# AVIATION SECURITY: AIRLINE PASSENGERS' ROLES IN COMBATING AIR- TERRORISM IN THE 21ST CENTURY

**Ismail Adua Mustapha, Ph.d**
Department of Business Law, Faculty of Law, University of Ilorin, Ilorin
Email: ismadua@yahoo.com ismailaduam@gmail.com
Phone: 08062643265, 08181003642

**Abstract**
**Stakeholders in the Aviation Industry including the airlines passengers have roles to play in combating air terrorism especially in the 21st century where it has been discovered that it is possible for a Pilot or Co-pilot to hijack its own navigating aircraft. In this context, the paper seeks to critically analyse the roles of passengers in combating air-terrorism. To realise this objective, the paper adopts qualitative legal research method which includes primary and secondary sources of law. The paper finds that it is very difficult for passengers to carry out their roles in the event of hijacking by a Pilot or Co-pilot of an aircraft because the performance of their roles is limited to the cabin area of an aircraft. This, therefore, constitutes a serious global threat to Civil Aviation security which must be addressed as a matter of urgency by the International Civil Aviation(ICAO), the International Air Transport Association(IATA) and the National Civil Aviation Authorities(NCAAs).**

**Keywords:** **Aicraft, Air Trrorism, Passangers, Hijacking, Civil Aviation Security**

## 1. Introduction

Recent happenings in the Aviation Industry across the globe call for a review of rules, regulations, procedures and practices that will meet the purposes for which the aircraft is to be navigated. The challenging features of the 21st century air transport security[1] including aerial hijacking, aircraft sabotage and hostage-taking of passengers amongst others must be curtailed in all ramifications.

The hijacking of Ethiopian Airlines in 2014 of which the passengers on-board were handicapped to restore the aircraft back to the Pilot-in-Command[2] has further

1 Aviation security is defined as measures to safeguard civil aviation against acts of unlawful interference. See Jiefang Huang, *Aviation Safety and ICAO,* (Netherlands: Kluwer Law International 2009) 5

2 Pilot-in-command of an aircraft is a pilot member of the flying crew who, having met the necessary competency requirements, being designated by the operator-except in cases where he himself is flying his own machine and protected by the legal order in force, exercises command on board for the safe conduct and legal mastering of the aircraft during the time necessary for fulfilling the air operation of which he is in charge. See Frederico N.V. Escalada, *Aeronautical Law,* (Netherlands: Sijthoff and Noordhoff Publishing Ltd 1979) 201

challenged the aviation security stakeholders (the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA), the Airlines Association, and the National Civil Aviation Authorities (NCAAs) among others, to find solution(s) to a new development in air terrorism. Many writers have written on the roles of the stakeholders on the prevention and suppression of air-terrorism. It seems the roles of airlines passengers in relation to combating the menace have not been adequately dealt with, even though, such roles are mentioned in the International Convention on the Offences and Certain Other Acts Committed On Board Aircraft, 1963.[3] These roles will be examined later in this paper.

Looking at the possible aviation offenders in the context air-terrorism, one would be tempted to ask these questions: What are the expected roles of passengers onboard aircraft in the event of air-terrorism in general; and in particular where the Pilot or Co-pilot commits the offence? Are there any challenges in carrying out these roles? The paper will attempt to dwell on these posers and proffer recommendation(s) if any, to the situation on ground. It is on this note, that the paper will analyse the concept of terrorism and air-terrorism, and the relationship between the two concepts. It will also examine the question "Who can hijack?" and the expected roles of passengers in combating air-terrorism. The paper ends with conclusion and recommendations.

## 2. Concept of Terrorism and Air-Terrorism

The term terrorism originated from the French in 1798 during the "Reign of *Terror* of the French Revolution". It is a Latin word "*Terre*" meaning to "cause tremble".[4] There is no generally acceptable definition of the term 'terrorism'.[5] In support of this assertion, Blakesley, citing Professor Baxter, states:

> *We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no purpose.*[6]

However, Black's Law Dictionary[7] defines terrorism as "the use of or threat of violence to intimidate or cause panic as a means of political conduct".[8] West's Encyclopedia of American Law[9] defines terrorism as "an unlawful use of force or violence against persons or property in order to coerce or intimidate a government or

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[3] International Convention on the Offences and Certain Other Acts Committed On Board Aircraft, 1963, 704 U.N.T.S.219; 20 U.S.T 2941 [Herein referred to as "The Tokyo Convention" 1963].

[4] ibid 54; Abeyratne, R.I.R, 'The Beijing Convention of 2010 on the Suppression of Unlawful Acts Relating to International Civil Aviation- an Interpretative Study' (2011) 4, Journal of Transport Security, 131-143

[5] Ian, O.L, Bruce Hiffman, John Arquilla, David Ronfeldt and Michale Zarimi, *Countering the new terrorism*, (USA, RAND Project 1999) v .See also Miryam Lindberg, *Understanding Terrorism in the twenty first century*.( In GEES 2010)1

[6] Blakesley, C.L, 41.

[7] Garner, 62.

[8] ibid 1513

[9] Lehman,J and Phelps S. (eds.) *West's Encyclopedia of American Law* (2nd edn, Thomson Gale, USA 2005)vol 13

the civilian population in furtherance of political or social objectives".[10] Concise Dictionary of Law[11] states that "terrorism is the use or threat of violence, for political, religious, or ideological ends".[12]

The term has been given various definitions and connotations by various scholars and academic writers.[13]

Cassese[14] maintains that regional and international legal instruments aimed at suppressing the offence of terrorism have universally defined terrorism[15] as "the application of threat of violence carried out in terrorists' state or on another state against citizen or government of their state in order to achieve political aim or propagandise their mission".[16] Blakesley defines terrorism as "an act of terror violence against innocent and non- violence citizen for the purpose of political, Military, philosophical end from the third party".[17]

Various International and Regional Conventions have also defined the offence of terrorism. The International Convention for the Suppression of the Financing of Terrorism[18] describes terrorism as an unlawful intentional act intended to cause death or serious bodily injury to innocent populace for the purpose of intimidating government of particular state or international organization to compel to do or refrain from doing any act".[19] The Arab Convention for the Suppression of Terrorism,[20] Convention for the Organization of Islamic Conference on Combating International

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10 ibid 196

11 Martin, E.A and Law, J. (eds), *Concise Dictionary of Law* (7th edn, New York, Oxford University Press 2009)

12 ibid 546.

