

UNAUTHORIZED AIRSPACE INFRINGEMENTS AND USE OF WEAPONS AGAINST CIVILIAN AIRCRAFTS FROM AN INTERNATIONAL LAW PERSPECTIVE*

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Abstract

The immense growth of the air transport business has attracted the highest level of scrutiny for safety on airspace traffic. Despite the fact that the sky is a vast place with limitless loft and borderless horizon, still, there is an imaginary border line where the concept of jurisdiction applies and is recognized in the legal framework of international airspace law. In the state's perspective, to use force in self-defense in order to protect its national safety, security and sovereignty is an inherent right, as confirmed by Article 51 of the UN Charter. However, the prohibition on using force is expressed to be without prejudice to the rights and obligations of States set out in the Charter. Thus, in truly exceptional circumstances, a state would be entitled to shoot down a civil aircraft if that is the only way to avoid an anticipated greater loss of life. This paper aims to analyze the use of weapons against civilian aircrafts on the context of unauthorized airspace infringements from an international law perspective, in particular towards the principle of self-defense and human rights.

Intisari

Pesatnya perkembangan industri transportasi udara dewasa ini berimplikasi pada kebutuhan akan tingkat keselamatan yang tinggi, terutama dalam mengatur lalu lintas udara. Meskipun ruang udara memiliki luas dan ketinggian yang tak dapat ditentukan ukurannya, terdapat sebuah garis pembatas imajiner yang menjadi tempat bernaungnya konsep yurisdiksi negara sebagaimana tercantum dalam aturan hukum udara internasional. Dalam perspektif suatu Negara, penggunaan senjata untuk membela diri dalam usaha mempertahankan keamanan dan kedaulatan nasional telah dimain sebagai sebuah hak yang tercantum dalam Pasal 51 Piagam PBB. Namun, larangan penggunaan senjata yang ada dalam Piagam PBB cenderung belum dirasa jelas dan memenuhi rasa keadilan dalam menentukan hak dan kewajiban suatu negara. Dalam suatu keadaan yang memaksa, suatu Negara diperbolehkan untuk menembak pesawat sipil apabila hal tersebut menjadi satu-satunya pilihan untuk menjaga keamanan dan menghindari jatuhnya korban jiwa yang lebih banyak. Makalah ini mencoba untuk menganalisis penggunaan senjata terhadap pesawat sipil yang melakukan pelanggaran wilayah udara dalam perspektif hukum internasional, terutama terkait dengan prinsip pertahanan diri (principle of self-defence) dan aspek hak azasi manusia.

Keywords: airspace infringements, use of force, civil aircraft.

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A. INTRODUCTION

The immense growth of the air transport business has attracted the highest level of scrutiny for safety on airspace traffic. Despite the fact that the sky is a vast place with limitless loft and borderless horizon, still, there is an imaginary borderline where the concept of jurisdiction applies and is recognized in the legal framework of international airspace law. Shaw (2003) stated that there existed a variety of theories prior to the First World War concerning the status of the airspace above States and their territorial waters.¹⁶

As aviation technology advanced, several theories on airspace territory denied the right of innocent passage as it no longer fits the factual condition in civil aviation as the fear of threat to national safety, security and sovereignty of a State arises. The mother of airspace law, the 1910 Paris Convention, acknowledged complete and exclusive sovereignty over airspace territory and denied rights of innocent passage of any kind to foreign aircrafts of non-contracting States in a state's airspace territory. The convention granted rights of innocent passage only to civil aircraft of its Contracting States.

There is no acknowledgement of the right of innocent passage in the 1944 Chicago Convention. Moreover, in response to the *usque ad coelum principle*,¹⁷ Article 9c of the Chicago Convention stated that a State possesses the right to require a civil

aircraft to land if it flies over its territory without permission. However, the use of weapons against civil aircraft is prohibited, as the lives of persons on board and the safety of aircraft must not be endangered.¹⁸ Shaw (2003) had also stated that such unauthorized over flight would justify interception and a demand to land.

Martono and Sudiro (2012) noted that a number of incidents have occurred since the 1950s destruction of foreign airspace intruders. In 1955, an Israeli civil airliner namely EL AL Constellation was shot down while cruising from London to Israel. This aircraft entered Bulgarian airspace and was shot by Bulgarian MIG-15 military planes. A similar tragedy also occurred to Korean Airlines flight number KL007 in September 1983. The plane had strayed several hundred miles into sensitive Soviet airspace, resulting in the death of 269 persons. Richard, as quoted by Matte (1984), also noted that there were at least 12 cases of downing of civilian aircrafts in the period of 21 years, including but not limited to DC-7 Red Cross in 1969, DC-8 Alitalia in 1978, Boeing 727 Libya in 1973 and some other cases situated in Congo, Cuba, Angola, Vietnam, Cambodia, Mozambique and Chad.

