

EXAMINING THE ROLE AND STATUS OF IFSO VIS-À-VIS THE AIRCRAFT COMMANDER IN CONTEXT OF THE PROTOCOL TO THE TOKYO CONVENTION 1963

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ABSTRACT

The Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963¹ (Tokyo Convention) entered into force in 1969 and has 186 parties.² The inclusion of “In-Flight Security Officers” (abbreviated “IFSOs”) was made in the Montreal Protocol, 2014 which sought to amend the Tokyo Convention. This article explores the degree to which the Montreal Protocol clarifies the role of an IFSO and whether the role as per the Protocol conforms to the needs of modern day air travel and safety.

Though IFSOs are hired in nearly 40 or more states³ to serve somewhat the same purpose, different states have widely different practices with regard to them. Acceptance of all states involved needs to be taken in order to allow IFSOs to travel from one State to another.⁴ In spite of the universality of the threat IFSOs are employed to neutralize, it has been suggested by States that the matter of IFSOs be completely left to bilateral agreements between nations⁵ rather than be incorporated into the Protocol amending the Tokyo Convention. That a core question exists as to whether IFSOs should be granted an “independent and internationally confirmed authority”⁶ or be solely governed by specific bilateral agreements, is indicative of the lack of unanimity in the world community regarding the status of IFSOs.

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¹ The Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 15, 1963, ICAO Doc. 8364, 704 UNTS 220, 1970 ATS 14.

² International Civil Aviation Organization (ICAO), *Convention on Offences and Certain Others Acts committed on board Aircraft Signed At Tokyo On 14th September 1963*, ICAO (May 25, 2016)

http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf

³ ICAO, *Draft Protocol to Amend the Tokyo Convention of 1963—Authority and Protections for In-Flight Security Officers—Presented by United States*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 2.3, ICAO DCTC Doc No. 7

⁴ ICAO, Annexure 17 Security- *Safeguarding International Civil Aviation Against Acts of Unlawful Interference* (March 22, 1974) 4.7.5, Ninth Edition (March 2011).

⁵ ICAO, *Comments and Observations on the Draft Proposed Text of the Tokyo Protocol of 1963—Presented by Qatar*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 4.1 ICAO DCTC Doc No. 12 (2013).

⁶ Michael Milde, *ICAO Legal Committee and Progress in the Development of International Air Law; The 35th Session of the ICAO Legal Committee Drafts a Protocol on Unruly Passengers*, 62 ZLW 669 (2013)

I. CONCEPTUALIZING THE KEY TERMS

A. PILOT-IN-COMMAND

The concept of Pilot-in-Command (used interchangeably with “Aircraft Commander”) has its origins in the military and was used to affix responsibility to military pilots.⁷

Annex 2 to the Chicago Convention defines pilot-in-command as

*The pilot designated by the operator, or in the case of general aviation, the owner, as being in command and charged with the safe conduct of a flight.*⁸

Therefore, at its very essence, the Aircraft Commander is a pilot. Designating a pilot-in-command is a must for each flight⁹ and when a pilot flies alone (or with passengers) he is the de facto pilot-in-command.¹⁰ Holding a commercial licence entitles a pilot to act as pilot-in-command in commercial air transportation.¹¹ He has to attempt landing (unless considerations suggest otherwise) if there is an act of unlawful interference.¹²

B. IFSOs

IFSOs are undercover agents who blend in with other passengers on the aircraft. They are also known as “sky marshal” or “air marshal”. Only USA, Ethiopia, Israel and Russia allowed armed personnel on aircrafts before 1970s.¹³ After the Dawson’s Field Hijackings, Egypt, Pakistan, Jordan and India started using IFSOs.¹⁴ Only a few countries, such as New

⁷ Kathleen McChesney Goodman; Scott Davis, *Free Flight and the Pilot-in-Command Concept - A Recipe for Disaster*, 62 J. Air L. & Com. 663 (1996-1997).

⁸ ICAO, *Annexure 2- Rules of the Air* (February 1946) Chapter 1, Tenth Edition (July 2005).

⁹ ICAO, *Annexure 6 Part 1 – Operation of Aircraft, International Commercial Air Transport- Aeroplanes* (1969) 4.2.11.1, Ninth Edition (July 2010).

¹⁰ Raymond C. Speciale; Brett D. Venhuizen, *Pilot in Command and the FARS: The Buck Stops Here (almost always)*, *The*, 83 N.D. L. Rev. 818 (2007).