13 Lambert, J.J, *Terrorism and Hostages in International Law- A commentary on the Hostages Convention 1990 (*The Burlington Press Ltd., Cambridge 1990) 13; Blakesley, C.L, *Terrorism, Drug, International Law, and the protection of Human liberty* (Transnational Publishers Inc., New York 1992) 41; Guesnier, F, 'Acts of Terrorism as a Crimes against Humanity under the Rome Statute, in Seinho Yee(ed.), *International Crime and Punishment: Selected issues,* vol. 2,( University press of America Inc., New York 2004) 55. Ruwantissa,54; Bassiouni, C; 'Legal control of International Terrorism: A Policy Oriented Assessment' (2002) 4, Harvard International Law Journal, 83; John, P.S, *Air piracy, Airport Security and International Terrorism: Wining the War against Hijackers* (Quorum Books, New York 1991) 220; and Abi Saabi, 'The proper role of International Law in Combating Terrorism', (2002)Chinese Journal of International Law, 305

14 Cassese, A. *International Criminal Law* (2nd edn, Oxford University Press, Oxford 2008) 164

15 ibid 1

16 Bassiouni(n 13) 83; Guesnier (n 13) 57. See also Bassiouni, C. 'A Policy Oriented Inquiry into Different Forms and Manifestations of International Terrorism, in Legal Response to International Terrorism: United States Procedural Aspect', cited in Blakesley, 34

17 Blakesley, 35.

18 International Convention for the Suppression of the financing of Terrorism, adopted in New York, United States of America by Resolution 54/109 on 9 December 1999 without a vote, opened for signature on 10 January 2000 and entered into force on10 April 2002.It has 173 parties. See Klein, *International Convention for the suppression of the financing of Terrorism (*United Nations, United Nations Audiovisual Library of International Law 2009)1-2; <http://cns.miis.edu/inventory/pdfs/finterr.pdf> accessed 29 April 2012

19 ibid., Article 2 (1) (b)- (4).

20 Arab Convention for the suppression of Terrorism 1999. This Convention, Cairo Declaration, was adopted by the Arab Ministers of Interior and the Council of Arab Ministers of Justice in Cairo on 22 April 1988. See 'Essential Documents: Arab Convention on the Suppression of Terrorism (Cairo Declaration) <http://www.cfr.org/terrorism-and-the-law/arab-convention-suppression-terrorism-cairo-declaration/p24799> accessed 29 April 2012

Terrorism[21] and the Organization of Africa Unity Convention on the Prevention and Combating of Terrorism[22], all have the same elements of offence of terrorism as defined by the International Convention for the Suppression of Financing of Terrorism 1999. These elements indicate act or threat of violence, for whatever motives or intention or any intimidating act directed against the populace which endanger or likely to endanger the peace of a nation in all ramifications,[23] except in cases of "armed struggle against foreign occupation and aggression for liberation and self-determination in accordance with the principle of International Law".[24] It is on the basis of these exceptions that the international community has not been able to agree on universal definition of terrorism, even though there is a draft UN Comprehensive Convention on International Terrorism still awaiting international ratification.

The criminal elements of the offence of terrorism are the general criminal law elements of "*actus reus*" and "*mens rea*".[25] Therefore, all the above definitions of Terrorism contain the two elements. That is threat of violence against innocent persons and their properties, or government or international institutions; and the intention to harm them or intimidate the populace or section thereof.

The term Air-Terrorism as used in this paper is referring to Aircraft hijacking, which is derived from the phrase "*High, jack*", "a command to raise one's hand before robbed".[26] It has traditionally interpreted to mean "to use violence or threats to take control of vehicle, especially a plane, in order to force it to travel to a different place".[27] "Hijacking gained popularity during the prohibition period, 1920-1933 when boot leggers commandeered truck loads of liquor from each other".[28] It was

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21 Organization of Islamic Convention on Combating International Terrorism, 1999,adopted at the Organization of the Islamic Conference, Twenty-Sixth Session of the Islamic Conference of Foreign Ministers, Ouagadougou, Burkina Faso, July 1999,See Organization of the Islamic Conference, *Convention of the Organisation of the Islamic Conference on Combating International Terrorism*, 1 July 1999, Annex to Resolution No: 59/26-P<http://www.unhcr.org/refworld/docid/3de5e6646.html> accessed 29 April 2012

22 Organization of Africa Unity Convention on the prevention and combating of Terrorism, 1999.Adopted 14 June 1999 in Algiers and entered into force on 6 December 2002.see Organization of African Unity, *OAU Convention on the Prevention and Combating of Terrorism* 14 June1999,<http://www.unhcr.org/refworld/publisher,OAU,,3f4b1f714,0.html> accessed 29 April 2012

23 Arab Convention for the Suppression of Terrorism 1999. Article 1(2); Organization of Islamic Convention on Combating International Terrorism, 1999. Article 1 (2); and Organization of Africa Unity Convention on the prevention and combating of Terrorism, 1999, Article 1 (3).

