

There is no doubt that the Tokyo Convention has been a successful convention. As of writing, 185 member states have ratified the convention. In fact, few international conventions have more parties than the Tokyo Convention. Nevertheless, the Tokyo Convention has its shortcomings, as we discuss below.

2. Definition

Although the Tokyo Convention applies to offences against penal law and acts which jeopardize or may jeopardize the safety of the aircraft¹⁸⁾, it does not provide for a definition of what constitutes the offences against penal law and of what acts jeopardize or may jeopardize the safety of the aircraft. Courts must interpret the definitions in the Tokyo Convention unless the country has adopted relevant legislation. Therefore, conduct that may be considered to be a criminal offence in the country of embarkation may not be a criminal offence in the country where the aircraft lands.¹⁹⁾ Having different definitions may lead to ineffective action on the part of air carriers.

The aircraft commander is the one who determines whether a person has committed, or is about to commit, an offence on board the aircraft²⁰⁾. This fact could make the

17) Article 1

1. This Convention shall apply in respect of:

(a) offences against penal law;
(b) 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.

18) Ibid

19) William P. Schwab, "Air Rage: Screaming For International Uniformity"(2001) 14 Transnat'l Law. 401 at 410.

20) Article 6

situation more complicated. In most cases, aircraft commanders are not legal experts who are familiar with penal law.²¹⁾

Recognizing the shortcoming in question and the jurisdictional gap which will be discussed next, ICAO published Circular 288, “Guidance Material on Legal Aspects of Unruly/Disruptive Passengers” in June 2002. ICAO Circular 288 provides that a uniform list of offences is considered desirable for two reasons: firstly, in order to provide a common denominator for offences as a basis for national prosecution; and, secondly, in order to offer uniform criteria for states to extend their respective jurisdiction.²²⁾

Although ICAO Circular 288 provides a list of offences in the “Model Legislation on Certain Offences Committed on Board Civil Aircraft”²³⁾, the Circular is not an

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

- (a) to protect the safety of the aircraft, or of persons or property therein; or
- (b) to maintain good order and discipline on board; or
- (c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this Chapter.

21) See Jiefang Hwang, *Aviation safety through the rule of law: ICAO's mechanism and practices*, 2009 Kluwer Law International, P. 117.

22) See ICAO Circular 288, *Supra* 13 at 3.

23) *Ibid*

Section 1: Assault and Other Acts of Interference against a Crew Member on Board a Civil Aircraft
Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

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

Section 2: Assault and Other Acts Endangering Safety or Jeopardizing Good Order and Discipline on Board a Civil Aircraft

- (1) Any person who commits on board a civil aircraft an act of physical violence against a person or of sexual assault or child molestation thereby commits an offence.

international legal instrument so it is not sufficient to effectively deal with issues involving unruly passengers. Even the Circular recognizes its limitations as follows:

“...the advisability of an appropriate international legal instrument (e.g. a protocol to the Tokyo Convention of 1963) specifically for these purposes as an effective mechanism to deal with the problem relating to unruly passengers should be considered.”

3. Jurisdiction

In principle, the state of registry of the aircraft is competent to exercise jurisdiction over criminal acts that take place onboard.²⁴⁾ Exceptionally, a state can exercise jurisdiction if a) the misdeed had an effect on its territory, b) it was committed by or against a national or permanent resident, c) the offence threatens the security of the state, d) the offence involves a breach of any rules relating to the flight in force in the state, or e) the exercise of jurisdiction is necessary according to a multilateral

(2) Any person who commits on board a civil aircraft any of the following acts thereby commits an offence if such act is likely to endanger the safety of the aircraft or of any person on board or if such act jeopardizes the good order and discipline on board the aircraft:

- (a) assault, intimidation or threat, whether physical or verbal, against another person;
- (b) intentionally causing damage to, or destruction of, property;
- (c) consuming alcoholic beverages or drugs resulting in intoxication.

Section 3:. Other Offences Committed on Board a Civil Aircraft

Any person who commits on board a civil aircraft any of the following acts thereby commits an offence:

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

24) Article 3

- 1. The State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.
- 2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.
- 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

international agreement²⁵⁾.