¹¹ ICAO, Annexure 1- Personnel Licensing (1948) 2.4.2.1, Eleventh Edition (2011).

¹² ICAO, *Annexure 2- Rules of the Air* (February 1946) 3.7, Tenth Edition (July 2005).

¹³ P. Paul Fitzgerald, *Air Marshals: The Need for Legal Certainty*, 75 J. Air L. & Com. 361 (2010).

¹⁴ *Id* at 372.

Zealand do not have an Air Marshall Program but place emphasis on “ground-based security measures”.¹⁵

There are different definitions of IFSO. An IFSO is defined in Annex 17 of International Civil Aviation Organization (ICAO)¹⁶ as:

A person who is authorized by the government of the State of the Operator and the government of the State of Registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference. This excludes persons employed to provide exclusive personal protection for one or more specific people travelling on the aircraft, such as personal bodyguards

European Union has defined IFSO as:

*A person who is employed by a state to travel on an aircraft of an air carrier licensed by it with the purpose of protecting that aircraft and its occupants against acts of unlawful interference that jeopardise the security of the flight.*¹⁷

They have also been defined thus:

*An IFSO is a person who is hired, trained and approved by the Government of the State of the aircraft operator to travel on the aircraft in order to protect the aircraft and its passengers against unlawful acts.*¹⁸

By virtue of the credibility of the organization who gave it (ICAO), the first mentioned definition of IFSO has the most authority in relation to the signatories of the Tokyo Convention. However, the subtle differences in the three definitions from three varied sources suggest a certain lack of a clarity regarding the concept of an IFSO.

The first definition merely requires that the IFSO be *authorized* by the respective states. However, the second definition is narrower in its scope as it requires the IFSO to be *employed* by

¹⁵ *Id* at 383.

¹⁶ ICAO, Annexure 17 Security- *Safeguarding International Civil Aviation Against Acts of Unlawful Interference* (March 22, 1974) Chapter 1 Definitions, Ninth Edition (March 2011).

¹⁷ Regulation (EC) No. 300/2008 of the European Parliament and of the Council of 11 March 2008 on common rules in the field of civil aviation security and repealing Regulation (EC) No 2320/2002, Article 3(31).

¹⁸ ICAO, *Authority in Handling Offences and Certain Other Acts Committed on Board Aircraft –Presented by Indonesia*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 4.1 ICAO DCTC Doc No. 24, 21/3/14.

the state. The third definition goes one step further to state that the IFSO must be *hired, trained and approved* by the State. The second most obvious difference in the definitions is regarding the role of an IFSO. While the first definition holds that the purpose of an IFSO is protecting against acts of unlawful interference, the second holds that it is particularly acts of unlawful interference that jeopardise the safety of the flight and the third simply refers to *unlawful acts* (whether or not they constitute unlawful interference).

Annex 17 to the Chicago Convention sheds more light on the IFSO concept by stating it the duty of a state to make sure that IFSOs are government personnel who are specially selected and trained and deployed considering the threat assessment by the competent authority.¹⁹ The deployment has to be kept confidential. There is a general trend to define an IFSO as a government employee. However, after September 11, Air France entered into a contract with a private security company (Pretory S.A.) for hire of 200 air marshals.²⁰ This also underscores the variant approaches States have taken in the interpretation of the concept of IFSO.

In India, an IFSO is defined as a government security personnel with the primary object of maintaining security of aircraft against any acts of unlawful interference.²¹ Rule 30(2) of the Aircraft (Security) Rules, 2011 states that the pilot-in-command ought to be informed regarding the number of armed persons and their seat location. This is in line with Annexure 17 to the Chicago Convention which casts a duty on the Contracting state to notify the pilot-in-command as to the number of the armed personnel and their seat numbers.²²

II. COMPETING OPTIONS FOR IFSO INCORPORATION IN THE PROTOCOL

The Tokyo Convention was entered into in the 1960s and most IFSO programmes started in the wake of the 9/11 (September 11) terrorist attacks, much after the Tokyo

¹⁹ ICAO, Annexure 17 Security- *Safeguarding International Civil Aviation Against Acts of Unlawful Interference* (March 22, 1974) 4.7.7, Ninth Edition (March 2011).

²⁰ Fitzgerald, *Supra* Note 13, p. 377.

²¹ Aircraft (Security) Rules, Section 2(1) (2011).

