

Aerial Stow-Away as A Threat to Aviation Security in International Air Transport: Perspectives from Nigeria

By

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ABSTRACT

Air transport is one of the fastest modes of transport. It saves time and discounts costs. It is, however, being threatened by many emerging phenomena. One of such phenomena or threats is aerial stow-away. This phenomenon appears innocuous in terms of its potential havoc. It is, however, a threat in disguise to international air transportation. There is no specific international treaty to combat this menace. Domestic legal mechanism is also scanty in this respect. This paper argues that stow-away in international air transport is not a mere adventure. It is a potential threat to the security of air navigation. The paper contends further that an appropriate legal framework should be forged for combating it. The International Civil Aviation Organization is in a position to initiate this move. At the domestic level, meanwhile each nation should also have a legal template, which will complement or be modelled after the international one. The paper concludes that failure to promptly nip this embryonic threat to aviation security in the bud will spell calamity to the airline industry. The paper recommends an appropriate prompt legal approach.

Introduction

Air travel is one of the safest modes of transport in the world. It is, however, being beleaguered by many threats. The popularly acknowledged threats consist in aircraft hijacking, aircraft bombing, and myriads of criminal acts committed against the safety of air transport. The most recent, but seemingly innocuous, of these threats is aerial stow-away, a phenomenon that general consensus associates with maritime affairs. It has now gained notoriety in civil aviation, particularly in the continent of Africa. Civil aviation in Africa is faced with many challenges. One of such challenges is stow-away.

A Brief Factual Background

Nigeria has the highest incidence of this form of terrorism in embryo². In March 2010, one Okechukwu, a Nigeria, was found dead in Lagos (Nigeria) in the nose wheel compartment of a US-registered Delta Airlines aircraft, having illegally flown with the aircraft from America to Nigeria³. On August 24, 2013, one Daniel Ohikena, a 13-year-old boy, hid himself in the well wheel of an Arik Airline aircraft from Benin City to Lagos, Nigeria. He was lucky to be found alive⁴. On September 14, 2012, one Jose Matada, a 26-year-old Mozambican man, fell

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2. Eze, Chinedu, "Poor Security Management in Airports Exposes Passengers to Danger", *THISDAY* Newspaper, November 29, 2013, page 19.

3. Eze, Chinedu, "Dead Stow-aways: Posers on Airports Security", *THISDAY* Newspaper, November 2, 2012, page 34.

4. Adekola, Shola, "The Role of National Security at the Airports", *Nigerian Tribune*, September 5, 2013, page 23.

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from the undercarriage part of a Heathrow-bound aircraft from Angola. His corpse dropped off the aircraft onto a street in Mortlake, South West London as the aircraft lowered its landing wheels preparatory to landing in Heathrow Airport⁵. On June 18, 2015, a stow-away man, out of the two of them, was found dead in a British Airways aircraft. His corpse fell on a shop in London. The other was hospitalized. Both were travelling from Johannesburg in South Africa to London⁶.

From 1947 until September 2012, there were 96 known stow-away attempts globally in the wheel wells of 85 separate flights, out of which 73 resulted in death with only 23 survivors⁷. Despite the excuses advanced by those who engage in it, the act poses a serious threat to air passengers as stow-away can plant explosives in the aircraft. This inevitably thrusts a great duty on the member countries of the African Civil Aviation Commission (AFCAC), including Nigeria, to devise an appropriate legal approach to the emerging phenomenon so as to meet up with the security ideals of the International Civil Aviation Organization. The International Civil Aviation must set the pace.

Nature of Aerial Stow-Away in Air Transport

One fact that may initially be debated is that aerial stow-away is an act of terrorism. A deeper look at the act will, however, reveal that it is a potential act of terrorism. It is an unauthorized travel, which is criminally wrong. It comprises in hiding in a part of the aircraft from the time of departure to the time of arrival without the knowledge of either the flight crew or the relevant aviation regulatory agencies. On some other occasions, it happens by the connivance or collusion of relevant aircraft crew or aviation security personnel.