However, the state of landing does not have jurisdiction. Thus, although the identity of unruly passengers and the relevant evidence can usually be established, there are many cases in which unruly passengers have to be released without being submitted to judicial proceedings due to the lack of jurisdiction of the state where the aircraft lands.²⁶⁾

Mr. Alejandro Piera, the Rapporteur of the ICAO Special Sub Committee of the Legal Committee for the Modernization of the Tokyo Convention, offered a hypothetical example which better explains the Tokyo Convention's jurisdictional gap:²⁷⁾

Thai Airways (TG) flight number 721 takes off from Bangkok International Airport (BKK) bound to Osaka Kansai Airport (KIX). During the flight, a Mongolian female passenger twice smokes a Cuban cigar in the business class lavatory. When a TG flight attendant demands that she stop smoking, the passenger verbally and physically assaults her. As a result of the incident, the flight attendant suffers severe physical injuries. Upon arrival at KIX, TG's Captain demands that KIX police detain the passenger. The latter is delivered to the police. After an assessment of the facts of the case, KIX police conclude that there is no jurisdiction to prosecute offences which were committed: (i) on board an aircraft registered in a state other than Japan

25) Article 4

A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except 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;
- (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

26) ICAO Circular 288, Supra 13 at P.1.

27) Piera, supra note 10 at 214-215.

(Thailand); (ii) outside Japanese's territory (somewhere over the high seas); (iii) by an offender who was not Japanese (Mongolian). Reasoning that there were insufficient elements connecting the case to Japan, and on the basis that the Japanese legal system does not extend its jurisdiction to cover these types of acts, KIX police free the Mongolian passenger without imposing any penalty. Despite having seriously jeopardized TG 721's safety, the Mongolian passenger walks away with absolute impunity.²⁸⁾

Clearly, this is a significant loophole in the Tokyo Convention. The impact of the Tokyo Convention is limited by not recognizing that civil aviation safety demands universal jurisdiction over criminal acts.²⁹⁾

4. Enforcement

The other major shortcoming is that the Tokyo Convention does not oblige states to penalize, prosecute or extradite for unruly behavior. The Convention only recognizes the competence of the state of registry to exercise criminal jurisdiction but does not impose the duty to actually use that competence in any specific case.³⁰⁾

In fact, the state of registry is only obliged to "take measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State."³¹⁾ Moreover, since Article 3 only speaks about "offences," it is even questionable whether there is any legal basis for the state of registry to exercise jurisdiction over all the acts that Article 1 of the Tokyo Convention stipulates, i.e. not only offences against penal law but also acts that are not criminal offences but which may nonetheless jeopardize the safety of the aircraft or the good

28) Ibid

29) Michael Milde, *International Air Law and ICAO*, 2008 at 220.

30) Ibid, at 214.

31) Tokyo Art 3 (2).

order and discipline on board.³²⁾

This wording grants enough flexibility that, in practice, the exercise of jurisdiction even for the state of registration of the aircraft is reduced to a mere ‘best effort’ obligation.³³⁾

III. Korean Legal Approaches To Dealing With Unruly Passengers

1. Background

Korea has continued to experience problems with unruly passengers. The number of incidents involving unruly passengers officially reported by Korean national carriers has hovered around 30 incidents annually (31 in 2006, 35 in 2007, 31 in 2008, 29 in 2009 and 29 in 2010).³⁴⁾ The incidence of less serious unruly/disruptive behaviour is presumed to be more frequent, since the statistics above only counted those cases where the offenders were physically handed over to law enforcement. Considering the large number of flights departing from Korea (340,640 in 2006, 386,183 in 2007, 388,418 in 2008, 379,476 in 2009, and 403,296 in 2010³⁵⁾, the frequency of incidents is quite low - approximately one per 10,000 flights. Nevertheless, it is worth noting that any disturbance on the plane could easily frighten other passengers and also create a safety risk for the entire flight.

The Tokyo Convention stipulates that “The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.” In fact, along with

32) See Christian Giesecke, “Unruly Passengers: The Existing Legal System and Proposed Improvements” 53 *Annals of Air & Space Law* (2001) [hereinafter Giesecke].

33) Piera, *supra* note 10 at 217.