²² ICAO, Annexure 17 Security- *Safeguarding International Civil Aviation Against Acts of Unlawful Interference* (March 22, 1974) 4.7.8, Ninth Edition (March 2011).

Convention came into force. Therefore it was felt that legally addressing the IFSO concept in the Protocol was an integral part of the modernization of Tokyo Convention.²³

Discussions regarding the Protocol to the Tokyo Convention heralded two options regarding the possible inclusion of IFSOs in the Protocol - *firstly*, powers of the IFSO would be equivalent to the powers of the aircraft commander in responding to an offence *or secondly*, aircraft commander would retain full power but legal recognition would be given to the existence of IFSOs aboard aircrafts.²⁴ It has been noted that protection available to IFSOs under Option 2 is the same as granted to passengers.²⁵ Option 1 gives IFSO an equal right to decide to restrain a passenger and also gain help of crew members and passengers in the same. Since the IFSO's identity would be elusive before the act of unlawful interference, this would have to refer to his ability to give directions and gain help in security safety after the act in question is happening or about to happen after the IFSO has sprung into action.

The reasoning of the first option was included in Appendix F of the Report of the 35th Session of the ICAO Legal Committee by the Friends of the Chair Working Group on IFSOs on the lines that the inclusion would serve to align the power of the IFSO with the aircraft commander (except to deliver and disembark).²⁶ This group included 17 Member States including Canada, China, France, Russian Federation, Singapore, United Arab Emirates and USA. However, the latter option (Option 2), which maintained status quo giving deference to

²³ ICAO, *Draft Protocol to Amend the Tokyo Convention of 1963—Authority and Protections for In-Flight Security Officers*-Presented by United States, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 1.1, ICAO DCIC Doc No. 7.

²⁴ Ruwantissa Abeyratne, *Protocol to the Tokyo Convention of 1963: A Legal Triumph or Damp Squib*, 39 *Air & Space L.* 246 (2014).

²⁵ ICAO, *Draft Protocol to Amend the Tokyo Convention of 1963—Authority and Protections for In-Flight Security Officers*-Presented by United States, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 4.1.4, ICAO DCIC Doc No. 7.

²⁶ ICAO, Appendix F of *Draft Report on the Work of the Legal Committee during its 35th Session*, Legal Committee 35th Session (Montréal, 6 – 15 May 2013) F-1, ICAO LC/35-WP/7-13 .

aircraft commander's authority, was chosen in the Conference.²⁷ Thus it is reflected in the Article 6 of the Montreal Protocol, 2014.²⁸

Option 2 allows the Aircraft Commander to gain assistance of IFSO to restrain passengers. IFSOs deployed by an agreement between the Contracting States can undertake reasonable preventive measures suo moto (with no authorization from the Aircraft Commander) if such an action is deemed by him to be immediately necessary for the protection of the safety of the aircraft (or persons therein) from unlawful interference. He is also permitted to take reasonable preventive measures to halt the commission of serious offences, if the agreement deploying him so allows. But he cannot request or authorize assistance from passengers or crew members.

III. EXAMINING THE RATIONALE FOR CHOOSING OPTION 2

A host of different reasons were given as to why Option 1 was unfavourable as compared to Option 2. These will be examined along with an analysis of the suitability of both options to the Convention and air safety.

A. ANOMALOUS SITUATION

According to Articles 6(2) and 6(3) the Protocol, the crew members and even passengers can take reasonable preventive measures suo moto (without authorization by Aircraft Commander) when:

he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

However, IFSO can only take reasonable preventive measures suo moto 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.

²⁷ Abeyratne, *Supra* Note 24.

²⁸ 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 Committed On Board Aircraft (Montreal, 2014) art. 6, April 4, 2014, ICAO DCTC Doc No. 33.

While the passengers/ crew members are allowed to take suo moto action in relation to the safety of the aircraft or persons or property inside, IFSO's can only take action in relation to aircraft or persons inside (*not* with regard to property) and only if it is an unlawful interference scenario. Intervention regarding serious offences is allowed only if the deploying agreement allows. Therefore, the scope of passenger's authority is wider than that of the IFSO as there may be many instances that fall within the purview of passenger's authority but not IFSO's authority. Acts of Unlawful Interference are defined in Annexure 17 to the ICAO as including acts such as unlawful seizure of aircraft, hostage-taking, and using an aircraft to cause death, serious, bodily injury, serious damage to property or environment.