24 Article 2 (a) Arab Convention for the Suppression of Terrorism 1999. Article 2(a); Organization of Islamic Convention on Combating International Terrorism, 1999. Article 1 (2); and Organization of Africa Unity Convention on the prevention and combating of Terrorism, 1999, Article 3 (1).

25 Meaning forbidden act and intention to commit forbidden act. See Blakesley, 42.

26 Thomson Gale, *West's Encyclopedia of American Law*, The Gale Group Inc.,< http://www.answers.co/topic/hijack > accessed 20 June 2012; Merria-webster, *An Encyclopedia Brittanica*, < http://www.answers.com/dictionary/hijack > accessed 20 June 2012

27 Sally Wehmeir (ed.), *Oxford Advanced Learner's Dictionary of Current English*, (6th edn, Oxford University Press, London 2000) 565

28 Thomson Gale; and Merriam-webster.

introduced into the Aviation Sector in the 1960s when political activists began to seize commercial aircraft in the sky.[29]

Black's Law Dictionary defines "hijack" to mean "to commandeer a vehicle or aircraft, to rob or steal from vehicle or plane at gun point".[30] Encyclopedia Britannica[31] states that unlawful seizure is the legal name that states at the international level have given to aircraft hijacking. Australia Legal Dictionary[32] defines hijacking as "an unlawful seizure or attempted seizure of an aircraft by force, threat, or other form of intimidation".[33] Dictionary of Canadian Law[34] defines the term hijacking as "an unlawful, by force or threat thereof, or by any form of intimidation, seizing or exercising control of an aircraft with intent to cause any person onboard the aircraft to be confined or imprisoned against his will; to cause any person onboard aircraft to be transported against his will to any place other than the next schedule place of landing of the aircraft; to hold any person onboard the aircraft for ransom or to service against his will or to cause the aircraft to deviate in a material respect from its flight plan".[35] New World Encyclopedia defines hijacking as "the assumption of control of a vehicle through some means of coercion, often the threat of violence".[36]

However, the Academic writers and Journalists have variously identified the offence as *"Aircraft hijacking," "Air piracy," "Skyjacking" and "Skypiracy" "Aerial piracy"*.[37] Agarwala stated that they are the terms used to describe the illegal seizure of an aircraft in-flight and its diversion to a non scheduled destination.[38] Evans[39] defines Aircraft hijacking as an "illegal diversion of a commercial aircraft to a destination outside the country of origin of the flight".[40] He also described the offence as "consisting of the taking or conversion to private use of an aircraft as a means of transportation and forcibly changing its flight plan to a different destination".[41] Shawcross and Beaumont maintained that it is a "seizure by force, or control of an aircraft in-flight by a person on board",[42] while some writers adopt

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29 David K.B and Allen A.M, *Houghton Miffin Word Origin* (Houghton Maffin Co.1997) < http://www.answers.co/topic/hijack > accessed 20 June 2012. See also Thomson (n 26)

30 Gardner, B.A (ed.) , *Black's Law Dictionary* ( 9th edn, USA, West publishing Co.2009)789

31 'Air law', *Encyclopaedia Britannica.* Online, Academic Edition, Encyclopaedia Britannica Inc, 2012

32 Peter E. N and Peter. B (eds), *Butterworth Australia Legal Dictionary* (Australia, Butterworth Publishing Co.,1997)

33 ibid 550

34 Dukelow and Daphne A, *The Dictionary of Canadian Law* (Thompson Professional Publishing Co. Canada 1991)

35 ibid 475

36 New World Encyclopaedia.

37 Evans, 'The Law and Aircraft Hijacking'(1972-1973)1, Syracus J. Int'l L & Com, 266.See also *The Times*, 29 July 1968 and 20 December 1968. See Ismail Adua Mustapha & K. I. Adam, 'An Overview of the International and Nigerian Legal Framework for Prevention of Aircraft Sabotage'(2014) 17 (2) Centre Point Journal (Humanities Edition) 2

38 Agarwala 14

39 Evans, A.E, 'Aircraft Hijacking: Its Causes and Cure' (1969)63(4) American Journal of International Law

40 Evans Alona, 'A Proposed Method of Control'(1971) 37, Journal of Air Law and Commerce, 171

41 Ibid 696

42 Shawcross and Beaumont, *Air law,* (94th edn, Butterworth, London 1991)vol 1, 521

"*Skyjacking, aircraft hijacking and Air piracy*" to mean "forcibly obtain control of an aircraft, its crew and passengers and utilize that control for the purpose of obtaining something that the seizing party deems of value".[43] Adua defines aircraft hijacking as an unlawful and intentional act of terrorism against international civil aircraft by seizing the control of its operation either by means of threat or use of violence or intimidation to assume superior authority over the lawful authority of the aircraft during the in-flight operation.[44]

It should be noted that "air piracy", "aerial piracy", "aerial hijacking" or "hijacking" or "unlawful seizure", "skyjacking", "aerial skyjacking" were the terminologies suggested at the Hague Conference 1970. None of these terms was adopted but the term offence was retained.[45]

However, Alona[46], Agarwala[47]Samuel,[48]Sami[49] Nicholas,[50] Dawson[51]and Ruwantissa[52] argued that the term Piracy as used in Maritime Law and defined by the Geneva Convention, 1958[53] is not the same as aircraft hijacking.[54]

It is submitted that there is a nexus between terrorism and offence of aircraft hijacking. The two offences contain the same elements of violence, threat of violence destruction of lives and properties. The offences are mostly committed against international community for political reasons among others.[55]

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43 Ruwantissa, 68; Agrawala, S.K, *Aircraft Hijacking and International Law* (Oceanic Publications, Inc, India 1973) 242

44 See Ismail Mustapha Adua, *International Law on Aircraft Hijacking: The Practice in Malaysia and Nigeria*, (Ph.d Thesis, International Islamic University, Malaysia, 2014) 61-62.