34) Yonhap News (in Korean), *Disruption in Aircraft Persists* (8 March 2010) and Dong A newspaper (in Korean), *Looking into frequent disruptions in aircraft* (3 March 2012).

35) <http://www.airportal.co.kr/knowledge/statistics>, 14 April 2012

ratifying the Tokyo Convention in 1971, Korea enacted the Aviation Navigation Safety Act in 1974. The Aviation Navigation Safety Act expressly states in article 3³⁶⁾ that the act applies to all of the offences the Tokyo Convention defines in article 1. However, there was no legal penalty prescribed for unruly passengers. All the punishments are related to graver offences such as hijacking.³⁷⁾

In January 2002, the Aviation Navigation Safety Act was substantially amended. This amendment was essentially intended to specify unruly conduct prohibited on board flights and establish punishments for such conduct. Soon after the amendment was approved, the Aviation Safety and Security Act that superseded the Aviation Navigation Safety Act was enacted and it became law in August 2002.

2. Korean Aviation Safety And Security Act

The Aviation Safety and Security Act partially reflected the ICAO's model legislation, Circular 288, which was published in June 2002. Indeed, the 33rd Session of the ICAO Assembly adopted Resolution A33-4 (Adoption of national legislation on certain offences committed on board civil aircraft (unruly/disruptive passengers)), setting forth model legislation. The Resolution urges all contracting states to enact as soon as possible national law and regulations to deal effectively with the problem of unruly or disruptive passengers, incorporating so far as practical the model legislation set out in the Appendix to the Resolution.³⁸⁾

Over the past ten years, the Aviation Safety and Security Act has been amended fourteen times and those amendments have mainly been about increasing and clarifying penalties. With the same purpose, Korean courts have been actively applying the Aviation Safety and Security Act. For instance, one court meted out a fine of approximately 5,000,000 KRW in a case in 2006,³⁹⁾ and another even sentenced one

36) Aviation Navigation Safety Act Article 3.

37) Aviation Navigation Safety Act Article 8.

38) ICAO Circular 288, supra note 13 at 2.

39) Travel Times (in Korean), Heavier Sentence for Disruption in Aircraft (19 April 2006).

offender to 6 months in prison in 2008⁴⁰⁾ (later appealed and reduced to a fine of 10,000,000 KRW) in another case widely covered by the media.⁴¹⁾

The current Aviation Safety and Security Act consists of 8 chapters⁴²⁾ and 51 articles. Chapter 1 is about general provisions and the most interesting article in this chapter is Article 3. Article 3 (Compliance with International Agreements) states that “In order to ensure the safety and security of civil aviation, the following international agreements shall be complied with, except as provided in this Act.” The following international agreements are the Tokyo Convention of 1963, the Hague Convention of 1970, the Montreal Convention of 1971, the Montreal Protocol of 1988 and the Montreal Convention of 1991. Also, Article 3 expressly states that if there are any international agreements on aviation safety and security other than these five international agreements, such agreements shall be complied with.⁴³⁾

Chapter 2 deals with functional bodies handling aviation safety and security. In particular, Article 7 (Aviation Safety Council) deals with the Aviation Safety Council. The Aviation Safety Council is a high level government council. Members of the Aviation Safety Council are senior executives of various government bodies including the Ministry of Land, Transport and Maritime Affairs, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry of National Defense, and the Ministry of Culture, Sports and Tourism, along with aviation safety and security experts as commissioned by the Minister of Land, Transport and Maritime Affairs.

Chapter 3 is about the security of airports and aircraft. It describes in great detail

40) Court of Busan District Judgment, “2008GoDan1656” (22 May 2008).

41) MBN News (in Korean), CEO Park Fined 10 million won for Disruption in Aircraft (4 December 2008).

