Weapon against Civil Aircraft: Legal and Ethical Aspects of the Use of Force against Civil Aircraft

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Submitted: Dec 23, 2023; Reviewed: Jan 26, 2024; Accepted: Feb 27, 2024.

Using weapons against civil aircraft is interconnected with several areas: international legal responsibility, prohibition of force, right to self-defense, ethical dilemmas, and the protection of human rights. The arguments presented in this study emphasize that while self-defense provides a theoretical possibility for using weapons against aircraft, there are still ethical challenges and unavoidable rules of international law. Therefore, using weapons against civil aircraft poses several challenges that must be considered in both legal and moral aspects. This paper presents the international legal liability regime for the use of weapons against civil aircraft, as well as its human rights and ethical responsibilities.

A. Introduction

Civil aircraft refers to non-military aircraft used for civilian purposes, such as commercial air transportation, recreational flying, and other civilian activities. Aircraft as a mode of transportation has prompted major changes in the world. By the aircraft, people can circumnavigate the globe in hours. In this case, the existence of the aircraft has become increasingly important worldwide. This results from the human need for a fast, safe, and comfortable transportation method.\(^1\) To ensure the safety of passengers, flight crews, aircraft, and cargo as governed by the International Convention, civil aircraft operations at international and national levels must refer to applicable rules in international and national law. During the war, many countries were left to manage their aircraft regulations within their airspace throughout the war, whether they were military or not.\(^2\)


To prevent war, the rules of international law emphasize the prohibition of the use of force. Force or use of force is an unfavorable essential part of governmental administration. The state would descend into chaos or, as Hobbes proposes, a state of nature if the government were not permitted to employ force lawfully. The state should employ the force only in certain situations and with limited vigor. The prohibition on using force is contained in the UN Charter unless the country has engaged in an armed attack indicated as self-defense. Therefore, the use of force may be lawfully authorized under international law if the following elements are met.

Under international law, using force against civil aviation and civilians is prohibited. Civilians are protected in both peacetime and wartime situations. Moreover, under existing international laws, using force against civilian aircraft in flight is illegal, even for humanitarian purposes. In an era where aviation trespassing incidents have grown more prominent, discussions have been reignited regarding the justification and legitimacy of defensive measures against unauthorized civil aircraft. This discourse delves into the complex intersection of international legal frameworks, ethical considerations, and the fundamental rights of individuals. Undoubtedly, the emergence of the security threat posed by the misuse of civilian aircraft as weapons of destruction requires adapting government policies.

The novelty of this research is that it focuses on the balance between safeguarding aviation security (public safety) and respecting airspace sovereignty. Instances involving civilian aircraft being misused for malicious purposes have presented unique challenges. From human rights to international law regulations and aspects of humanitarian law, it holds immense significance. The objective of the present study is to delve into the legal aspects of the use of arms against civil aircraft, shedding light on ethical and legal considerations and highlighting potential solutions and consequences.

This legal research uses normative research methods with secondary qualitative data. The secondary qualitative data will be in the form of primary and secondary legal materials. Primary legal materials, such as international conventions, while secondary legal materials come from expert opinions found in multiple sources. This research has an analytical description of the provisions and status of the use of force under international law. Furthermore, this study also explains the moral and legal considerations surrounding using force against civilian aircraft globally.

B. Discussion

In international law, the principle of non-use of force has been discussed for a long time. The starting point of international legal responsibility for the use of weapons against civilian aircraft is the general prohibition against violence, as stated in Article 2.4 of the United Nations Charter:

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“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.”