45 Gerald, F.F, 'Toward Legal Suppression of Act Against Civil Aviation', in Patricia (ed) Air Hijacking: International Perspective, (1970-1972)39, International Conciliation, 52

46 Evans, (n 40) 296

47 Agarwala, 14

48 Samuel, A., 'The Legal Problems: An Introduction', (1971)37, Journal of Air Law & Commerce, 164

49 Sami, S, 'Is Hijacking of Aircraft piracy in International Law?'(1968-69)43, Brit. Y.B. Int'l L., 199-202.

50 Nicholas M.P, 'Hijacking v. Air Piracy: A Substantial Misunderstanding Not A Quarrel Over Semantics', (1970) *RHD*,1

51 Dawson, H.G, 57

52 Ruwantissa, 103.

53 Geneva Convention 1958, Done at Geneva on 29 April 1958. Entered into force on 30 September 1962.See the United Nations, *Treaty Series*, vol. 450, at 11, 82. Article 15 defines offence of piracy as any of the following acts:
(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(*a*) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article".

54 For a detail analysis of the differences between Maritime piracy and Air piracy, see Ismail Mustapha (n 44)23, 57-58

55 Bassiouni, 83; Guesinier, 57; Blakesley, 35

It is further submitted that the term "terrorism" is a general term for all kinds of violence or threat of violence against persons and their properties in all ramifications. From the practical and factual situation, the impact of terrorism on hijacking of civil aircraft are felt whenever the act of terrorism is directed towards international civil aviation causing loss of lives and properties, psychological trauma as well as severance of international relations. Terrorists transfer the acts of violence, threat of violence and intimidation to hijack aircraft. Most hijackers see aviation sector as a very weak sector in term of securities both onboard, in-flight, in service and on the ground. This is because while onboard in-flight, there is no police, Air Marshal and armed personnel to maintain security of law and order. Again, the hijackers commit offence of aircraft hijacking because they deem it as a very visible method of achieving their objectives with a wide range of global attention to their cause. It therefore means that terrorism embodies hijacking of aircraft and at the same time as a means to terrorise the international community.

The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970,[56] the 2010 Beijing Protocol Supplementary to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970[57] and national law[58] on aircraft hijacking have directly defined the scope of the offence of aircraft hijacking. For this purpose, definitions of the offence as contained in these international instruments and that of Nigerian law shall be considered.

The Hague Convention 1970 defines aircraft hijacking as an offence where a person onboard aircraft or accomplice of a person who unlawfully seizes or exercises control over that aircraft or attempts to do so by force or threat thereof or by any other form of intimidation.[59] An improved definition of aircraft hijacking has been provided in the Hague Protocol that any person who unlawfully and intentionally seizes or exercise control of an aircraft in service by force or threat thereof, or by coercion, or by any other form of intimidation , or by any technological means.[60] The major improvements in the Protocol definition of the offence are the inclusion of new innovations such as the commission of the offence in "aircraft in service" and by "technological means". An aircraft is considered to be in service from "the beginning

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56 The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, [Herein referred to as 'The Hague Convention], 80 UNTS 105, 22 U.S.T. 1641, T.I.A.S No. 7192.

57 The Protocol supplementary to the Convention for the suppression of unlawful seizure of aircraft" done at Beijing on September 10, 2010, [Herein after referred to as 'The Hague Protocol'], 50 I.L.M 141 (2011) 1) +. See also Samuel .M. Witten "Introductory note to the Convention on the suppression of unlawful acts relating to international civil aviation and the Protocol supplementary to the Convention for the suppression of unlawful seizure of aircraft" 50 I.L.M 141 (2011) 1) +.

58 For example, Nigerian Civil Aviation Act, No. 6, 2006

59 See Hague Convention, 1970, Article 11

60 The Hague Protocol, Article 1. See also Samuel .M. Witten 'Introductory note to the Convention on the suppression of unlawful acts relating to international civil aviation and the Protocol supplementary to the Convention for the suppression of unlawful seizure of aircraft' 50 I.L.M 141 (2011) 1) +.

of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing."[61]

The Nigerian Civil Aviation Act[62] describes the offence of aircraft hijacking as "whosoever on board an aircraft either on the ground or in-flight unlawfully, by force or threat of force, or by any other form of intimidation, seizes or exercises control of that aircraft..."[63]

It is submitted that the elements of the offence are that: the hijacker must be onboard aircraft in-flight or on the ground; and he must unlawfully, by use of force, or threat or any form of intimidation, seizes or exercises control of aircraft. It therefore means that if the hijacker is not onboard, the offence is not committed. Also, the degree of threat, force or intimidation is not defined. It is therefore posited that a small degree of threat or force or intimidation that will endanger the safety of aircraft will suffice.

The prominent characteristics of all the definitions and descriptions of the offence of aircraft hijacking is "unlawful seizure of aircraft by force or threat". It should be noted that looking at the history of aircraft hijacking up to date, aircrafts were hijacked for so many reasons. While some were hijacked for ideological reasons, others were hijacked for political and religious reasons.

It therefore, posits that the offence of aircraft hijacking needs not only be committed onboard aircraft in-flight, same may be committed before take-off or while the aircraft is in operation on the ground for whatever reason.

## 3. Who are the Air Terrorists?

In the context of Aviation security, the poser cannot be properly addressed without tracing the incidents of air-terrorism. From 1931 till date, over 1000 aircrafts have been terrorised and subsequently hijacked.[64] Three different categories of air-terrorists exist. Firstly are the terrorists who could not pilot the aircraft but seize it and directed the pilot–in-command on the route to follow. Secondly are those terrorists who are well trained as pilots that hijack the aircrafts and take over the control of the air navigation; and thirdly, the aircraft pilot who seized his own aircraft.

