

Weapon against Civil Aircraft

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ABSTRACT: The use of weapons against civilian aircraft, in view of the ethical and legal dilemmas, endangers human life, society and its stability, and has legal and economic consequences; it is one of the most serious legal cases of our time. Even if the problem is analysed and interpreted in the light of the available legal concepts and instruments, and the legality or otherwise of the use of weapons is not established, the problem cannot be dealt with in a way that is beyond doubt and reassuring, since it certainly involves a violation of the right to life of the passengers on board the aircraft and of the international obligations of the State such as general rules of international law or humanitarian law. The purpose of this paper is to present the international legal liability regime for the use of weapons against civil aircraft in peacetime and in armed conflict, as well as its human rights and ethical responsibilities.

KEYWORDS: Chicago Convention, civil aircraft, weapons, arms, force

I. INTRODUCTION

Aviation, an integral part of our modern world, forms the foundation of our global interconnectedness. The rapid development of societies and science-technology in the 20th century, coupled with the shrinking distances between states and nations, fulfilled humanity's age-old desire, studied and envisioned by figures like Leonardo da Vinci and tirelessly experimented upon by the Wright brothers: the concept of flight. However, the advent and proliferation of aviation also brought with it malevolent possibilities, leading to the emergence of a new form of international terrorism. Numerous events, including the aftermath of World War II and the ensuing treaties, the rise of terrorism from the mid-20th century, and later aviation-disrupting catastrophes – such as the shootdown of Korean Air Lines Flight 007 in 1983 by the Soviets, the bombing of Air India Flight 182 in 1985, the Lockerbie disaster in 1988, the events of September 11, 2001, the shootdown of Malaysia Airlines Flight 17 in 2014, and the downing of Ukraine International Airlines Flight 752 near Tehran in 2020 – have contributed to the notion and evaluation of using weapons against aircraft, becoming a substantial concern for legislation and legal practice.

The use of weapons against civil aircraft is a topic of huge importance, from human rights to international law rules and humanitarian law aspects. This paper aims to delve further into the legal aspects of the use of weapons against civil aircraft, highlighting ethical and legal considerations and showing possible solutions and consequences.

II. INTERNATIONAL LEGAL RESPONSIBILITY FOR USE OF WEAPONS IN PEACETIME

International law prohibits force, as expressed in Paragraph 4 of the Article 2 of the UN Charter:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Under Article 1 of the Chicago Convention, States have full and exclusive sovereignty over the airspace above their territory, but Paragraph a) of the Article 3bis¹ immediately limits 'full sovereignty' by prohibiting the shooting down of civil aircraft in flight:

“The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.”

The definitions of 'in-flight' and 'civil aircraft' need to be interpreted separately for the purposes of the application of this provision. The definition of an aircraft in flight can be defined in several different ways, but in the light of this provision of the Chicago Convention, I believe that an aircraft is considered to be in flight from the moment its doors are closed for the purpose of embarking for flight until the moment its doors are opened again for disembarkation. That definition rightly, in my view, decouples this issue from the actual location and other circumstances of the aircraft.

¹ The adoption of Article 3bis of the Chicago Convention was prompted by the 1983 shooting down of KAL-007 by the Soviets in South Korea; the article was adopted in 1984 and entered into force in 1998.

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The definition of civil aircraft, however, runs into the difficulties I have often stressed. The Chicago Convention only defines state aircraft – and does so rather broadly, when it says: “*aircraft used for military, customs and police purposes shall be considered state aircraft*” – and defines civil aircraft as ‘non-state aircraft’. In practice, therefore, in order to determine the status of an aircraft, a number of difficult to define and ‘flexible’ aspects have to be taken into account, such as the purpose of use, the quality of the flight crew, the flight plan or cargo, the ownership of the aircraft, the quality of the operator, the controller, the commander, the flag and registration, the content of the on-board documentation.² There are also mixed situations where delimitation becomes even more difficult, such as when a civil aircraft is temporarily performing State functions, when a civil aircraft is carrying weapons (or weapons too), or when a State aircraft is carrying civil passengers in an emergency situation, which has happened several times, for example during the COVID pandemic. When considering specific cases, the San Remo Manual on the International Law Applicable to Armed Conflicts at Sea can be helpful in interpreting the Chicago Convention's terminology, especially in mixed situations, but it is often only a guide, as its scope, especially in relation to ‘ordinary’ scheduled air transport, is often not applicable.³ There is currently not generally and unequivocally accepted definition of civil aircraft in international law.