The grant of wider authority to the passengers might be justified on the ground that since they lack the requisite training to distinguish between an unlawful interference scenario and merely a troublesome person, they might be granted more authority while an IFSO must be presumed to have more expertise and use it cautiously. The only issue with this argument is that what might seem like a situation involving merely troublesome passengers (perhaps even fraught with mental illness or aerophobia) might quickly escalate into a situation of unlawful interference.

Another argument that can be made is that IFSOs would do better to not reveal their identity for small acts of disruptive passengers so as to not make themselves vulnerable to terrorists who might be on the aircraft waiting for the IFSO to show himself and take him out first. However, this argument is based on the assumption that there is only one IFSO on the aircraft (on international flights, there are often more than 1 IFSOs). The IFSO must be given an opportunity to apply his mind to the situation and respond accordingly. Therefore it is in the interest of overall aircraft safety if the IFSO has authority to take reasonable preventive measures beforehand i.e. when the situation shows potential to turn into one of unlawful interference.

In a recent incident, a woman punched the Captain in his face when she was asked to leave the flight due to her behaviour.²⁹ Though this happened when the aircraft had not taken

²⁹ Press Association, '*Disruptive Passenger*' Arrested after Pilot Punched in Face, DAILY MAIL UK, (accessed May 23, 2016)<http://www.dailymail.co.uk/wires/pa/article-3586581/Disruptive-passenger-arrested-pilot-punched-face.html> (last updated May 12, 2016).

off, it will be useful to explore the ramifications if the aircraft was in air. Technically, a slap on the face would not amount to “Unlawful interference” as it is not an attempt to jeopardize the safety of civil aviation and by virtue of the 7 grounds mentioned in the definition of Unlawful Interference in Annex 17.

In such a case, the IFSO would be unable to act whereas the passengers and crew members would be able to. But such a situation could quickly escalate into situation where the frantic passenger attempts to beat up another person or try to vandalize property in aircraft. In view of this, it is best that such situations are not left to the discretion of the untrained passengers and crew members but to the adept skill and discretion of IFSO to give him opportunity to decide whether the situation merits his interference. Furthermore, that passengers and crew members have a wider authority in taking reasonable preventive measures as compared to IFSOs creates a jarring legal anomaly that is not conciliatory with the core reason of the deployment of the IFSO.

B. SHARING OF RESPONSIBILITIES

It has been argued that equal authority of the IFSO and Aircraft Commander to take measures when there are reasonable grounds to believe that a person has committed or is about to commit an act stated in Article 1 of Tokyo Convention would cause “unnecessary overlap of responsibilities”³⁰ and uncertainty giving way to “an adverse impact on safety”.³¹

However, this overlap is important and in furtherance of the safety of the aircraft and persons and property therein. This is because it is necessary that the pilots stay behind the safety of the cockpit doors so as not to give the passengers causing the interference to gain an advantage by steering the flight as per their goals. A representative of ALPA (Airline Pilots Association) had remarked that pilots have no alternative other than stepping out of their cockpits when there are acts of unlawful interference.³² However, having an IFSO with equal

³⁰ ICAO, *Comments on the Draft Text of the Protocol—Presented by Japan*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 1.2.2, ICAO DCTC Doc No. 10.

³¹ ICAO, *Diplomatic Conference to adopt the Proposed Draft Text of the Protocol to the Tokyo Convention of 1963—Presented by Argentina*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 5.7, ICAO DCTC Doc No. 25.

³² John J. O'Donnell, *Air Crimes: Perspective from the Cockpit*, 18 Vill. L. Rev. 989 (1973).

authority to control the situation will assuage the need of Pilots having to step out themselves and pacify the situation. The importance of a pilot staying behind cockpit doors was also commented upon in the case of *Eid v. Alaska Case*,³³ which addressed the reasonableness standard in Article 6 that is used to assess a pilot's actions.

The facts were that Captain Swanigan (the pilot) was notified by a member of the cabin crew that control had been lost of the first-class cabin. The pilot did not raise questions or use the cockpit window to peer into the cabin. The judgment noted that commander is in "an imperfect position"³⁴ to understand the intensity of the disturbance when he is seated in the cockpit, and to leave the cockpit might mean that the safety of the entire aircraft is jeopardised.³⁵ This case also underscores the extent to which a pilot may be unprepared to attend to disturbances on board all by himself.