Most of the air terrorisms were committed by a number of terrorists who were neither trained nor endowed with the knowledge of how to pilot the aircraft. They seized the aircraft and commanded the pilot on route to follow. For example, in 1993, the air terrorists hijacked a Nigerian Airway en route Lagos to Abuja and command the

61 The Hague Protocol 2010, Article 3

62 Nigerian Civil Aviation Act, No 6, Vol. 93 (61), 2006. [Herein after referred to as the Act]

63 ibid, Section 57(1)

64 Rodney, W, *How Safe Are Our Skies? Assessing the Airlines' Responses to Terrorism* (U.S.A: Praegar Publishers)17. See also 'Flight Safety Foundation: Aviation Safety Network'< htpp://aviationsafety.net/statistics/period/stats.php? > accessed 5 May 2015. For further discussion on the history of air-terrorism, see Ismail-Adua (n 44)41-54

Pilot-in-Command to change his route to Niger Republic.[65] This pattern of seizure is different from the terrorists who are well trained on how to pilot the aircraft. The trained terrorists always take the advantage of aeronautical knowledge to hijack the aircraft and divert same to the country of their choice or use the aircraft as weapon of mass destruction. For instance, on September 11, 2001, well-trained terrorists hijacked and piloted four United States of America aircrafts. The aircrafts were used as weapons of mass destructions.[66] Recently, it has been proved that a Pilot or Co-pilot has the tendency of committing the offence of unlawful seizure of aircraft. In February, 2014, an Ethiopian Airlines Flight ET 702 (Boeing 767-300ER) carrying 202 passengers flying from Addis Ababa to Rome was hijacked by a Co-pilot, Hailemedehin Abera Tagegn, having waited for the Pilot-in-Command to go to the toilet before locking himself in the aircraft compartment. He thereafter "radioed Geneva to request permission for an emergency refuelling, before setting off an alarm indicating that the plane has been hijacked". The aircraft landed safely at Geneva Airport. Passenger(s) neither sustained injury nor dead was recorded.[67] It is submitted that the action of the co-pilot is a clear breach of trust reposed in him by his employer, the Ethiopian Airlines. Redwan said:

> *His action represents a gross betrayal of trust that needlessly endangered the lives of the passengers that a pilot is morally and professionally obliged to safeguard.*[68]

The event has clearly showed that it is not only the passengers that have the tendency to commit the offence of air-terrorism. Aviation employee and co-pilot have also been on the register of the offenders in the context of air-terrorism.

It is not an understatement to state that passengers and pilots including co-pilots have roles to play in aviation safety and security, especially in combating air-terrorism. This paper is outside the scope of the roles of pilots in maintaining aviation security. Thus, what are the legal roles of passengers in combating air-terrorism?

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65 Wale, A, The June 12 Nigeria Airways Plane hijack: The Untold Story, *The Nation*,(Nigeria, 22 June 2009)Foes of Nigeria Rulers Hijack Plane to Niger <http://www.nytimes.com/1993/10/26/world/foes-of-nigeria-rulers-hijack-plane-to-nigerhtml>accessed 14 April 2012. Most of the hijacking of aircraft were committed by terrorists who have no knowledge of how to pilot the aircraft.

66 New World Encyclopaedia <http://www.newworldencyclopedia.ng/entry/hijacking >, accessed 22 February 2012; Jefferey, M.A and Jefferey, S.F, *Practical Aviation Security: Predicting and preventing Future Threats*, (Elsevier Inc., USA, 2009) 72-76; See also, Elias, B, *Airport and Aviation security: US Policy and Strategy in the Age of global Terrorism* (Auerbach Publications Taylor & Francis Group, USA 2010) 49-50

67 'Ethiopian Airlines Co-pilot Hijacks Plane to Seek Geneva Asylum', *BBC News*(London, 17 February 2014< http://www.bbc.com/news/world-europe-26222674 > accessed 6 May 2015

68 Redwan Hussein, Ethiopia Information Minister, comment at a news conference in Addisa Ababa on 17 February 2014, See 'Ethiopian Airlines Co-pilot Hijacks Plane to Seek Geneva Asylum',*BBC News* (London 17 February 2014)< http://www.bbc.com/news/world-europe-26222674 > accessed 6 May 2015

## 4. The Tokyo Convention 1963 and Passengers' Roles in Combating Air-Terrorism

### I. The Tokyo Convention 1963

The inapplicability of Convention on the High Seas, 1958[69] to address the offence of aircraft hijacking in the late 1960s prompted the international community under the auspices of the International Civil Aviation Organization[70] to set up a legal committee to look at the dramatic increase in the offence of aircraft hijacking.[71] At the committee level, the Mexican Representative to the ICAO Council submitted a proposal on airport security to the legal committee. The proposal was referred to the Sub-committee where it was decided that the offences committed onboard aircraft be fully examined with specific reference to the issue of jurisdiction, because some states lacked jurisdiction to try hijacking offence, while some conferred jurisdiction to their national courts. In addition, there was no international law to deal with such situation. To avoid conflict of jurisdiction and double punishment for the offender, something urgent needed to be done.[72] Thus, in 1962, the committee met in Rome to draft a Convention on Crime committed on Board Aircraft. A draft copy was submitted to the international community for screening and comments. Between 20$^{th}$August-14$^{th}$ September1963, a diplomatic conference was held for the final ratification and approval from the international community. The Convention was finally concluded on 14 September and entered into force on 4 December 1969.[73] 185 states have so far ratified the Convention.[74] Nigeria ratified on 7th April 1970, and entered into force on 6$^{th}$ July 1970.[75]

It is submitted that the intended aims and objectives of the Convention are to prevent and suppress the offence of aircraft hijacking; to provide for uniform rule on the exercise of jurisdiction over the offence onboard aircraft; and to settle the conflict of jurisdiction between the international communities. In addition, it is to recognise the offence of aircraft hijacking as an international crime; and to maintain good orderliness and discipline onboard aircraft[76] by expressly obliged the Pilot-in-

69 Convention on the High Seas, 1958 done at Geneva on 29 April 1958 and entered into force on 30 September 1962. See United Nations Treaty Series, Vol.450, 82.