It is also worth pointing out the link between the general prohibition of the use of force under the UN Charter and the prohibition of the use of weapons against civil aircraft. The different terminology of the two bans is not only grammatically distinct but is also relevant in the context of international legal liability.⁴ The use of weapons always constitutes force, however, milder forms of force (e.g., coercion or the explicitly specified act of ‘capture’) by themselves do not necessarily involve prohibited use of weapons. Based on all of these, it can be determined that the Chicago Convention does not prohibit the application of milder forms of force, but the act of capture or coercion cannot result in endangering the lives of people on board or the safety of the aircraft. Therefore, prohibited use of weapons essentially pertains to shooting down.⁵

III. INTERNATIONAL LEGAL RESPONSIBILITY FOR WEAPON USE DURING ARMED CONFLICTS

The prohibition of shooting down a civilian aircraft in flight is subject to a single exception, namely the right of individual and collective self-defense as defined in Article 51 of the UN Charter.

“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

Another noticeable difference in terminology emerges once again – the concept of armed attack. As we have seen, the interpretation of the notion of force holds significant importance from various aspects. But is the interpretation of the general prohibition of force to be narrowly understood, encompassing only direct armed force, or does it potentially include a broader sense, such as political or economic coercion (e.g., embargo)? Understanding this requires delving into the underlying process that led to the creation of the provision. In the 1945 San Francisco conference, a proposal originating from Brazil suggested that economic coercion should be considered within the concept of force, yet this proposal was rejected by the participants. Subsequently, in 1970, the United Nations General Assembly Resolution 2625 (XXV) provided further clarification on the matter of force, and since then, the narrower interpretation has gained acceptance. Based on all of these, it can be determined that self-defense is grounded exclusively on the most severe forms of force; international jurists generally concur that achieving the level of aggression is required for this.⁶

In addition, for a legitimate situation of self-defense to exist, the armed attack must be attributable to the state (the content of which was elaborated by the International Court of Justice in the Nicaragua case), and finally, the response to self-defense must also meet the requirements of necessity and proportionality (and the state is obliged to promptly notify the Security Council of such action).⁷ The primary objective of the fight against terrorism is not, of course, to respond with acts of self-defense to acts of terrorism (let alone to avenge terrorism), but rather to aim for their prevention and deterrence. However, what is the point at which the armed attack on an aircraft, thus directly causing a serious act or an undeniable and irreversibly catastrophic event, occurs?

² Sipos, Attila, “A polgári légi jármű jogi státusza”, *Repüléstudományi Közlemények*, Vol. 2017 Nr. 3. p. 278.

³ Csaba, Török, “From Athens to Vilnius with A Near-Fatal Detour to Minsk? The Issue of Demarcation Between Civil and State Aircraft”, *Nurani Hukum Jurnal Ilmu Hukum*, Vol. 2023 No. 1. p. 4.

⁴ Geiß, Robin, “Civil aircraft as weapons of large-scale destruction: Countermeasures, Article 3bis of the Chicago Convention, and the newly adopted German „Luftsicherheitsgesetz”, *Michigan Journal of International Law*, Vol. 2005 No. 1. p. 255.

⁵ Csaba, Török op. cit. p. 8.

⁶ Sulyok, Gábor, „A terrorcselekmény elkövetéséhez használt polgári légi jármű lelövésének nemzetközi jogi és alkotmányjogi megítélése”, *Fundamentum. Terrorizmus és jog*, Vol. 2005. Nr. 3. p. 36.

⁷ Siska, Katalin, 2010, *A nemzetközi jog alapkérdései a nemzetközi kapcsolatok elméletének és történetének viszonylatában: tankönyv közigazgatási menedzsereknek*, Debrecen: Debreceni Egyetemi Kiadó, Debrecen, p. 69-82. and Siska, Katalin–Szemesi, Sándor, 2006, *A nemzetközi jog története*, Debrecen: Kossuth Egyetemi Kiadó, p. 66-81.