Huskisson (2005) discussed one recent incident occurring on the 20th of April 2001, when Peru shot down a light aircraft as part of an anti-drug-smuggling campaign assisted by the Government of the United States of America (USA). The shooting down of suspected drug aircraft by countries such as Columbia and Peru is not new, and the success of such operations have relied upon airborne tracking devices which the USA provides. This joint-operation fired two salvos of machine gun

¹⁶ One view was that the airspace was entirely free, another that there was, upon an analogy with the territorial sea, a band of 'territorial air' appertaining to the state followed by a higher free zone, a third approach was that all the airspace above a state was entirely within its sovereignty, while a fourth view modified the third approach by positing a right of innocent passage through the air space for foreign civil aircraft. See Shaw (2003) p. 463

¹⁷ Air rights concept which encoded in Latin phrase '*cuius est solum, eius est usque ad caelum et ad inferos*' means 'for whoever owns the soil, it is theirs up to heaven and down to hell'.

¹⁸ Generally reckoned as principle of 'safety first'. See Article 44a Convention of International Civil Aviation 1944.

fire into a small Cessna floatplane. Unfortunately, the aircraft was not ferrying drugs but rather carried members of American Baptist Missionary Group. An American missionary and her infant daughter were killed by gunfire.

Aside from air force combatant, the use of Man-Portable Air Defense System or MANPADS has also been widely reported in bringing a catastrophic effect. MANPADS, often used by terrorists, criminals, and other non-state actors, are shoulder-fired anti-aircraft missiles. The use of such weapon has posed serious threat to civil aircrafts around the world. The US Bureau of Political-Military Affairs (2011) reported that more than 40 civilian aircraft have been hit by MANPADS's missiles since 1970s which resulted to 28 incidents of crashes and the death of 800 people.¹⁹ The latest MANPADS attack on civil aircraft happened on March 23, 2007 when Trans Avia Export Ilyushin 76TD cargo plane was shot down over Mogadishu, Somalia, killing the entire crew of 11.

In the State's perspective, to use force in self-defense in order to protect its national safety, security and sovereignty is an inherent right, as confirmed by Article 51 of the United Nations (UN) Charter. Aust (2005) noted that it is very difficult for a State to force an uncooperative pilot to land without putting the aircraft or its occupants in danger. However, the prohibition on using force is expressed to be without prejudice to the rights and obligations of States set out in the Charter. Thus, in truly exceptional circumstances, a state would be entitled to shoot down a civil aircraft if that is the only way to avoid an anticipated greater loss of life.

In the recent era of sophistication, the United Kingdom Civil Aviation Authority

with its project named "On Track" (2003), reported that during the 18 month data collection period, there were 165 reports of airspace infringements. The project found that of the 165 reports, 144 were 'infringements' and 21 were 'almost infringements'. Infringements often occur in areas where the amount of free airspace available to general aviation aircraft is restricted. Airspace constrictions or "choke points" are particularly prone to airspace infringements. It is important to note the dangerous position of civil aircrafts in situation of airspace infringements, as some countries have started to apply laws enabling them to use weapon in these situations.²⁰

Status quo has shown that current airspace regulations allowing the use of weapon towards civilian airliners have put civil aviation security into risk. Most airspace infringements happen unintentionally and are usually caused by technical problems or miscommunication between pilots and Air Traffic Controller (ATC) staffs. According to the UK CAA On Track report (2003), pilots reported difficulty in understanding why zone crossing clearances were so often refused without explanation. Here, not only is there a perceived attitude of mistrust between General Aviation pilots and controllers, but airspace policy and procedures are also not well understood by General Aviation pilots who would definitely benefit from a focused education program and improved publicity.

One example of a 'peacefully resolved' case of airspace infringement is the case of Partemavia P-68, an aircraft owned by Cape Air Transport, Australia which landed on Mopah Airport, Merauke,

¹⁹ See MANPADS: Combating the Threat to Global Aviation from Man Portable Air Defense System at www.state.gov/t/pm/rls/fs/169139.htm.

²⁰ In October 2004, Brazil announced that a domestic law had now come into effect to enable it to shoot down suspected drug trafficking aircraft. See Aust (2005) p. 353.