In the Tokyo Convention, one important overlap that exists is the concurrent jurisdiction that exists among States by virtue of Article 3 of the Convention. However, this overlap is necessary for deterrence to criminals who cause danger to the aircraft or disturb good order and discipline. Like the concept of concurrent jurisdiction, an overlap in the authority of IFSO and Aircraft Commander is also needed much needed in the Convention.

In the case of *Administrator v. Lusk*,³⁶ it was understood that that complexity of air travel necessitates the delegation of responsibility by the Captain. Delegation does not mean that the Aircraft Commander cannot perform the same task, it merely means that the IFSO is entitled to take control of situation and restore safety of the flight.

C. NO SHARING OF OTHER POWERS

What is relevant is that even if Option 1 is incorporated, there is no overlap of the other powers of the Aircraft Commander with the IFSO (barring Article 6). For instance, equal authority with respect to Article 6 (Option 1) does not affect the power of the Aircraft

³³ *Eid & Ors v Alaska Airlines Inc* [2010] 621 F.3d 858 (9th Cir.)28.

³⁴Comments of the International Air Transport Association (IATA) on LC/35- WP/2-1 and the Legal Aspects of the Issue of Unruly Passengers 1, ICAO Working Paper No. LC/35-WP/2-2, 2013).

³⁵ Vernon Nase; Nicolas Humphrey, *Angry People in the Sky: Air Rage and the Tokyo Convention*, 79 J. Air L. & Com. 735 (2014).

³⁶ *Administrator v. Lusk*, 2 N.T.S.B. 481 (1973); Speciale & Venhuizen, *Supra* Note 10, 826.

Commander to disembark or deliver a person. The specific usage of the word “person” as opposed to “passenger” or “crew member” makes it possible for the Aircraft Commander to disembark/deliver even an IFSO. An example of this is a relatively recent incident involving Sky Marshal David Maldonado who the Captain forced off the aircraft before it even took-off.³⁷

D. NO CONTRADICTION WITH AIRCRAFT COMMANDER’S OVERALL MANDATE

The predominant interest of a pilot is to safeguard the lives of passengers rather than answer to a bureau³⁸; conventionally, the Aircraft Commander is directly responsible for, and is the final authority on the operation of the aircraft.³⁹ He has the duty of ensuring safety of all crew members, passengers and cargo on board. He is also responsible for the safety of the aeroplane from when the aeroplane is ready to move for the purpose of taking off until the moment it comes to rest at the end of the flight.⁴⁰ Pilot Proficiency checks are carried out to ensure that piloting technique as well as the ability of pilot to execute emergency procedures is sufficient.⁴¹

Annex 6 to the Chicago Convention confers responsibility on the pilot-in-command for the operation and safety of the aircraft and the safety of the persons on board, during flight time.⁴² The aircraft commander has authority to arrest, detain and deliver the offender⁴³ and also has disciplinary authority over passengers under Article 6. His authority has been judicially interpreted to be “extensive and wide”⁴⁴ and IATA (International Air Transport Association) has

³⁷ John Hutchinson for Mail Online, ‘Air marshal kicked off plane by furious pilot after bursting into the cockpit to complain flight attendant had spilled a drink on him’, DAILY MAIL UK, (accessed May 23, 2016) http://www.dailymail.co.uk/travel/travel_news/article-3263186/Who-f-think-Captain-air-marshall-removed-plane-confronted-cockpit-complain-flight-attendant-spilled-drink-him.html (last updated Oct 07, 2015).

³⁸ Robert N. Buck, *Airline Pilot's View of Safety*, *An*, 34 J. Air L. & Com. 443 (1968).

³⁹ 14 C.F.R. § 91.3(a) (2006).

⁴⁰ ICAO, *Annexure 6 Part 1 – Operation of Aircraft, International Commercial Air Transport- Aeroplanes* (1969) 4.5.1, Ninth Edition (July 2010).

⁴¹ *Id.*, 9.4.4.1.

⁴² ICAO, *Annexure 6 Part 1 – Operation of Aircraft, International Commercial Air Transport- Aeroplanes* (1969) 4.5.1, Ninth Edition (July 2010).

⁴³ Dionigi M. Fiorita, *Aviation Security: International Response*, 3 Alb. L.J. Sci. & Tech. 283 (1993)

⁴⁴ Brief of Amicus Curiae by ATA and IATA, p. 17, *Eid & Ors v Alaska Airlines Inc* [2010] 621 F.3d 858 (9th Cir.)28

advocated for a highly deferential standard of review for actions of the Aircraft Commander.⁴⁵ Unlike actions of crew members and passengers, which must have been immediately necessary, related to safety and be preventative in nature, the actions of the aircraft commander are bound by no such limitations.⁴⁶

Sharing of powers under Article 6 with IFSO does not deviate from Aircraft Commander's mandate or alter its nature.