The Charter refers to two unrelated circumstances in which the prohibition does not apply: forcible measures may be taken or authorized by the Security Council, and force may be used to exercise the right of individual or collective self-defense. Understanding the concept of 'force' contributes to the process leading to the creation of the general prohibition of force. During the 1945 San Francisco Conference, a proposal was raised by the Brazilian delegation suggesting that economic coercion should also be included in the concept of force. However, the participants supporting a narrower interpretation of force rejected this proposal. For many decades, differing interpretations of the concept posed difficulties in various cases until the United Nations General Assembly Resolution 2625 (XXV) was adopted in 1970, further clarifying the matter of force. Today, there is consensus that the concept should be understood narrowly, encompassing only actual armed force (thus excluding actions of a broader nature that are coercive, such as political or economic pressure embargoes, which do not fall under the prohibition of force).

According to Article 1 of the Chicago Convention, states have full and exclusive sovereignty over the airspace above their territory. However, in 1983, the shooting down of the South Korean KAL-007 flight by the Soviets led to the recognition of the need to address the use of force against civil aircraft within the framework of the Convention. 1984, the Chicago Convention's Article 3 bis was adopted and enacted in 1998. However, this article cannot be considered as absolute as certain conditions where a state can neutralize an aircraft, and the UN Charter provides these exceptional conditions. Paragraph a) of this article prohibits the shooting down of civil aircraft in flight, thereby setting limits on the 'full sovereignty' as stated in Article 1:

“The contracting States recognize that every State must refrain from using 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 the rights and obligations of States outlined in the Charter of the United Nations.”

The terms 'in-flight' and 'civil aircraft' are noteworthy in their application. Both concepts require separate definitions; however, it is often emphasized, and I share this viewpoint, that the precise definition of these terms poses difficulties, and there is no complete consensus among international legal experts regarding their exact content. The Chicago Convention protects civil aircraft flying legally in a state’s airspace and aircraft that contravene the overflight rules.

Civil aircraft: The basis of the problem lies in the fact that the Chicago Convention only defines state aircraft: 'Aircraft used in military, customs, and police services shall be considered

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10 Ibid., P. 47.
as state aircraft.' The definition is quite broad and raises numerous questions that require clarification and supplementation. Adding to the complexity, civil aircraft are defined negatively as non-state aircraft. An aircraft's status is based on several 'flexible' criteria, which can sometimes change momentarily. Factors such as the purpose of use, the quality of the flight crew, flight plans, cargo, aircraft ownership, operator, controller, commander roles, flag and registration, and content of onboard documentation must be considered.\textsuperscript{11} Additionally, situations can arise that make the distinction even more challenging. Such a mixed situation arises, for example, when:

\begin{itemize}
\item[a.] a civil aircraft temporarily or periodically performs state tasks (during the COVID pandemic, it happened several times that privately owned, predominantly civilian aircraft were used under state orders to transport medical equipment or vaccines, but even in non-emergency situations, similar aircraft are used to fulfill partially or entirely state tasks);
\item[b.] when a civilian aircraft carries military or other state-used equipment or items (e.g., transporting military supplies, weapons, or their accessories under state orders or for the benefit of state organizations, or even state archival materials, state-owned artworks, etc.);
\item[c.] when (in an extraordinary situation) an otherwise state-owned aircraft transports civilian passengers or conversely, when an otherwise civilian aircraft transports military personnel (as it has happened on multiple occasions, for example, during the COVID pandemic; in such cases, the question becomes particularly intriguing regarding how the presence of soldiers mingling with civilian passengers 'requalifies' the aircraft as a state (military) aircraft).
\end{itemize}

Furthermore, the current aircraft use often adds nuances to the above considerations: a predominantly civilian aircraft can temporarily serve a state function or vice versa. In assessing specific cases, determining the status of aircraft can be aided by the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, which pertains to armed conflicts at sea. However, it should be noted that the Manual is not considered a primary source of law (it has a more compilatory nature), and it lacks binding force (especially concerning 'everyday' scheduled civil aviation).\textsuperscript{12} The San Remo Manual also, albeit practically, distinguishes between civilian, state, and military aircraft, contrary to the terminology I prefer to use. There is no universally and fully accepted definition of civilian aircraft in international law.