42) CHAPTER I GENERAL PROVISIONS
CHAPTER II AVIATION SAFETY COUNCIL ET AL.
CHAPTER III SECURITY OF AIRPORTS, AIRCRAFT, ETC.
CHAPTER IV SAFETY AND SECURITY IN AIRCRAFT
CHAPTER V AVIATION SAFETY AND SECURITY EQUIPMENT ETC.
CHAPTER VI RESPONSE TO THREAT TO AVIATION SAFETY
CHAPTER VII SUPPLEMENTARY PROVISIONS
CHAPTER VIII PENAL PROVISIONS

43) Aviation Safety and Security Act Article 3.

the duties of airports and air carriers. For example, the airport operator shall perform security screening on persons boarding an aircraft as well as carry on baggage and checked baggage. The security screenings of cargo, on the other hand, must be performed by the air carrier.⁴⁴⁾

Chapter 4 contains key provisions concerning unruly passengers. Article 23 (Obligation of Passengers to Cooperate in Maintaining Safety)⁴⁵⁾ stipulates (excerpted):

(1) The passengers in aircraft shall be prohibited from acts falling under any of the following subparagraphs to ensure the safe flight and travel of both the aircraft and themselves:

1. An act of disruption such as abusive language and loud singing;

2. An act of smoking (excluding the act of smoking in any designated smoking area);

3. An act of doing harm to other persons after drinking alcohol or abusing drugs;

4. An act of causing others to feel sexual humiliation;

5. An act of using electronic devices in violation of Articles 61 and 62 of the Aviation Act; and

6. An act of attempting to enter the cockpit without the captain's approval.

(2) The passengers shall be prohibited from employing violence and making intimidation, perpetrating any deceptive act, or operating any door, emergency exit and devices, which hinder the safety of aircraft or the flight.

(3) The passengers shall be prohibited from occupying an aircraft and staging a sit-in in such aircraft while refusing to get off the aircraft after the aircraft lands.

(4) The passengers in aircraft shall follow lawful instructions given by the captain and crew who prohibit any acts hindering the safety of aircraft or the flight

...

44) Aviation Safety and Security Act Article 15.

45) Unofficial translation aided by the Korea Legislation Research Institute's online database of the English translation of the Statutes of the Republic of Korea (<http://elaw.klri.re.kr/>).

One significant development in this article had to do with the spatial element of the offence. Originally it referred to acts “committed in flight”, meaning with all doors closed. There were, however, several incidents, notably in 2007, where disruptions began after embarkation but before the closing of all doors. As the aircraft was not strictly “in flight,” law enforcement was of the view that the general laws, as opposed to the stricter Aviation Safety and Security Act, should be applied.⁴⁶⁾ For more effective enforcement, the National Assembly amended the act by replacing the words “in flight” with “in the aircraft” in 2008. Interestingly, this is different from the Tokyo Convention, which concerns acts committed “from the moment that power is applied for the purpose of takeoff until the moment when the landing run ends”. It is also different from the Hague Convention, which takes effect “when all its external doors are closed”

Chapter 5 basically requires storing aviation safety and security equipment and providing compulsory training to the relevant personnel. Chapter 6 deals with contingency plans in case of threat to the flight’s safety. It also contains operational guidelines and a communication network. Chapter 7 contains supplementary provisions.

The final chapter, Chapter 8, is about legal punishments. Article 50 prescribes for those passengers who violate Article 23 a fine of up to 10,000 USD. Articles 46 and 47 grant the penalty of imprisonment of 3 to 5 years in serious cases.⁴⁷⁾ These punishments are much heavier compared with the same offences on the ground. Chapter 8 has been amended many times, and the penalties have gradually become more severe

Although the Korean Aviation Safety and Security Act is a comprehensive act which has been constantly updated, there is no provision with respect to jurisdiction. When it comes to jurisdiction, only the Korean Criminal Code is applicable.

46) Joongang Daily (in Korean), Conflicting Opinions between Air Carrier and Police over Penalty for Unruly Passenger (13 February 2006).

47) Up to 5 years of imprisonment for those who breached Art. 23 Paragraph 2 (employing violence or intimidation), and up to 3 years for those who violated Art. 23 Paragraph 3 (staging a sit in, etc).

3. Korean Criminal Code

The Korean Criminal Code establishes its jurisdiction based on connection to territoriality, nationality and registration. Article 8 of the Korean Criminal Code states that “the general provisions of the Act shall also apply to such crimes as are provided by other Acts and subordinate statutes unless other Acts provide otherwise.” As there is no provision regarding jurisdiction in the Korean Aviation Safety and Security Act, the jurisdiction principles that the Korean Criminal Code states apply to offences are provided for in the Korean Aviation Safety and Security Act.