Indonesia without the possession of diplomatic clearance, security clearance, nor flight approval on September 2008. The infringement occurred due to a misunderstanding between Captain William Henry Scott-Bloxam, the pilot-in-command for the aircraft, and an ATC staff from Mopah Airport where the Captain misinterpreted assistance from the staff as flight approval. It should be known that an ATC staff is not in the position to give flight approval²¹ as the Ministry of Transportation issues official flight approval in Indonesia.

B. DISCUSSION

1. State's Self-Defense Principle

Article 2(4) of the UN Charter stated that its Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state. However, Article 51 of the Charter acknowledges the right of self-defense if an armed attack occurs against a Member. This article gives justifications on the use of force based on self-defense principle.

In regards to the particular issue, the application of the self-defense principle to justify the use of weapons against civilian aircrafts has often been conducted heavily-handedly. Firstly, from various incidents of airspace infringements done by civilian aircrafts, there had been no strong evidence that particular States had forcibly conducted such measures of using arms to shoot down the aircraft. From various

reports of civilian aircraft shoot downs, it was found that it was not a terrorist attack as the majority of victims are innocent civilians. Conversely, as Aust (2005) had stated, "if these measures had been taken by the US Government, or had good grounds for believing that it knew, the real intentions of the hijackers of the four US airliners on 11 September 2001, it could have authorized their shooting-down over less populated areas." However, Foont (2007) noted that the aircraft involved were all US flag carrying aircraft operating on domestic routes, which gave a real example to test the criteria and left a question whether it is appropriate to shoot down those aircrafts.²²

Second, there is no strong evidence that the aircrafts were about to launch an attack. Using the self-defense principle to justify the shooting of the aircrafts would breach of the principles of necessity and proportionality. Various scholars, however, has understood the definition of the term 'proportionality' differently. Shaw (2005) questioned whether the term proportionally 'would relate to the damage that might be caused or rather to the scope of the threat to which the response in self-defense is proposed', while Martono and Sudiro (2012) stated that principle the of self-defense shall be in accordance with principle of proportionality, which means that any measure of defense shall not be greater than threat of the attackers.

Moreover, the High-level Panel on Threats, Challenges, and Change on the UN General Assembly Report (2004) noted that Article 51 of the Charter of the United Nations should be neither rewritten nor reinterpreted, either to extend its long-established scope or to restrict it. This is as to allow preventive measures to non-imminent threats and allow its application

²¹ According to Indonesian air law legislation, diplomatic clearance for flight shall be issued by Ministry of Foreign Affairs, while security clearance shall be issued by Ministry of Defense. ATC's assistance shall not be considered as flight approval, but, a part of efforts on safeguarding aviation safety, notwithstanding status of flight approval of the aircraft. See Martono & Sudiro (2012) p. 262.

²² See Foont (2007) p. 722.

only to actual attacks. In considering whether to authorize or endorse the use of military force, the Panel suggested to the Security Council to consider at least five of the following criteria of legitimacy:

- a. Seriousness of threat, by means, whether the threat harms the State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force. In the case of internal threats, the Security Council shall consider whether it should involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended or not.
- b. Proper purpose, by means, whether it is clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved.
- c. Last resort, by means, whether every non-military option for meeting the threat in question has been explored, with reasonable grounds for believing that other measures will not succeed.
- d. Proportional means, including the scale, duration and intensity of the proposed military action, whether it is necessary to meet the threat in question.
- e. Balance of consequences, by means, whether there is a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse

than the consequences of inaction.

The Panel (2004) also noted that no State, no matter how powerful, can by its efforts alone make itself invulnerable to today's threats. Every State requires the cooperation of other States to make itself secure. It is in every State's interest, accordingly, to cooperate with other States to address their most pressing threats. This measure, in particular, will maximize the chances of reciprocal cooperation to address its own threat priorities and hopefully, will avoid the use of force in peacekeeping attempts and the promotion of civilian aircrafts safety.

2. Human Rights Aspects

The use of weapon against civil aircraft could be determined as a violation of human rights. This is as the measure of endangering a civilian's life has breached the inherent right to live as promulgated on the Article 6 of the International Covenant on Civil and Political Rights (ICCPR). This right shall be protected by law and no one shall be arbitrarily deprived of one's life. Even though Article 4 of the Covenant stipulated that there is a justification to derogate several kinds of rights in time of public or national emergency, still, the right to live has no derogation.