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The unusual behavior of an aircraft (such as violating air traffic regulations, ignoring air traffic control instructions, unexpectedly altering its flight profile, engaging in radio communication deviating from standard procedures, transmitting unauthorized codes or signals suggesting unlawful actions, or possibly broadcasting notifications about terrorism threats)⁸ by itself does not establish the basis for the destruction of the aircraft, but can play a role in the underlying process that leads to it. The question of shooting down an aircraft came to the forefront in relation to the events of September 11, 2001,⁹ when the United States government faced numerous (albeit often controversial or layperson) criticisms for not opening destructive fire against the involved aircraft – although that would have extinguished the lives on board (yet their unfortunate demise still occurred), it could have saved thousands of lives on the ground and within the affected buildings. Therefore, the question arises: at what point was it certain that a terrorist act was imminent, but still preventable?

In the context of lawful self-defense, this is the point where it becomes necessary to address the issue of anticipatory self-defense. Self-defense, as we have seen, is guided by the principle of necessity and proportionality, meaning that the force used in self-defense must be proportionate to the attack, and defensive measures necessary to repel and avert the attack must be taken. Retaliatory measures, as well as anticipatory measures, are unlawful. In international law, anticipatory self-defense is generally prohibited as the primary rule. However, given contemporary military capabilities, advancements in technology, and the permissiveness of international law, preemptive self-defense is recognized as a subset of anticipatory self-defense. We consider a situation to be one of preemptive self-defense when an actual and imminent attack is about to occur, and no alternative means of defense are available. On the other hand, preventive self-defense occurs when the attack is not actual or imminent – only 'expected' due to a threat – or when alternative means of defense are available.¹⁰ Nonetheless, the requirement of attributability to the state remains a necessary condition throughout. In the context of the September 11 terrorist attacks, the temporality of the preemptive self-defense situation was indeed quite short from the moment of recognition. However, satisfactory answers to the question of attributability only emerged much later. As stated by the International Court of Justice in the Nicaragua case, it is not sufficient for establishing the state's international legal responsibility if the state is involved in financing, training, or planning the perpetrators; it is also necessary for the state to direct the actions of the perpetrators and exercise effective control over the committed operations.¹¹

Therefore, for the purposes of establishing international legal responsibility, the shooting down of an aircraft requires that the aircraft commit an act attributed to at least another state (done upon the orders of that state and effectively controlled by it), involving an armed attack that reaches the level of aggression. For instance, if the armed aircraft employs its onboard weaponry, or in another manner using its armaments endangers life and property security, committing severe violent acts or causing a catastrophe. This is closely linked to the significance (and intricacies) of distinguishing between civil and state aircraft, as the ultimate basis for justifying self-defense lies in the 'transmutation of a civil aircraft into a state aircraft.'¹² Further interpretive challenges arise from cases such as September 11, where civilian aircraft (referring to the aircraft itself) were used as weapons against the target of the attack.

Several attempts have been made for the aforementioned 'transmutation,' typically based on the following grounds. Firstly, the Chicago Convention is not applicable during times of war and emergency.¹³ In this regard, the use of armed force by a civil aircraft or the utilization of a civilian aircraft as a weapon leads to an armed conflict, causing the immediate cessation of the scope and applicability of the Chicago Convention. Instead, the *ius in bello*¹⁴ comes into play. When considering the legal framework and terminology of humanitarian law, the rules do not necessarily exclude shooting down a civilian aircraft based on the principle of military necessity and the concept of a military objective. In this context, humanitarian law does not inherently prohibit civilian casualties in attacks against military objectives (provided there are adequate guarantees of necessity and proportionality). Secondly, the Chicago Convention itself states that aviation cannot be employed for purposes contrary to the objectives of the Convention. This provision can establish that the use of aviation for purposes contrary to the Convention's objectives is unlawful and therefore

⁸ Sulyok, Gábor, 2019, *A terrorcselekmény elkövetéséhez használt polgári légi jármű lelövésének alkotmányjogi megítélése az új szabályozási környezetben*, Budapest: Gondolat Kiadó, p. 36.

⁹ Many authors refer to the events of September 11, 2001 as having changed the world and brought international terrorism to a new level; it is common to distinguish between the “pre-September 11” and the “post-September 11” worlds. (See for instance: Ernszt, Ildikó, 2007, *A nemzetközi légitörvény védelme*, Pécs: University of Pécs, and Siska, Katalin, “Gondolatok a török külpolitika 21. századi útkereséséről”, *Jura*, Vol. 2018 Nr. 1.) See more: Csaba, Török op. cit. p. 11.

¹⁰ Kajtár, Gábor, 2018, “*Az erőszak tilalma*”, Available on website: <http://ijoten.hu/szocikk/az-eroszak-tilalma>. [53]-[54], Accessed August 26th, 2023.