E. NO DIRECT RESPONSIBILITY OF IFSO

It was argued that the IFSOs derive their power from an authority such as government and an IFSO is not directly responsible for overall safety⁴⁷ whereas the aircraft commander has the responsibility of overall safety delegated to him by the operator (who has ultimate duty to maintain safety on aircraft). However, the IFSO *can* be made to possess direct responsibility for the safety of the aircraft, albeit in a limited manner.

In international law, aircrafts may be considered as the extension of the State of Registration,⁴⁸ thus being “territory” within the limits of which the State in question may exercise its functions such as policing and maintenance of law and order. Many countries employ IFSOs who are also police officers (such as Australia). Thus the IFSO (and by attribution, the State) can be made responsible for the safety of the flight. Fairness demands that his responsibility should be decided in accordance with the sphere of his authority/reach, but there is no reason as to why his responsibility should not be of a direct nature.

⁴⁵ ICAO, *Comments of the International Air Transport Association (IATA) on LC/35-WP/2-1 and The Legal Aspects of the Issue of Unruly Passengers—Presented by IATA*, Legal Committee 35th Session (Montréal, 6 — 15 May 2013) 6.14, 6.15, ICAO Working Paper LC/35-WP/2-2.

⁴⁶ Aaron B. Swerdlow, *Modern Approaches to the Powers of the Aircraft Commander under Article 6 of the Tokyo Convention*, 10 *Issues Aviation L. & Pol'y* 118 (2010-2011).

⁴⁷ ICAO, *Diplomatic Conference to adopt the Proposed Draft Text of the Protocol to the Tokyo Convention of 1963—Presented by Argentina*, International Conference on Air Law (Montréal, 26 March to 4 April 2014) 5.7, ICAO DCTC Doc No. 25.

⁴⁸ COUNCIL OF EUROPE, *COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM* 54 (Council of Europe Publishing 2005).

Even construing the word “responsible” with reference to Article 10 of the Tokyo Convention, which exempts some classes of persons for actions taken in accordance with it, the argument in question would not apply as IFSOs have been added as one of the classes in the Montreal Protocol 2014 who would be exempt from responsibility in proceedings against them.

F. UNIQUE POSITION AND TRAINING OF IFSO

The ALADA (Latin American Association of Aeronautical and Space Law) has rightly contended that incidents can arise and sometimes be outside the purview of both the aircraft commander and even the crew and in such situations, speed of the IFSO can be the deciding factor in the safety of the flight.⁴⁹ His speed in addressing a situation is likely to be greater than an Aircraft Commander’s speed as he has the advantage of proximity. Moreover, in many jurisdictions, pilots are not armed with guns. Only IFSOs are allowed to carry arms onboard, thus giving them a crucial leg-up in the process of restraining a person.

As discussed, the Pilot should ideally not come out of the cockpit to verify the circumstances himself and even if there is technology installed by virtue of which the Aircraft Commander can see and understand what is going on in other areas of the flight, the IFSO is in a much better position to judge the demands of the situation, owing to his exposure to similar situations and to his unique position among the passenger and hence his ability to adjudge the escalating interference from up close. His training also makes him more adept than the Aircraft Commander at tackling such situations.

Intensive training is provided to IFSOs by the State of Registration. USA has one of the most sophisticated IFSO (“Air Marshall”) programs worldwide. The Federal Air Marshall Service (FAMS) is made of law enforcement officials who are trained specialists.⁵⁰ It was created in 1961 as the US Sky Marshall Program and grew significantly after September 11, 2001.⁵¹ The Sky Marshalls receive specialized initial and recurrent training and additionally, 20 days of

⁴⁹ Nase and Humphrey, *Supra* Note 35, 739.

⁵⁰ Transport Security Administration (TSA), ‘*The Federal Air Marshall Service*’, DEPARTMENT OF HOMELAND SECURITY, (accessed May 23, 2016) <https://www.tsa.gov/news/testimony/2015/09/17/testimony-federal-air-marshall-service> (Sept. 17, 2015).