70 The International Civil Aviation Organization is one of the United Nations Organization established in 1944 pursuant to article 43 of the Convention On International Civil Aviation 1944, done at Chicago on 7 December 1944 and entered into force on 4 April 1947, 15 UNTS 295, 61 Stat. 1180. T.I.A.S No. 1591. [Hereinafter referred to as ICAO].

71 Diana M. Stanai, 'AVSEC Convention',(2010) 16 (5) Global Journal of Airport and Airline Security 10-12

72 Ruwantissa A, *Aviation Security* (Ashgate Publishing Co. Ltd., Aldeshort 1998) 144-145

73 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft, 1963, [hereinafter referred to as 'The Tokyo Convention', 704 UNTS 219, 20 U.S.T 2941, T.I.A.S No. 6768

74 Tokyo Convention Inventory of International Non-proliferation organization and Regime, Centre for Non-proliferation studies, < http://www.nti.org research/official.doc/inventory/pdf/airterr.pdf > accessed 7 May 2013

75 < http://www.icao.int/secretariat/legal/List%20of20Parties/Tokyo> (accessed 7 May 2013).

76 Nancy D. Joyner, *Aerial Hijacking as an International Crime* (United State of America: Library Congress Catalogue Publication 1974)127; Sami Shubber, *Jurisdiction Over Crimes Committed On Board Aircraft* (Neitherland: Martinus Nihoff, The Hague 1973)45; Diana,12. For a detailed discussion see Ismail Adua (n 44)83-84

command and airlines passengers to perform very important roles to prevent unlawful interference with the civil aviation. The roles of passengers will therefore be considered in this paper.

## II. Expected Roles Of Passengers In Combating Air Terrorism

Neither the Hague Convention 1970 and the Hague Protocol nor other International Conventions on Aviation Security defines passenger(s). However, it may be defined as "the person who concludes a contract of carriage by air with a carrier, with a view to being taken from one place to another in exchange for a determined remuneration".[77] To qualify as a passenger, a person must have entered and concluded a contract of carriage by air with an airliner; there must be an agreement of carriage from one distinction to another; and there must be a consideration for the duty performed by the airliner. In *Laroche v. Spirit of Adventure (U.K.) Limited*,[78] it was held that a person is not a passenger in an aircraft unless he is in it for the predominant purpose of being conveyed from one place to another."

In this connection, the Fountain Count Chambers opined that "an employee of a carrier who is working on the flight (for example, an air steward) is an example of someone who will not be a passenger".[79] In addition, a pilot who is directing the affairs of the aircraft would not be regarded as a passenger.[80] One would therefore argued in another way that an air steward or a pilot who is travelling on a personal basis will be regarded as a passenger because his employment as air steward or pilot is incidental to the travel and not the reason for it.[81]

Safety and security of aircraft is not only for the aviation security practitioners including the airline operators and airport operators across the world. Passengers are taking into consideration in this crusade within the global aviation security domain. That is why the international community has through the Tokyo Convention 1963 designated the expected roles of passengers in combating air-terrorism. The Convention goes thus:

> *"The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization who he has reasonable*

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77 Federico N. Videla Escalada at 374

78 Court of Appeal, (2009) EWCA Civ. 12 January 2009

79 Fountain Court Chambers at 54

80 See Re Air crash near Cali. Colombia on December 20, 1995, 26 Avi 15. 109 (SD Fla, 1997). See also Eg Re Mexico City Air crash of 31 October 1979, 708 F2d 400 (9th Cir, 1983) 17 Avi 18. 387. Also, student pilots flying with an instructor have been held not to be a passenger: *Johnson Estate v Pisdike* (1989) 1 S & Bb AVR VII/337 (1989) 3WWR 207 (sask). *See also Stc Mutu ells d'Assurance A'eriennes v Gauvain (1967) 21 RDA 436*

81 ibid

*grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons, or of property therein.*[82] *Emphasis added*

On one hand, the general aim of the article is to maintain safety and security of aircraft, passengers and the pilot while onboard aircraft. On the other hand, the specific aim and objective is to specify the expected roles of the crew members (outside the scope of this paper) and passengers in combating air-terrorism.

The expected roles of passengers according to the article are examined here under:

**(a) Assistance to restrain the terrorist**

Passengers are obliged to assist the pilot-in-command in restraining the terrorist or unruly passenger(s). Request and/or authorisation from the pilot-in-command to the passengers are the condition precedents to the performance of this obligation. Unlike the crew members, passengers are not therefore required to perform this role.

The discrepancy in the roles of crew members and the passengers emanating from the use of the words "request or authorization, and require" need further clarification. Longman Advance Dictionary of Contemporary English interprets the word *Request* to mean, "to ask for something politely or formally".[83] Thus, the Pilot-in-Command needs to ask for the help of the passengers to restrain the terrorist(s), otherwise such assistance is not required. "Authorization" has been defined to mean "official permission to do something".[84]Black's Law Dictionary defines it to mean "to give legal authority or to empower".[85] In this context, a passenger must be empowered or permitted to assist in restraining the terrorists. This is a clear contrast to the role of crewmembers who need not ask for the permission of the Pilot-in-Command before they could perform their expected roles. This is because the word "require" as used in the Convention could mean "to need or make necessary".[86] Therefore crewmembers are not to ask for the permission of Pilot-in-Command before they could restrain the terrorist(s).