¹¹ Papp, Zoltán “Az MH-17 légi járat lelövésének nemzetközi jogi megítélése a nemzetközi polgári repülésről szóló Chicagói Egyezmény tükrében”, *Debreceni Jogi Műhely*, Vol. 2016 Nr. 1-2. p. 50.

¹² A San Remo Kézikönyv 63. cikke értelmében polgári légijármű katonai célponttá válhat például, ha az ellenség nevében háborús cselekményekben vesz részt, az ellenség fegyveres erőinek kiegészítő légijárműveként lép fel, az ellenség hírszerzési rendszerébe beépül, vagy azt segíti elő, levegő-levegő vagy levegő-szárazföld fegyverekkel van felfegyverezve, egyéb hatékony módon segíti elő a katonai műveletet stb. Fontos emlékezni arra ugyanakkor, hogy a San Remo Kézikönyv nem minősül jogforrásnyagnak, rendelkezései útmutatások, de nem kötelező érvényűek.

¹³ Article 89 of the Chicago Convention.

¹⁴ A *ius in bello* a háborúban (fegyveres összeütközések során) alkalmazandó jog összessége, tulajdonképpen a humanitárius jog.

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constitutes an exception to the prohibition of the use of weapons. While certain aspects of these arguments are difficult to dispute, in my opinion, such exceptions could hollow out the prohibition of weapon use and render the legality of using weapons against civilian aircraft ambiguous – especially due to the dilemmas surrounding the aircraft's status. Therefore, these should not form the basis for forming exceptions.

IV. RESPONSIBILITY RELATED TO HUMAN RIGHTS CONCERNING THE USE OF WEAPONS

Regardless of whether the legality of using weapons against aircraft can be justified from the standpoint of either international law or humanitarian law responsibility, ethical dilemmas that complicate decision-making, as well as questions of human rights responsibility, still persist.¹⁵

The responsibility of the state extends to the right to life of those on board a civilian aircraft and potential victims on the ground. This means the state must refrain from depriving individuals of their lives and is obligated to take active measures to protect the lives of its citizens.¹⁶

The use of weapons against an aircraft result in fatal casualties, with the only argument justifying this being the active action taken by the state to protect potential victims on the ground. It is crucial to bear in mind, however, that passengers on board are unfortunate victims of circumstances beyond their control and cannot escape or influence the unfolding events that determine their fate. Therefore, such conduct by the state objectifies the passengers, depriving them of their inherent human dignity, thus violating their fundamental right to life. With the shooting down of a civilian aircraft, passengers would become victims of the state to at least the same extent as they would of the terrorists.¹⁷

It is also neither appropriate nor satisfactory reasoning to claim that the use of weapons (shooting down) against a civilian aircraft results in fatalities, yet still fewer deaths than refraining from using force. As the German Federal Constitutional Court has pointed out, “[...] *it is completely unthinkable to deliberately kill innocent people such as the crew and passengers of the hijacked aircraft, on the basis of legal authority.*”¹⁸

Another aspect of using weapons against aircraft pertains to the anticipated consequences, specifically the risk of flying debris and shockwaves. A comprehensive evaluation and modeling of such consequences by decision-makers would incur irreparable delays, thereby jeopardizing the legality of preventive actions.

V. CONCLUSIONS

The use of weapons against civilian aircraft – considering the ethical and legal dilemmas – jeopardizes human life, society, and its stability, with legal and ultimately economic implications arising as well; it can be stated that it is one of the most serious and relevant legal cases of our time. Addressing this issue doesn't lead to unquestionable and reassuring outcomes, even if we analyze and interpret it based on the available legal concepts and tools and deduce the legality or absence thereof of weapon use.

To prevent the emergence of more severe consequences and the possibility of using weapons against civilian aircraft, a variety of measures must be employed. In my opinion, this should involve stricter controls and security protocols by airports, airlines, relevant authorities, and other entities involved in aviation to swiftly identify and mitigate risks jeopardizing safety. Swift and effective information sharing among states about terrorist threats and suspicious activities is essential. Additionally, raising awareness and educating industry participants through continuous training on aviation security measures and threat identification is crucial.