The Korean Criminal Code deals with jurisdiction under Article 3⁴⁸⁾, Article 4⁴⁹⁾, Article 5⁵⁰⁾, and Article 6⁵¹⁾. Applying the Korean jurisdiction principles to the Korean Aviation Safety and Security Act, Korean jurisdiction applies where: 1) the offender is a Korean citizen; 2) the incident happened on a Korean aircraft (based on registry); and 3) the victim is a Korean citizen.

However, when an incident happens when the state of registry of the aircraft is

48) Article 3 (Crimes by Koreans outside Korea)

This Act shall apply to all Korean nationals who commit crimes outside the territory of the Republic of Korea.

49) Article 4 (Crimes by Aliens on Board Korean Vessel, etc. outside Korea)

This Act shall apply to aliens who commit crimes on board a Korean vessel or Korean aircraft outside the territory of the Republic of Korea.

50) Article 5 (Crimes by Aliens outside Korea)

This Act shall apply to aliens who commit any of the following crimes outside the territory of the Republic of Korea:

1. Crimes concerning insurrection;
2. Crimes concerning foreign aggression;
3. Crimes concerning the national flag;
4. Crimes concerning currency;
5. Crimes concerning securities, postage and revenue stamps;
6. Crimes specified in Articles 225 through 230 among crimes concerning document; and
7. Crimes specified in Article 238 among crimes concerning seals.

51) Article 6 (Foreign Crimes against Republic of Korea and Korean National outside of Korea)

This Act shall apply to aliens who commit crimes, other than those specified in the preceding Article, against the Republic of Korea or her nationals outside the territory of the Republic of Korea: Provided, That this shall not apply in case where such acts under Act in effect at the time of the act do not constitute a crime, or the prosecution thereof or the execution of the punishment therefor is remitted.

not Korea and neither offender nor victim is a Korean national, it is not subject to Korean jurisdiction. This is essentially the same as the jurisdictional principles of the Tokyo Convention. Therefore, the domestic legal regime cannot close the loophole discussed above.⁵²⁾

4. Korean Supreme Court Decision (1984)

Since neither the Tokyo Convention nor Korean domestic legislation can solve the jurisdictional gap which results in the loophole, it is worth considering other possible ways to close the gap, perhaps by another convention. The Supreme Court decision of 1984 that we will examine partially dealt with this possibility.

On May 5th, 1983, six Chinese nationals hijacked a commercial jet of the Civil Aviation Administration of China flying from Shenyang to Shanghai.⁵³⁾ The six Chinese hijackers forced the pilot to fly to Korea. The plane was carrying 105 passengers. Two crewmen were shot while the plane was in the air. As soon as the plane approached Korean air space, the Korean air force communicated with the captain. The plane landed at a Chuncheon US Army base. Three days after the incident, the Chinese government sent a delegation of thirty three representatives to Seoul to negotiate the return of the plane. The passengers, crew, and plane were returned to China; the hijackers served jail time in Korea before being deported to Taiwan.

The Supreme Court had to answer the question of whether Korea could exercise jurisdiction in the hijacking case. The Court noted that 1) it was committed by foreigners, 2) it took place in a foreign registered aircraft outside Korea, and 3) the victims were non Koreans. The Korean Supreme Court reviewed the Tokyo Convention of 1963 and the Hague Convention of 1970. Finally, the court ruled that

52) See page 6 and 7.

53) The CAAC was split into Air China and China Eastern in 1987. See http://en.wikipedia.org/wiki/Civil_Aviation_Administration_of_China

the Korean Aviation Navigation Safety Act, which was an act that preceded the Aviation Safety and Security Act, could be applied to this particular case because Korea was the state of landing. In fact, according to Article 4 of the Hague Convention of 1970⁵⁴), the Convention for the Suppression of Unlawful Seizure of Aircraft, a state of landing can exercise jurisdiction. However, the only offences stipulated in the Hague Convention are hijacking or attempted hijacking.