Strictly speaking, about five forms of terrorism have been identified: individual or group terrorism, international state terrorism, state regime or government terror, state sponsored, or state supported terrorism, and national liberation struggles for self-determination⁸. Terrorism is a multi-faceted phenomenon which manifests itself in a variety of ways, and this usually leads lawmakers at both the national and international levels to adopt an equally diverse range of approaches to the problem of terrorism⁹. As an inchoate act of terrorism, aerial stow-away is capable of causing harm not only to the stow-away but also to non-combatant passengers in the aircraft. In the view of an erudite author, terrorism comprises in any of the following:

...attacks which may cause death; attacks upon physical integrity; kidnapping or host taking; 'causing extensive destruction' to specified public property or any private property 'likely to endanger human life or result in major economic

5. Quinn, Ben et al. "Flight Stow-away in Critical Condition as Police Investigate Links with Fall Victim", available at www.theguardian.com/uk-news/2015/Jun/19.stowaway-fell-todeath-plane-London-shop-heathrow-richmond, accessed on 6/8/15.

6. Topham, Gwyn, "One of Four Plane Stowaways Can Survive, but London case is astonishing", available at: www.theguardian.com/world/2015/Jun/19/one-in-four-stowaways-survive-London-astonishing, accessed on 6/8/15.

7. Shadare, Wole, "Stowaways Puts Nigeria's Aviation Security to Test", *THE GUARDIAN*, August 30, 2013, page 45.

8. Jodoin, Sebastien, "Terrorism as a War Crime" (2007) Volume 7, *International Criminal Law Review*, page 78.

9. *Ibid.*

loss'; 'seizure of aircraft, ships, or other means of public or goods transport'; specified offences connected with nuclear, biological, or chemical weapons; 'release of dangerous substances or causing fires, floods or explosions' with the effect of endangering human life; or 'interfering with or disrupting the supply of water, power or any other fundamental natural resource' with the same effect. Threatening to commit any of these eight types of act is also included¹⁰.

In as much as aerial stow-away is an act that may cause death and extensive damage to the aircraft by the release of dangerous substances capable of causing explosion in the aircraft, it is an act of terrorism.

Again, since the ulterior motive for engaging in aerial stow-away may be to cause death to innocent passengers and persons, it has been appositely described as an intentional act of targeting non-combatants, and consequently an act of terrorism¹¹. An attempt to unlawfully travel with an aircraft without paying air fare should also be made a criminal offence. Any errant person found at the airport airside, particularly at the embarkation area of the airport, without cogent reason for his suspicious movement should be arrested. But before this can be done, the law must have provided for it. Curbing both the act and the attempt will enable air travellers, irrespective of their continental boundaries, to experience the joy of air travel, and not the ordeal of airport¹².

Reasons for Aerial Stow-Away Incidents in Air Transport

Many reasons account for aerial stowaway. Exposure to the marvels of technological innovations, as typified by the use of the internet, availability of home movies and terrorist-packaged books, among others. Sheer sense of adventure usually harboured by the young ones is another possible reason for embarking on stow-away. In developing African countries, the desire to leave the shores of a person's home country for another foreign country is another important reason. This is common among the desperate youth who think that they can never make it unless they travel out of their home country. Usually, this is informed by an intense longing to search for greener pastures in other countries but without the wherewithal to transport themselves, due largely to poverty that is affecting many citizens of the developing African countries, including Nigeria.

Another reason is porous security or lack of security in Nigeria's airports. Of the twenty-two airports being managed by the Federal Airports Authority of Nigeria, only few of them have perimeter fencing. Cattle invade the Nigerian airports at will. When a plane is coming to land, it runs into confusion because the tarmac has been taken over by cattle. In 2005, some cows rammed into an Air France plane at the Port Harcourt International Airport, Omagwu, Rivers State. This does not project Nigeria's image in good light¹³. This is also a breach of Annex 17, which specifically deals with safeguarding international civil aviation against acts of unlawful interference which requires that each contracting state should have measures in place in order

10. Peers, Steve, "EU Responses to Terrorism" (2003) Volume 52, *International and Comparative Law Quarterly*, pages 228-229.