According to Shaw (2005), quoting the 1973's Libyan Airline incident, the Council of the International Civil Aviation Organization (ICAO) condemned Israel's action for the downing of the aircraft after straying several score miles into an Israeli-occupied Sinai territory after it refused to land. The Council also declared that 'such actions constitute a serious danger against the safety of international civil aviation'. Israel's attitude was criticized as a 'flagrant violation of the principles enshrined in the Chicago Convention'.

Quoting the Israeli Memorials submitted to the International Court of Justice (ICJ) on the matters of EL AL Constellation, Israeli emphasized that a State faced with an unauthorized aerial intrusion may deal with it in one or both of two ways. First, by informing the intruder that it is performing an unauthorized act and this may include compelling it to land, and secondly, by taking diplomatic action. This statement is actually very concise and viable as there must be many measures to escort intruding aircraft to land rather than shooting it down. The Court, however, dismissed the case on the ground of lack of jurisdiction.

With regards to the Korean Airlines K007 incident, just two weeks after the tragedy, ICAO assembly for an emergency meeting and adopted a resolution to express its deepest sympathy for the tragedy and reaffirmed prohibited use of weapons against civil aircraft.²³ On May 10 of the following year, still in response to the downing of the aircraft, ICAO Assembly unanimously adopted Article 3 *bis* to the Chicago Convention. Security Council also drafted a resolution, which reaffirmed the rules of international law prohibiting acts of violence against the safety of international civil aviation which, regrettably, was vetoed by the Soviet Union.

In 1996, the Security Council finally passed a resolution in regards to the downing of two planes by Cuba. UN Security Council Resolution 1067 noted that the shooting down of the two planes which were part of the Brothers to the Rescue, an organization run by Cuban Exiles, was a violation of the principle that no weapon were to be used against civil aircrafts and that, when intercepting such aircrafts, the lives of those on board should not be

jeopardized. China and Russia abstained from voting on this resolution. From this, we can see that there is a lack of good faith and willingness from States and international institutions to take this matter seriously.

Even though, there is no definitive international law that restricts firing on civilian aircraft (Foont, 2007), the issue of the implementation of humanitarian law and human rights as a universally acknowledged international norm should be able to abolish the State's desire to fire on civil aircrafts.

C. CONCLUSION

As previously explained, measures in safeguarding one's life has been universally acknowledged in the practice of airspace law. Thus, there should be no justification towards endangering one's life unless there is an actual attack that is strongly believed will threaten and result in a greater loss of life. Even if there is, sacrificing one's life should be taken as the last resort.

Having further considered Article 2(4) UN Charter and Chicago Convention 1944, as well as realizing the importance and dependency of the global society on airline transport, its safety and security should become a significant point for the international society to start to create policies in regards to the prohibition of the use of weapons against civilian aircraft. It is essential that besides this, the international community should start to recognize that any acts of violence against the safety of international civil aviation as a violation towards Article 2(4) UN Charter and Chicago Convention 1944. Furthermore, the international community should also condemn any kind of acts in the future that would endanger civil aviation security and deprive basic human rights.

²³ See ICAO Consideration 22 I.L.M 1149, 1150 (1983) at Foont (2007) p. 8.

The use of multilateralism as a common platform for developing countries, international NGOs and developed countries is very important in developing efforts as a policy option. As Oduntan (2003) has stated, 'developing countries, the international community and developed countries are the three pillars in which the future security of both earth and outer space will heavily depend on tidal relationship between the three'. This also applies on the matters of this issue.

International organizations also play a large role in solving this problem. Organizations such as the ICAO have the purpose of facilitating discussions and negotiations involving legal and technical aspects of aviation safety and security. Thus it is undeniable that this organization holds an important position to resolve this issue. The ICAO should engage with UN Bodies, most likely to be the Security Council, and position itself to discuss this issue in the context of human rights implementation and international security in order to create preventive actions and solutions regarding the issue to further reduce political and

economical interest from particular States. Moreover, there is an urgent need to rethink a clear rule and criteria of an 'emergency situation' which justifies the use of weapon against civil aircraft, if any.

There also needs to be some clarity in the issue of legal jurisdictions, formulation of effective sanctions and compensation of loss to the human rights violator so as to prevent future harm acted as part of collective self-defense.

All nations should also remain technologically and scientifically alert, agile and robust so as to anticipate and respond to new and emerging threats arising from the ongoing technological revolution. Regional and international cooperation to maintain airspace safety should be promoted to ensure security and protection towards civilian aircrafts. This cooperation should also include but not be limited to a harmonization in national laws and regulations for this particular issue which, of course, requires leap of faith and willingness to put down individual and collective interest for the sake of safety and security.

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