

The Shooting of A Civilian Aircraft : *Legal Perspective on Justification and Jurisdiction.*

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Since the era of globalisaztion the usage of civilian aircraft has been widely used for the purpose of mass transportation to carry passengger in a cross-country journey. The usage of the transportation and its development as the most popular mass transporataion for a cross country journey had also made civil aircraft as one of the most vulnerable transportation towards the incident, in this case from the shooting resulted from a military activities. The list of incident in the shooting of a civilian aircraft goes way back from the 1930 with the *Kweilin Incident* through the recent incident of the Malaysian airlines flight 17 in the early of 2014. This leave the question towards the International society on the protection ofa civilian aircraft from the shooting down, how is it jutifiable that a the shooting of a civilian aircraft which consist of inocent passengger in the eyes of International Law, and who would have the justification and the jurisdiction to pursue legal measure.

The analysis of the writings will focus on two different perspective, the first is the perspective of justification of such act, which is apt to consider the values at stake when a state contempelates the destruction of a civilian passengger craft. This scenario touches upon many interests, the most important of which are human dignity and right to life of persons both in the plane and on the ground; the state concerns for national security and the legal outcomes of suchmeasure. The second perspective would be upon the pursue of a legal measure towards the action.

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I. International Law

It is with astonishing and controversially being said that the shooting of a civilian aircraft will be clearly excused by the shootdown of an airliner being used in a suicide attack. This comes from the idea that the vast mass of cases after the 9/11 has made the nations vulnerable in protecting its national security towards the attack of terrorist in a suicide attack using a civilian aircraft. This point has been made with the argument of saving the greater goods of a national security depicting the rights and life of the civilian aircraft passenger. This best brought to out to picture every treaty rule exhibits simultaneously a codification and a generative phenomenon, which is inevitably derogates from its customary and instantiation through the process of transformation of the current situation.²

Despite international law's shortcomings, as will be seen, states do tend to attempt to clothe their actions in the robes of legality. On occasion, these attempts weaken international norms, degrade important legal categories, and bring the whole system into disrepute.³

A. The Chicago Convention

The *convention on International Civil Aviation* (*Chicago Convention*) is the core document that governs and regulates civil aviation. Its governing body, the International Civil Aviation Organisation (ICAO) is responsible, amongst other duties, for minimum standards of flight safety.

The first query must to relate the status of the treaty. Basically, it is widely accepted that an International convention might be declarative, crystallising, or generative international law.⁴

² Robert Jennings, *Judicial reasoning at an International Court*, Universitaat des Saarlands, Ress ed, No. 236.

³ Par Rory Stephen Brown, *Shooting down civilian aircraft : Illegal, Immoral and just plane stupid*.

⁴ Wlasyaw Czaolisky, *Sources of International Law in the Nicaragua Case, 1989, at 151 and 153*.

The milestone provision of the *Chicago Convention*, Article 1 states that “the contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory”⁵ this pictures a rather odd form of an International law which gives the milestone justification of the national actions of what is passing by its airspace as a part of their full legal sovereignty.

Furthermore on the Article 3 *bis* of the *Chicago Convention* addresses the question by the stipulating :

- a. 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.
- b. The contracting states recognize that every state, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aim of this convention. It may also give such aircraft any other instruction to put an end to such violation. For this purpose, the contracting states may resort to any appropriate means consistent with relevant rules of international law.

The wording used in this provision has a vague sense of the use of force against civil aircraft is already a part of general international law.⁶

⁵ *Chicago Convention*, *Supra* Note 16, Art. 1

⁶ Farooq Hasan, :*The shooting down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety Passengers* (1984) 33 at 712 and at 721.

B. The Charter of The United Nations and Self Defence

The legality in the use of force and a measure of self defense is primarily featured by the United Nations Charter. Which is expressly limited by Article 51 of the Charter, which provides :

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. Measure 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.⁷

This regulation has still too have a vague interpretation on the justification on whether such self defence presented as an argument in the shooting of civilian aircraft is justifiable under the charter, yet still used as a legal justification in many acts on the shooting of a civilian aircraft.

Jurisdiction on the shooting of a civilian aircraft.

The action on the shooting of a civilian aircraft whether it is justifiable under the international law as a self defense or not will still be subject towards the action of a legal process, this leave the question to who would be justifiable to turn on the such cases and disputes in the proceedings of an International Court. The writings will be asserted on a standpoint of the recent incident in the shooting of the Malaysian Airline flight 17.

Criminal Jurisdiction in International Law

A State must base its criminal jurisdiction on one or more of the following principles before its courts can punish the offenders:

⁷ Charter, *Supra Note 29*, art 21 (Emphasis added).

1. *Territorial Principle* - The territorial principle is the most basic and common principle of jurisdiction. This principle basically states that all offences committed within the territory of a State can be brought before its domestic courts, even if it involves foreign citizens.
2. *Active Nationality Principle* - The active nationality principle, which is also a well-established principle, allows a State to exercise jurisdiction over crimes committed by its nationals abroad.
3. *Passive Personality Principle* - The passive personality principle allows a State to claim jurisdiction to try a foreign citizen for offences committed abroad which have affected or will affect nationals of that State
4. *Protective Principle* - The protective principle allows a State to exercise jurisdiction over persons whose acts are directed against the vital interest of the State even though committed abroad. Instances or categories of what may be considered 'vital interests' are not closed, but the principle is commonly invoked in regards to currency, immigration and economic offences.
5. *Universality Principle* - The universality principle focuses purely on the nature of the offence irrespective of the place of commission of the crime, any link of active or passive nationality, or any other grounds of jurisdiction recognised under international law. Crimes which would invoke the universality principle would include piracy, slavery, and possibly, genocide, torture, crimes against humanity and breaches of the laws of war, especially of the Hague Convention of 1907 and grave breaches of the Geneva Convention of 1949.