Airborne aircraft: The situation regarding the concept of airborne aircraft is somewhat less complex, though far from trivial. Airborne aircraft can be defined based on different criteria and perspectives. In light of the provision of the Chicago Convention under examination, I believe that an aircraft should be considered airborne from the moment its doors are closed after boarding, with the intent of commencing the flight, until the doors are reopened for disembarkation. I believe this definition appropriately divorces the question from the aircraft's current location and other circumstances. However, it should be noted that the issue of using weapons against aircraft pertains in practice to aircraft in flight, a condition which, in every sense and aspect, should be regarded as airborne.

It is also warranted to examine the relationship between the general prohibition of the use of force under the UN Charter and the prohibition of using weapons against civilian aircraft. These prohibitions are formulated with linguistic differences, yet they hold significant implications for issues of international legal responsibility.\textsuperscript{13} The use of weapons constitutes violence in all cases, although milder forms of violence (such as coercion or the specified act of 'capture') do not inherently entail prohibited weapon use. Based on these considerations, it can be concluded that the Chicago Convention does not explicitly prohibit the application of milder forms of violence against aircraft (as long as such actions do not endanger the lives of people on board or the safety of the aircraft itself), meaning that the prohibition pertains specifically to shooting down an aircraft.\textsuperscript{14}

The general prohibition of the use of force (as well as, in line with the above, the prohibition of shooting down a civilian aircraft in flight) has only one exception, which is found in the interpretation of the individual and collective right to self-defense as defined in Article 51 of the UN Charter.

\textit{“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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. Members’ measures to exercise this right of self-defense shall be immediately reported to the Security Council. They shall not affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.”}

As we have seen, the interpretation of the concept of force holds significant importance from various aspects. However, we encounter a different terminology in this provision: ‘armed attack.’ Considering the concept of force presented earlier, it can be concluded that self-defense is based only on the most serious forms of force; international legal experts generally agree that reaching the level of aggression\textsuperscript{15} is necessary for such force.

Another condition for the existence of a legitimate situation of self-defense is that the armed attack (aggression) must be attributable to another state (the content of which the International Court of Justice elaborated in the Nicaragua case), and the defensive response must also meet the requirements of necessity and proportionality. If the conditions are met and the state exercises the right of self-defense, it must immediately notify the Security Council.\textsuperscript{16}

How, then, can the issue of self-defense be interpreted in the case of an armed attack against a civil aircraft or the use of a civil aircraft as a weapon? The unusual behavior of an aircraft itself (such as violating air traffic rules, ignoring air traffic control instructions, unexpected changes in flight profile, deviating from applicable regulations, unusual radio

\textsuperscript{14}Csaba, Török op. cit. p. 8.
\textsuperscript{15}Az agresszió egy vagy több állam fegyveres erejének súlyos következményekkel járó, elsőként való alkalmazása más állam vagy államok szuverenitása, területi épsége vagy politikai függetlensége ellen vagy az Alapokmánnyal össze nem férő bármely más módon.
communication, transmitting unauthorized codes or signals indicating unlawful activities, or issuing alerts about terrorist threats, etc.)\(^{17}\) does not in itself justify the destruction of the aircraft. Still, it can play a role in the decision-making process that leads to it. The question of shooting down an aircraft came to a head concerning the events of September 11, 2001,\(^{18}\) when the U.S. government faced numerous criticisms (some of which were debatable or layman) for not opening fire to destroy the involved aircraft. This action, while it would have ended the lives of those on board (though their deaths tragically occurred regardless), could have saved the lives of thousands of people on the ground and within the affected buildings. The expansive interpretation of the right to self-defense is based on the principle of preemptive strikes, exemplified by the Bush Doctrine after the September 11 attacks. According to this doctrine, a state can initiate an attack against another state in its defense if it faces a threat, and inaction would pose a greater risk. In this scenario, the state anticipates the armed attack and launches an offensive against the other state.\(^{19}\)