11. Herschensohn, Bruce, "War Against Terrorism" (2004) Volume 9, *NEXUS* 49, page 50.

12. *Ibid* at page 54.

13. Osa-Okunbor, Kelvin, "The New Grazing Field," *The Nation*, Tuesday, March 15, 2011, page 35.

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to ward off unauthorized entry to the aviation play field¹⁴. This state of things on the nation's airports will encourage surreptitious movements of people into the airports since there are many roads that lead to the airports.

The subterranean reason, unfortunately, may eventually be to plant bomb or any explosive substance in any accessible part of an aircraft with a view to precipitating an aerial evil of highest magnitude by causing death or injury to innocent passengers, or even damage to the aircraft. No matter the cogency of any adduced reason for engaging in stow-away, the danger and possible losses inherent in the act far outweigh the benefits. The nature of the act requires an urgent and condign legal and regulatory attention from the International Civil Aviation Organization, which each member country will later adopt or modify, as the peculiar circumstances of each member country demands.

Inadequacy of The Existing Legal Regime to Curb Aerial Stow-Away

The Nigerian criminal justice system is rooted in the principle of “no law, no crime”. Therefore, the principle that a person cannot be punished for an act that has not been criminalized in a written law is sacrosanct¹⁵. The domestic criminal statutes in Nigeria do not specifically criminalize aerial stow-away¹⁶. In fact, being an “international” office, it is the International Civil Aviation Organization that should tackle this phenomenon headlong. One important concession is that many international law instruments have been made under the auspices of ICAO to arrest aviation insecurity. These instruments are, however, not adequate to precisely tackle aerial stow-away. A brief survey of some of the applicable aviation security conventions will buttress this point.

There is first the international convention that tackles offences and certain other acts committed on board aircraft¹⁷. The Convention applies in respect of offences against penal law and acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board¹⁸. The title of the Convention expressly makes it inapplicable to offences “off board” an aircraft. This is because aerial stow-away “passengers” are not on-board passengers. Some of them sandwich themselves in the wheel or any open or available crevice of the aircraft without due authorization. The on-board-off-board dichotomy of the Convention, therefore, makes it inapplicable to aerial stow-away, a dangerous threat to aviation security.

14. Shadare, Wole, “Nigeria: Insecurity in the Air, on Tarmacs, Carousels”, *The Guardian*, Friday, March 11, 2011, pages 21-13.

15. Section 36(12) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

16. For example, the traditional criminal statutes in Nigeria, the Criminal Code, and the Penal Code, do not specifically deal with it as constitutionally required; the Nigerian Terrorism Act does not also squarely deal with it.

17. Known as the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo, on 14 September 1963 (Tokyo Convention); see https://www.mcgill.ca/iasl/files/iasl/tokyo_1963.pdf accessed on 16/7/16.

18. Article 1(a) & b, *Ibid.*

The second international aviation security Convention is on the suppression of unlawful seizure of aircraft¹⁹. What informed the making of the Convention was the realization that unlawful acts of seizure or exercise of control of aircraft in flight jeopardize the safety of persons and property, as well as seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation²⁰. The Convention provides that any person who on board an aircraft flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or is an accomplice of a person who performs or attempts to perform any such act commits an offence²¹. This Convention is clearly on aircraft hijacking, and not specifically on aerial stow-away. Stow-away appears innocuous. Hijackers behave like normal passengers by boarding the aircraft the normal and proper way, but with an ulterior and criminal motive. Therefore, this Convention does not specifically address stow-away.