5. Observation

Given this precedent, it could be argued that the Aviation Safety and Security Act is applicable to cases lacking any connection to territoriality or nationality. It is possible that the courts may take an active posture to jurisdiction when the offence in question is quite serious. However, most of the unruly behavior covered in Article 23 of the Aviation Safety and Security Act does not have such gravity. More importantly, without any connection to territoriality, nationality or registration, the criminal codes will not be understood to authorize the local authorities to exercise jurisdiction in extraterritorial cases.

In the absence of a treaty, there seems to be reluctance, if not resistance, on the part of both the Executive Branch and the National Assembly to legislate in a way that unilaterally - without international agreement - extends jurisdiction to 'offences by aliens outside Korea'. Such reluctance stems from the fear that unilateral extension of jurisdiction would potentially infringe upon other states' sovereign rights. Furthermore, any attempt to amend the Aviation Safety and Security Act would cause

54) Hague Convention (1970) Article 4.

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:
 - (a) when the offence is committed on board an aircraft registered in that State;
 - (b) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
 - (c) when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

doctrinal debate as to whether such fundamental issues of criminal jurisdiction can be addressed in the specific act rather than the general criminal code. Also, in practical terms, any change to the criminal code requires complicated preparations and multiple stages.

In light of the above, an international instrument would offer a solid basis for extended jurisdiction to the state of landing. Such an instrument will dispel the notion that the said extension of jurisdiction would be considered an infringement of other states' sovereignty.

IV. Conclusion

The number of incidents involving unruly passengers continues to grow, and the incidents in question fall within the scope of the Tokyo Convention. Although the Tokyo Convention is a successful convention, it has shortcomings, especially the jurisdictional gap. The shortcomings cannot be solved by domestic legal approaches. In light of this, the most desirable action would be for the international community, represented by the ICAO, to produce an international instrument offering a solid basis for extended jurisdiction to the state of landing.

It is reassuring that the ICAO is taking this issue seriously and taking some of the necessary steps. During the 34th Session of the ICAO Legal Committee, which took place from 9-17 September 2009, the International Air Transport Association (IATA) presented a proposal to form a Secretariat Study Group (SSG) in order to undertake a study on unruly and disruptive behavior on board aircraft. The Legal Committee recommended to the Council that the ICAO should undertake further study on the subject matter. On 30 October 2009, the Council approved the formation of the SSG.

Following meetings in Montreal from 2-3 May 2011 and in Paris from 3-4 October 2011, the SSG recommended that a Special Sub-Committee of the ICAO

Legal Committee (LCSC) be established to examine the feasibility of introducing amendments to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963* with particular reference to the issue of unruly passengers. Most recently, the Special Sub Committee of the Legal Committee meeting was held in Montreal at ICAO Headquarters from 22 to 25 May 2012.

In order to find tangible and uniform solutions to the problems which have emerged in the application of the Tokyo Convention, the modernization of the Tokyo Convention is necessary.

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Abstract

The Need for Modernization of the Tokyo Convention (1963) on the Issue of Unruly Passengers and the Inadequacy of Korean Domestic Legal Approaches

Bae, Jong-In · Lee, Jae-Woon

Although aviation safety and security have been improving, which has made air transportation more reliable, the international aviation community has witnessed a steady increase in the number of unruly passenger incidents. Under international law, the Tokyo Convention (*The Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963*) is applicable to unruly passenger issues. While the Tokyo Convention has been a successful convention which 185 member states have ratified, it has its shortcomings. Three major shortcomings are related to definition, jurisdiction, and enforcement. Firstly, the Tokyo Convention does not provide for a definition of unruly passengers, thereby resulting in a situation where conduct that may be considered to be a criminal offence in the country of embarkation may not be a criminal offence in the country where the aircraft lands. Having different definitions may lead to ineffective action on the part of air carriers. Secondly, the fact that the state of landing does not bear jurisdiction produces circumstances in which it is impossible to punish an unruly passenger who clearly committed an offence on board. Thirdly, the Tokyo Convention only recognizes the competence of the state of registry to exercise criminal jurisdiction but does not impose the duty to actually use that competence in any specific case.