The reason why in the case of passengers, the Convention adopts the phrase *may request or authorize* to assist in restraining the terrorists on one hand; and on the other hand, in the case of crewmembers, the phrase *may require or authorize* to assist in restraining the terrorists has been commented on by a writer. He comments thus:

*"For reason of different relationships existing between the commander and the crew and the passengers, since the former are subordinated in relation of dependence, while the latter*

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82 Tokyo Convention, 1963, art. 6 (2)

83 *Longman Advance Dictionary of Contemporary English*, (New edn,United Kingdom: Longman Group Ltd.1995)1204; See also *Cambridge Advanced Learner's Dictionary* (New edn,Cambridge, Cambridge University Press 2003) 1060

84 Longman (n 83) 73; See also Cambridge (n 83) 72

85 Bryan, A.G, *Black's Law Dictionary*, (8th edn, USA, Thomson West Group Ltd., 2004)143

86 Cambridge (n 83) 1060; Longman (n 83) 1204

*only are so for maintaining the necessary discipline for the adequate performance of the flight, the Convention foresees two different possibilities concerning the assistance that the commander may require.*[87]

The crew members who are subordinate to the pilot are under obligation to comply with the a legitimate order of their superior officer (pilot) to act in any way for the safety and security of the entire aircraft navigation, whereas the passengers only need to act should their actions are of necessity to the safety and security of air navigation.[88]

**(b) Power to restrain the terrorist**

In the interest of aviation safety and security, passengers are under a duty to restrain any person, without prior authority of the pilot-in-command, when they deem it necessary to do so. This role can only be performed in an emergency situation to take reasonable measure to prevent the commission of the offence. This is further subjected to the exercise of reasonable ground believing that the offence is about to be committed.

Although, Convention does not define what is reasonable preventive measure or reasonable ground. It is posited that "reasonable preventive measure" as used in the Convention could be described as an obligation to restraint the offender(s) from committing the offence. Since no passenger could carry out other functions of the aircraft commander in the event of attempted commission of the offences.[89]

It is further submitted that passengers must exercise this right with caution and in accordance with the circumstances of each case. For example, an attempt to forcefully open and enter the cockpit of an aircraft could be described as a reasonable ground on the part of passengers that an offence about to be committed, for which the passengers could reasonably carry out their obligation to restrain without aircraft commander's authorization. This passengers' role has been carried out twice in 2011.

In 2011, an attempt was made to hijack a Turkish Airline Flight 1754, flying from Oslo to Istanbul when it was in Belgian airspace. However the attempted hijacking failed when some passengers over-powered the hijacker and the aircraft safely landed at Ataturk International Airport where the suspect was arrested.[90] Again, in April 2011, an Italia aircraft A321-100 with registration no 1-BIXA en route Paris, France to Rome with 131 passengers was attempted to be hijacked thirty minutes prior to its landing in Rome. A man, one of the Kazakhstan delegates to the UNESCO turned

87 Federico N. Videla Escalada, *Aerinautical Law* (Neitherlands: Sijthoff and Noordhoff Publishers 1979) 217

88 ibid 218

89 Other functions and roles of the Pilot-in-command include right to disembark unruly passenger(s) and to deliver such person(s) to the competent Authority. See Tokyo Convention, 1963, arts. 8 and 9

90 Wires & Bergens, 'Turkish Airlines hijack Attempt Foiled by Passengers', *Daily News*(1 May 2011) <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=man-attempts-to-hijack-thy-plane-in-istanbul-reports-say-2011-01-05> accessed 11 April 2012

into a lunatic, stood up from his seat in front of the airbus, walked towards a flight attendant, pulled what appeared to be a small knife and threatened to cut the throat of the attendant. The cabin crew and other passengers subdued him. A doctor who was one of the passengers onboard pulled him down and injected the attacker with sedative. The aircraft continued for safe landing, the attacker was arrested and put in custody by the Italian police.[91]

The difference between the obligation of passengers to assist in restraining the offender and outright role to restrain lies in the exercise of judgement. In the former, the right to exercise reasonable judgement lies with the Pilot-in-Command, thus, consent of the commander is highly required, while in the latter, the passengers have the right to exercise their judgements as to what amounts to reasonable grounds without commander's consent.

### (c) Cooperate with Pilot-in-command

There is no argument as to the fact that the Pilot-in-Command, his crew members and passengers are responsible for the maintenance of good orderliness onboard aircraft in flight. In this circumstance, 100% cooperation and assistance of passengers are highly required to fully implement the provision of the Convention as "it is possible that, in some situations, urgent decisions are necessary before the commander is able to intervene".[92] Such circumstance includes an attempted hijacking of aircraft.

It is submitted that the above roles can only be performed where the terrorists on board aircraft in flight attempt to unlawfully interfere with the safety and security of the aircraft.

However, a challenge to the performance of these roles is passengers' lack of awareness of the existence of what is expected of them in the event of attempted hijacking or any of the unruly behaviour on board aircraft in flight. The concern of most passengers is to board the aircraft and perform the journey to their destination. They do not as such see to the security of the aircraft while on board in flight. The whole security domain while in-flight has been totally left into the hands of the Air marshal.

The next question is what is the expected role of passengers in the event of a Pilot-in-command or a Co-pilot who unlawfully seizes its own aircraft?