Another important international aviation security convention is on the suppression of unlawful acts against the safety of civil aviation²². The fundamental reason was that the States parties to the Convention considered that unlawful acts against the safety of civil aviation jeopardize the safety of persons and property, seriously affect the operation of air services, and undermine the confidence of the peoples of the world in the safety of civil aviation²³. Even though the Convention covers many offences, it does not specifically address the unlawful act of stow-away as constitutionally contained in Section 36(12) of the Constitution of the Federal Republic of Nigeria²⁴.

There was later a Protocol to further expand the scope of the Montreal Convention of 1971. It is for the same reason of suppression of unlawful acts of violence at airports serving international civil aviation²⁵. The Protocol introduces additional offences, but the new offences do not specifically include aerial stow-away²⁶. The last, but not the least, Convention is the one on the marking of plastic explosives for the purpose of detection²⁷. The Convention was made to prevent plastic explosives from being used for terrorist acts by marking them for the purpose

19. Known as the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague, on 16 December 1970 (The Hague Convention 1970); see <https://www.mcgill.ca/iasl/files/iasl/hague1970.pdf>.

20. See the Preamble to the Convention.

21. Article 1(a) & (b) of the Hague Convention, *Supra*.

22. Known as the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal, on 23 September 1971 (Montreal Convention 1971); see <https://www.mcgill.ca/iasl/files/iasl/montreal1971.pdf> accessed on 16/7/16.

23. See the Preamble to the Convention.

24. See Article 1 of the Montreal Convention, 1971.

25. Known as 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, signed at Montreal on 24 February 1988 (Montreal Protocol 1988); see <https://www.mcgill.ca/iasl/files/iasl/montreal1988.pdf>, access on 16/7/16.

26. See Article 11 of the Protocol.

27. Known as the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal, on 1 March 1991 (Montreal Convention 1991); see <http://www.mcgill.ca/iasl/files/iasl/montreal1991.pdf>.

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of detection. The Convention, therefore, is not for the creation or recognition of the unlawful act of aerial stow-away²⁸.

It is important to note that the Annex, made pursuant to the Chicago Convention, on aviation security²⁹ does not criminalize aerial stow-away in the manner envisaged by the Constitution of the Federal Republic of Nigeria, 1999, as amended, as it is just an omnibus provision that does not address this phenomenon of stow-away.

Conclusion and Recommendations

International air transport must be safe and secure. Any appearance of threat to these objectives must be resisted. The International Civil Aviation Organization must set an appropriate legal machinery in motion to address this innocuous but potentially damaging phenomenon-stow-away. The International Civil Aviation Organization, in its quasi-legislative capacity, should provide the regulatory framework for the curbing of all acts and incidents of stow-away. The International Civil Aviation Organization can do this by way of a new convention on “Seemingly Innocuous Acts Against the Safety of Civil Aviation”³⁰. The global aviation regulatory body can, in the alternative, amend one of the international aviation security conventions, particularly the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention of 1971), which will then include provisions on aerial stow-away as items of amendment.

The International Civil Aviation Organization can equally specifically add another annex to its Annexes, which will specifically address the issue of stow-away. Each member country of ICAO will then be directed to domesticate such legal provisions. This will contribute to airport security. The point here is reinforced by the fact that each State and member country of ICAO is under one domestic or international obligation or the other which places great premium on human life and properly, the two likely ultimate targets of the negative side of aerial stow-away³¹. Each member country of the International Civil Aviation must follow suit.

28. See the Preamble to the Convention as well as Article 1 of it.

29. Annex 17 to the Chicago Convention.

30. Laymen who are not experts in aviation matters do not view some activities like stow-away as threats to international civil aviation.

31. Such obligations may arise from international instruments like the Universal Declaration on Human Rights or African Charter on Human and Peoples Rights. See Eicke, Tim, “Terrorism and Human Rights” (2003). Volume 4, *European Journal of Migration and Law*, pages 453-454.