Conflict in Eastern Ukraine

On 7 April 2014, an armed group occupied the regional administration building in Donetsk and declared the establishment of the "Donetsk People's Republic". In mid-April, Ukraine began counter-insurgency operations resulting in sporadic clashes in Eastern Ukraine. On 23 July

2014, the International Committee of the Red Cross released a statement where it declared the conflict in Eastern Ukraine to be a non-international armed conflict.

Both Ukraine and Russia are parties to the 1949 Geneva Conventions. Common Article 3 to the four 1949 Geneva Conventions prohibits all parties in a non-international armed conflict, including insurgent groups, from deliberately attacking civilians or non-combatants.

Nature of the Incident

Based on the available information at the time of this writing, there are no concrete assertions as to any motive on Ukraine, Russia or the insurgents for intentionally shooting down a civilian aircraft. Therefore it is unlikely that the incident can be classified as a crime against humanity or a war crime under the Rome Statute. This is because such crimes require the offenders to be aware that the intended targets were civilians.

Murder under domestic law would be the most appropriate crime to use for prosecution. Although the civilians in MH 17 might not have been the intended targets, the perpetrators intended to shoot down a plane and kill whoever was in it. Under the doctrine of transferred malice, the intention to murder combatants would be transferred to the actual victims, who were the civilians.

States with Domestic Criminal Jurisdiction

With reference to the jurisdictional principles as explained above, the following States would have criminal jurisdiction over the perpetrators:

1. *Ukraine* - Ukraine can assert jurisdiction based on the territoriality and possibly the active nationality principle. It is too premature at this point to discuss on possible statehood of the "Donetsk People's Republic".

Therefore in the eyes of international law, Donetsk is still the territory of Ukraine.

2. *Netherlands* - Netherlands can assert jurisdiction based on the passive personality principle. Most of the victims on the aircraft were of Dutch nationality
3. *Russia* - IF the perpetrators were found to be Russian nationals, then Russia could claim jurisdiction under the active nationality principles
4. *Other States* - Basically the States in which the victims are nationals of would have jurisdiction under the passive personality principle

State Responsibility in International Dispute Resolution Forums

1. *International Criminal Court ("ICC")* - Although Ukraine and Russia are not members of the ICC, Ukraine could choose to refer the case to the ICC pursuant to Article 12(3) of the Rome Statute of the International Criminal Court ("Rome Statute") as a non-party State. Article 12(3) allows a non-party State to make a declaration to the effect of accepting the ICC's jurisdiction over crimes committed on its territory or by its nationals, even retroactively. This means that the ICC would have jurisdiction over all relevant crimes committed in Ukraine regardless of the perpetrators nationality. It would not come as a surprise if Ukraine makes an Article 12(3) declaration, as it had made such a declaration back in April 2014 to accept the ICC's jurisdiction for events that occurred in Ukraine between 21 November 2013 and 22 February 2014. The issue would be one of prosecution rather than jurisdiction. As stated above, it would be difficult to establish the mental element of the crime under the Rome Statute.
2. *International Court of Justice ("ICJ")* - The ICJ's jurisdiction for contentious cases depends on the consent of the parties. Both Ukraine and Russia have not made declarations to the effect of submitting to the compulsory jurisdiction of the Court.

Ukraine could be liable for a breach of its treaty obligations under Article 10 of the Montreal Convention 1971 for failing to “take all practicable measures” to prevent such an incident. MH 17’s presence in Ukraine’s airspace was legal under Article 1 of the 1944 Transit Agreement, which both Ukraine and Malaysia are parties to. Ukraine had the means to close the airspace, as the exercise of the privilege under Article 1 of the 1944 Transit Agreement is subject to Ukraine’s approval in “areas of active hostilities” under the same article. Additionally, Ukraine could have restricted aircrafts from using certain parts of its airspace for “reasons of military necessity or public safety” under Article 9 of the 1944 Chicago Convention.

There could be a way to circumvent the issue on States accepting the ICJ’s jurisdiction. States may consent to the jurisdiction of the ICJ by ratifying conventions or treaties containing jurisdictional clauses granting the ICJ with jurisdiction in advance over disputes involving the interpretation and application of the convention. Article 14 of the Montreal Convention 1971 is a jurisdictional clause of such nature, with a pre-condition of arbitration. Ukraine could argue that its obligation to prosecute or extradite the offenders under the Montreal Convention 1971 needs interpretation in light of a scenario where the offenders are in a territory not under their control. Ukraine could also pose a question on whether Russia has a duty to prosecute or extradite the offenders under the Montreal Convention 1971 if it can be proved that Russia has effective control over the rebels and in turn, the territory they are on.

3. *European Court of Human Rights (“ECHR”)* - Representatives of the German victims of Malaysian Airlines are planning to bring an action against Ukraine in the ECHR for manslaughter by negligence. .Details of

the action have yet to be made known. The argument above could be used to show Ukraine's negligence.