What becomes of passengers role(s) in this circumstance still not clear. Because the roles of passengers in connection to combating air terrorism while on board aircraft

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91 Simeon Hradecky, 'Alitalia A321 Enroute on April 24th 2011, Attempt Hijack', *Aviation Herald* (24 April 2011 <http://avherald.com/h?article=43b7e3ef&opt=1> accessed 11 April 12; 'Attempting Hijacking 2011, ASN Aircraft Accident 24-APR-2011 Airbus A321-1121-BIXA',<http://www.bbc.co.uk/news/world-europe-13184416> accessed 11 April 2012

92 Federico N. Videla Escalada, *Aerinautical Law*, 218

in flight is only limited to the cabin area of the aircraft. No any other person except the pilot and its co-pilot are allowed to enter the cockpit compartment.[93]

Apart from the fact that the compartment is restricted to pilot and co-pilot, other challenges facing the passengers in this circumstance are locking of cockpit door, and inability of the passengers to pilot the aircraft.

The ICAO Resolution A17-10 of 1970 obliges the airliners to always lock the cockpit door of the aircraft[94] to restrict movement within the area. It is submitted that by this directive, the door would be under locked and key before, during and after the pilot might have unlawfully seized the aircraft he was piloting. This therefore, constitutes a serious challenge in the exercise of passengers' role to restrain pilot(s) who unlawfully seized his own aircraft, as was the case in a co-pilot who hijacked Ethiopian airlines in February 2014.

Furthermore, inability of passengers to pilot the aircraft is another challenge to the exercise of right to resist air-terrorism. Even if the passengers were able to break into cockpit compartment of the aircraft, none of the passengers onboard the aircraft may have knowledge of how to pilot the aircraft. This may lead to total breakdown of law and order which may eventually lead to destruction of aircraft, as it happened in 9/11 event in 2001. In this incident, one of the four US hijacked planes was crashed in Pennsylvannia when the passengers sought to take back control of the aircraft before it, too could be used as weapon of mass destruction.[95]

## 5. Conclusion and Recommendation(S)

Terrorist(s)' attempt to hijack a commercial aircraft whether onboard aircraft in flight or when the aircraft is in service amounts to air-terrorism. It has been shown that it is not only the airlines passengers that have the tendency of committing the offence of aircraft hijacking. Airlines pilots and/or Co-pilots can also commit the offence.

As stated in the Tokyo Convention 1963, pilots and airlines' passengers are expected to perform certain roles to maintain good orderliness while onboard aircraft. Thus, passengers can assist the pilot to restrain any unruling passenger, on one hand, and on the other hand they have the right to restrain passengers without prior authority from the aircraft Pilot-in-Command, as a matter of urgency to secure the safety of aircraft

93 Cockpit compartment of an aircraft can be described as an area where the aircraft is being piloted.

94 Appendix A to Resolution A17-10(1970), para 33 –General security measures aboard aircraft in-flight), cited as 9 *ILM* 1278.See also Extracts from Annex 6-operation of aircraft, part 1-international commercial air transport Aero planes, standard 13 section 1. Elias defined cockpit door locking as a "short term in-flight security measure that consist of door modifications for stronger internal locking devices that can only be unlocked from inside the flight deck and reinforced bars to bind attempted force entry into the cockpit". Elias, 236; See also Howard M, *Double Door Security System for Aircraft and the Like* (Patent Number US 669679 B2, 6 March 2002 at 1); See also Gerald, D.S, *Aircraft security system* (Patent Number US 6474599, 5 November 2002,1)

95 See Robert Weston Ash, 'Square Pegs and Round Holes: Al-Qaeda Detainees and Common Article 3'(2007)17 (2), Indian Journal of International Law, 269. Se also, Daniel Byman, *Deadly Connections: States that Sponsored Terrorism*( NewYork: Cambridge University Press,2005) 215

and themselves. It can therefore be posited that security onboard aircraft in flight or in service belongs to everybody and belongs to nobody. That is, everybody onboard aircraft must cooperate with the Pilot-in-Command to maintain aviation security functions. It has also been found that lack of awareness of these roles is a major concern to the performance of these general roles of passengers.

It has been found that the role(s) of passengers where a pilot hijacked his own aircraft is still not clear. This is due to the fact that the performance of passengers' role(s) is limited to cabin area of the aircraft. Also, the locking of cockpit door further complicate this challenge as the door would have been locked before the pilot will commit the offence. The issue of pilot hijacking is a serious concern that is still subjected to further research with a view to finding solution to this challenge in the global aviation domain.

Following the concern of aviation security practitioners globally, the paper therefore recommends that Pilots should always be made to attend periodic medical check up to ascertain their level of psychology. Some of the pilots who had hijacked their aircrafts might have suffered from psychological problem. For example, it has been said that the co-pilot who hijacked Ethiopian Airlines Flight No ET-702 was psychologically upset over the death of his uncle.[96]

Also, Passengers should desist from breaking or damaging the cockpit door to gain entrance into the compartment as this may turn to be the end of their lives. The pilot or co-pilot hijacker may eventually crash the aircraft if the pressure is too much on him. For example, the co-pilot who hijacked the Ethiopian Airlines ET-702 threatened to crash the aircraft, probably the pressure was too much on him.[97]

Furthermore, passengers should be adequately informed of their roles to be played in event of suspecting a criminal while on board aircraft on one hand, and on the other hand, on how to carry out these important roles.

In addition, the Convention did not mention form(s) of restraint. It is suggested that restraint may be in form of injecting the criminal with sleeping injection, or helping the Air Marshall to handcuff the criminal. Cooperation of all stakeholders while on board aircraft is a panacea to the performance of passengers, pilot-in command and Air Marshall Security roles.

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96 See Ted Thornhill, 'Co-pilot Hijacked Ethiopian Airlines'< http://www.dailymail.co.uk/news/article- > accessed 18 July 2015

97 'Ethiopian Airlines Co-pilot Hijacks Plane to Seek Geneva Asylum'*BBC News* (London) < http://www.bbc.com/news/world-europe- > accessed 18 July 2014