⁵¹ TSA, ‘*Air Marshal Job Requirements*’, FEDERAL LAW ENFORCEMENT, (accessed May 23, 2016)

training in a year and a very high standard of conduct is expected of them.⁵² In Australia, IFSOs are called Air Security Officers and are specially trained officers of the Australian Federal police.⁵³ They are intensively trained in negotiation, defensive tactics, specialist firearm handling and small team techniques. They regularly undergo requalification and their inclusion in flights began in 2001 after the September 11 attacks in USA.⁵⁴ In Canada, the Canadian Air Carrier Protective Program also uses “highly specialized, tactical, covert operatives (IFSOs) in order to prevent passing over of aircraft commanders to unauthorized hands and to gather information about any criminal/terrorist activity in flight.”⁵⁵

IV. CONCLUSION

The core idea behind having a Protocol to the Tokyo Convention is for the purpose of modernization- the idea is that international law regarding air travel must keep pace with the changing practices of States.

The Protocol subjugates the IFSO to an inferior position to the Aircraft Commander in terms of authority conferred by Article 6 of the Tokyo Convention. This subjugation is unreasonable keeping in view the training and unique position of the IFSO among passengers. Aircraft commander remains responsible for the overall safety of the aircraft and accountable for it and sharing with the IFSO of his authority conferred under Article 6 of the Tokyo Convention to restrain and get help of crew members and passengers by way of delegation will only help the Aircraft Commander further his mandate.

Thus concurrent nature of responsibility does not contradict the Aircraft Commander’s overall mandate, especially keeping in mind that no other powers are shared except the power in

⁵² Homeland Security, *Written testimony of TSA Assistant Administrator for the Office of Law Enforcement and Director of the Federal Air Marshal Service...*, DEPARTMENT OF HOMELAND SECURITY, (last accessed May 22, 2016) <https://www.dhs.gov/news/2015/07/16/written-testimony-tsa-house-homeland-security-subcommittee-transportation-security> (July 15,2015).

⁵³ Australian Federal Police, *Air Security Officers* AUSTRALIAN FEDERAL POLICE (accessed May 2, 2016) <http://www.afp.gov.au/policing/aviation/air-security-officers>

⁵⁴ N.a, *Air Security Officers: Making our Skies Safe*, PLATYPUS MAGAZINE 34 (Ed. 99,2008) (accessed May 2, 2016) <http://www.afp.gov.au/~media/afp/pdf/3/34-airsecurity-officers-making-our-skies-safe.pdf> .

⁵⁵ Transport Canada, *Canadian Air Carrier Protective Program*, GOVERNMENT OF CANADA (last accessed May 22, 2016) <https://www.tc.gc.ca/eng/aviationsecurity/page-186.htm> (June 8, 2010) .

Article 6. Moreover, granting passengers greater scope of authority creates a legal anomaly that does discredit to the IFSO's years of training and exposure to combusive situations aboard a flight. That the IFSO's responsibility stems from the government (unlike Aircraft Commander's responsibility which is delegated by the Operator) does not necessarily mean that the nature of responsibility is not direct.

This is the reason Option 1 (which was rejected in the Conference) is preferable in the context of greater air safety. Giving an IFSO the same authority as the Aircraft Commander with reference to Article 6 of the Convention is also in line with the expressed objective of the amendment to the Tokyo Convention i.e. to address and control unruly behaviour that could jeopardize the good order and discipline or safety of the aircraft and/ persons or property inside.⁵⁶ On the other hand, Option 2 gives no new authority to the IFSOs which runs counter to the aim of modernizing the Tokyo Convention and the very purpose of drafting the Montreal Protocol.

100 member states participated in the Diplomatic Conference which adopted the 2014 Protocol⁵⁷ and the fact that only 1/5th of the participating states⁵⁸ signed the Protocol is indicative of the change that is required in effective handling of disruptive passengers cases. The change could be brought about by further amendment that enjoys a larger consensus. However, a much quicker and practical method would be to incorporate clauses along the lines of Option 1 in bilateral agreements between Member States deploying IFSOs on aircrafts.

⁵⁶ 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 Committed On Board Aircraft (Montreal, 2014) Preamble, April 4, 2014, ICAO DCTC Doc No. 33.

⁵⁷ ICAO, 'ICAO Diplomatic Conference Delivers New Protocol Addressing Disruptive Passengers,' ICAO (last accessed May 22, 2016)

⁵⁸ Abeyratne, *Supra* Note. 24.