¹⁵ For millennia, there was no concept of human rights (see: Siska, Katalin, "A rabszolgaság az iszlám jogban. Véget ért, vagy még mindig tart?", Miskolci Jogi Szemle, Vol. 2016. p. 15). The initial, seminal appearance of human rights is associated with the English, French, and American constitutions, yet according to some authors, the 1923 Treaty of Lausanne, signed in Switzerland, was already a human rights treaty (see: Siska, Katalin, "A kisebbségi jogok alakulása Törökországban, különös tekintettel a Lausanne-i Szerződés rendelkezéseire", Iustum Aequum Salutare, Vol. 2016 Nr. 3. p. 177. and see also: Siska, Katalin, "Az oszmán közigazgatási rendszer dimenziói", Pro Publico Bono, Vol. 2017 Nr. 1. p. 190). Human rights were first codified in the United Nations Charter, and then in 1948, the legally binding Universal Declaration of Human Rights was adopted.

¹⁶ Citizenship is a fundamental public law concept; it defines the relationship between the state and the individual (see: Siska, Katalin, "Mustafa Kemal Atatürk hatása a török identitás és állampolgárság koncepciójára, különös tekintettel az alkotmányjogi szabályozásra" Jog-Állam-Politika, Vol. 2016 Nr. 1. p. 61.). The essential content of citizenship, including the status of the state and its citizens, their rights, obligations, etc., is established by the constitution of the state. The first general definition of citizenship likely appeared in the 1835 inaugural edition of the Dictionnaire de l'Académie Française (see: Siska Katalin, "Fear Not...! Turkish Nationalism and the Six Arrows System – A State in Search of a Nation", Hungarian Journal of Legal Studies, Vol. 2016. p. 277. and Siska, Katalin, "A női jogok alakulásának áttekintése a Török Köztársaság megalakulásától napjainkig" Jog-Állam-Politika, Vol. 2017 Nr. 2., see also: Siska, Katalin, "Thoughts on the Special Relationship between Nationalism and Islam in Particular the Late Ottoman Empire and the Early Turkish Republican Era", Journal on European History of Law, Vol. 2017. Nr. 8. p. 123-128.).

¹⁷ Zakariás, Kinga, 2019, *Az emberi méltósághoz való alapjog. Összehasonlító jogi elemzés a német és magyar alkotmánybírósági gyakorlat tükrében*, Budapest: Pázmány Péter Katolikus Egyetem, p. 138-139, 151-152, 266-267, 330.

¹⁸ BVerfGE 115, 118 (157).

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The mentioned measures and collaborative mechanisms can assist in threat prevention and maintaining sustainable security for civil aviation. In cases where, despite all aviation security tools and methods, a civilian aircraft still poses a potential danger due to malicious intent, and the state decides to destroy the aircraft, it undoubtedly raises issues concerning the right to life of passengers on board the aircraft and potential violations of the state's international obligations.

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- 12) A San Remo Kézikönyv 63. cikke értelmében polgári légi jármű katonai célponttá válhat például, ha az ellenség nevében háborús cselekményekben vesz részt, az ellenség fegyveres erőinek kísérő légi járművéként lép fel, az ellenség hírszerzési rendszerébe beépül, vagy azt segíti elő, levegő-levegő vagy levegő-szárazföld fegyverekkel van felfegyverezve, egyéb hatékony módon segíti elő a katonai műveletet stb. Fontos emlékezni arra ugyanakkor, hogy a San Remo Kézikönyv nem minősül jogforrásanyagnak, rendelkezései útmutatások, de nem kötelező érvényűek.
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- 15) For millennia, there was no concept of human rights (see: Siska, Katalin, "A rabszolgaság az iszlám jogban. Véget ért, vagy még mindig tart?", *Miskolci Jogi Szemle*, Vol. 2016. p. 15). The initial, seminal appearance of human rights is associated with the English, French, and American constitutions, yet according to some authors, the 1923 Treaty of Lausanne, signed in Switzerland, was already a human rights treaty (see: Siska, Katalin, "A kisebbségi jogok alakulása Törökországban, különös tekintettel a Lausanne-i Szerződés rendelkezéseire", *Iustum Aequum Salutare*, Vol. 2016 Nr. 3. p. 177. and see also: Siska, Katalin, "Az oszmán közigazgatási rendszer dimenziói", *Pro Publico Bono*, Vol. 2017 Nr. 1. p. 190). Human rights were first codified in the United Nations Charter, and then in 1948, the legally binding Universal Declaration of Human Rights was adopted.
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