At this point, addressing the concept of anticipatory self-defense becomes necessary. The fundamental principles of self-defense involve the principles of necessity and proportionality (meaning that the force used in self-defense should be proportional to the attack, and the state should undertake only those self-defense measures necessary to repel and avert the attack, thus avoiding retaliatory or preventive actions).\(^{20}\) As a rule, preventive self-defense is prohibited under international law. However, given the capabilities of modern warfare and technological advancements, international law is permissive towards one subset of preventive self-defense known as preemptive self-defense. However, it remains to be seen whether preemptive self-defense is permitted under international law or whether it is permitted but only under certain conditions.\(^{21}\)

Preemptive self-defense is considered to occur when an attack is imminent and inevitable, and there are no alternative means available to avert it. On the other hand, preventive self-defense applies when an attack is not imminent or immediate—merely "expected" due to a perceived threat—or when alternative means exist to avert the threat.\(^{22}\) The Bush Doctrine, which involves the concept of preemptive strikes, in my opinion, can be best characterized as preventive self-defense in the absence of an imminent threat. In this context, the mere presence of a threat does not necessarily equate to the immediacy of an attack. The Bush Doctrine is generally not recognized by international law.

\(^{17}\) Sulyok, Gábor, 2019, *A terrorcselekmény elkövetéséhez használt polgári légi jármű lelövésének alkotmányjogi megítélése az új szabályozási környezetben*, Budapest: Gondolat Kiadó, p. 36.

\(^{18}\) 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 légiközlekedés 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.).


Another necessary condition for self-defense is the notion of attribution. In the context of the September 11 terrorist attacks, the recognition of a preemptive self-defense situation, if it existed at all, was of a very short timeframe. However, answers to the question of attribution only emerged later. Determining an international state's responsibility requires more than the state's involvement in financing, training, or planning the perpetrators. It's also necessary for the state to exercise control over the perpetrators' actions and have effective oversight over the operations committed.

Therefore, for the shooting down of an aircraft to be legally justifiable from the perspective of international responsibility, the aircraft must engage in an act attributable to at least one other state. This act should involve an armed attack reaching the level of aggression effectively controlled by another state (acting on its instructions). For instance, if an armed aircraft uses its onboard weaponry or employs its weapons in a way that endangers life and property safety, committing severe and violent actions or causing catastrophes. Ultimately, establishing the validity of self-defense requires the transformation of a civilian aircraft into a state aircraft, closely related to the significance of the distinction between civilian and state aircraft discussed earlier (and the complexities it entails). These difficulties are further amplified when civilian aircraft are used as weapons, as was the case in the September 11, 2001 attacks.

The transformation of a civilian aircraft into a state aircraft there have been several attempts that serve as examples. These attempts are based on various factors and considerations, including:

a. Article 89 of the Chicago Convention states that the Convention is not applicable during war and emergency. Therefore, in the case of a civilian aircraft carrying out an armed attack (using a civilian aircraft as a weapon), this action alone triggers an armed conflict, causing the cessation of the applicability of the Chicago Convention. Instead, the principles of *ius in bello* come into play; the legal framework and concepts of humanitarian law do not exclude shooting down a civilian aircraft under the principle of military necessity and in consideration of the concept of military objectives (humanitarian law does not prohibit civilian casualties in attacks against military targets);

b. According to the Chicago Convention, aviation cannot be used for purposes contrary to the objectives of the Convention, and this provision can provide a basis for considering aviation used for purposes contrary to the objectives of the Convention as unlawful. Therefore, such use may create an exception to the prohibition on the use of force.

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25 According to Article 63 of the San Remo Manual, a civil aircraft may become a military target, for example, if it participates in acts of war on behalf of the enemy, acts as an auxiliary aircraft to the enemy's armed forces, infiltrates the enemy's intelligence system, or contributes to it, is armed with air-to-air or air-to-ground weapons, or in any other effective way contributes to military operations, etc.