Along with ratifying the Tokyo Convention, Korea enacted the Aviation Navigation Safety Act in 1974 as a domestic legal approach to dealing with the problem of unruly passengers. Partially reflecting the ICAO's model legislation, Circular 288, the Aviation Safety and Security Act was enacted in 2002. Although the Korean

Aviation Safety and Security Act is a comprehensive act which has been constantly updated, there is no provision with respect to jurisdiction and only the Korean criminal code is applicable to jurisdiction. The Korean criminal code establishes its jurisdiction in connection with territoriality, nationality and registration, which is essentially the same as the jurisdictional principles of the Tokyo Convention. Thus, the domestic legal regime cannot close the jurisdictional gap either. Similarly, Korean case law would not take an active posture to jurisdiction unless the offence in question is a serious one, such as hijacking.

A Special Sub Committee of the ICAO Legal Committee (LCSC) was established to examine the feasibility of introducing amendments to the *Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963* with particular reference to the issue of unruly passengers. The result of the ICAO's findings should lead to the modernization of the Tokyo Convention, thereby reducing the number of incidents caused by unruly passengers and enabling all parties concerned to respond to unruly passengers more effectively.

Key Words : Tokyo Convention (1963), unruly/disruptive passengers, Aviation Safety and Security Act, Jurisdiction

초 록

기내난동승객관련 도교협약의 개정 필요성과
한국 국내법적 접근의 한계

배종인* · 이재운**

항공안전과 항공보안이 날로 발전하여 항공교통은 과거에 비해 월등히 안전해졌으나, 국제항공에서 기내난동사건은 지속적으로 증가하는 추세이다. 국제법으로는 1963년 도교협약(항공기내 범죄방지협약)이 난동승객관련 사건들에 적용된다. 도교협약은 185개국이 비준한 성공적인 협약이지만, 여러 문제점을 가지고 있고, 특히, 정의조항, 관할권, 집행력에 관련한 흠결이 있다. 첫째, 어떠한 행위가 항공기내 범죄에 해당하는지에 대한 정의조항이 없어서, 항공기 출발국에서 범죄에 해당하는 행위가 항공기도착국에서는 범죄에 해당하지 않는 상황을 야기할 수 있다. 각기 다른 정의조항은 항공사들의 대응을 효과적이지 못하게 할 수 있다. 둘째, 착륙국에 관할권이 없어서 기내에서 명백하게 범죄를 저지른 기내난동승객의 처벌이 불가능한 상황을 만들 수 있다. 셋째, 도교협약은 등록국에 대한 형사 관할권행사의 권한을 부여했을 뿐, 실제로 그 권한을 사용해야 한다는 의무를 부여하지 않았다.

도교협약을 비준함과 동시에, 한국은 기내난동승객문제를 처리하기 위한 국내법적 절차로써 항공기운항안전법을 1974년에 제정했다. 이후 2002년 ICAO 모델입법 Circular 288을 일부 반영하여, 항공안전 및 보안에 관한 법률(항안법)이 2002년 제정되었다. 항안법이 꾸준히 개정되어온 포괄적인 법률이지만, 관할권 관련 조항은 없으며, 오직 형법만이 관할권 관련조항이 있다. 형법은 영토, 국적, 등록을 기초로 관할권을 정하고, 이는 본질적으로 도교협약의 관할권 원칙과 동일하다. 그러므로, 국내법 또한 기내난동승객 처리에 대한 관할권의 흠결을 해결하지 못한다. 또한, 법원의 판결도 항공기 납치 같은 심각한 범죄가 아닌 이상 관할권 관련 적극적인 입장을 피력할 것으로 보이지 않는다. ICAO 법률위원회의 특별위원회가 기내난동승객관련 1963년

* ICAO 대한민국 대표부 참사관

** 대한항공 법무실 과장

도쿄협약 (항공기내 범죄방지협약) 개정의 실효성을 연구하기 위해 조직되었다. ICAO의 연구결과가 도쿄협약 현대화 작업으로 이어져서 기내난동승객을 보다 효과적으로 대응하고, 보다 근본적으로는, 기내난동승객 발생건수를 줄일 수 있도록 해야겠다.

주제어 : 도쿄협약, 기내난동승객, 항공안전 및 보안에 관한 법률, 관할권