26 *Ius in bello* is the entirety of law applicable during armed conflicts, essentially encompassing humanitarian law.
There may be no grounds for dispute in certain parts of the arguments mentioned above. However, in my opinion, following such reasoning could undermine the prohibition on the use of force and render the legality of using weapons against civilian aircraft questionable, especially when considering the dilemmas surrounding the aircraft's status. Therefore, there is no room for such exceptions. Even if we can justify the legality of using weapons against aircraft based on the above arguments, ethical and human rights dilemmas persist.\(^\text{27}\)

The state respects and protects human life, with the responsibility extending to the right to life of those on board a civilian aircraft and potential victims on the ground. The state is obligated to refrain from depriving individuals of their lives and to take active measures to safeguard the lives of its citizens.\(^\text{28}\) The justification for using force against an aircraft can only be rooted in the state's effort to protect potential victims on the ground. If we examine this issue from a human rights perspective, it's important to recognize that passengers on board are unwitting victims of circumstances beyond their control. They have no power to influence their fate or the course of events. By shooting down a civilian aircraft, not only would the terrorists become their captors, but the state as well.\(^\text{29}\) Destroying the aircraft on such grounds objectifies them, depriving them of their inherent human dignity and violating their fundamental right to life.

As pointed out by the German Federal Constitutional Court, “... it is completely unthinkable to deliberately kill innocent people such as the crew and passengers of the hijacked aircraft, based on legal authority.”\(^\text{30}\) It is not a valid argument to claim that the use of armed force (shooting down) against a civilian aircraft would result in fewer casualties compared to the scenario where the state does not use force against the aircraft. The use of armed force against a civilian aircraft could also lead to further potential consequences, such as scattering debris and shockwaves, which would further increase the number of innocent victims who do not influence their fate. Furthermore, the victims' families' human rights should also be considered. The simultaneous destruction of the aircraft, along with the unfortunate victims,

\(^{27}\) For long time, 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 first 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”, Istum 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 the Universal Declaration of Human Rights was adopted in 1948.


\(^{30}\) BVerfGE 115, 118 (157).
raises additional ethical dilemmas. Considering the points discussed earlier, it should be recognized that the detailed deliberation and modeling of ethical consequences by decision-makers can lead to irreparable delays, jeopardizing the success and legality of preemptive measures. This creates a vicious cycle within the closely intertwined legal and ethical dilemmas system.

C. Conclusion

In conclusion, the complex intersection of international legal frameworks, ethical considerations, and fundamental human rights shapes the dilemmas surrounding using weapons against civil aircraft. The international legal landscape, with principles such as the prohibition of the use of force and the right to self-defense, provides a foundation for examining armed interventions against civil aircraft. The concept of armed conflict and the circumstances warranting preemptive self-defense add to the issue's complexity.

Ethical dilemmas arising from the possibility of loss of innocent lives raise profound questions about the morality and justification of employing lethal force. The potential impact on passengers and individuals on the ground underscores the need for careful consideration of the consequences. The inherent value of human life, the principle of human dignity, and the notion of protecting the innocent challenge the acceptance of such forceful measures.

To prevent such incidents, in my opinion, it is necessary:

a. Implementing rigorous checks for those involved in aviation to swiftly identify and mitigate risks;

b. Rapid and effective information sharing among states is crucial for addressing all terrorist threats and suspicious activities;

c. Increasing awareness among industry participants through education and ongoing training, including aviation security measures, threat identification, protocols, and necessary and expected actions.

I believe that despite all aviation security measures and methods, the destruction of civilian aircraft raises concerns about violating the right to life of passengers on board as well as the international obligations of the state.
REFERENCES

A. Journal


Mustafa Kemal Atatürk hatása a török identitás és állampolgárság koncepciójára, különös tekintettel az alkotmányjogi szabályozásra“ Jog–Állam–Politika.


Sipos, Attila, (2017). “A polgári légi jármű jogi státusza”, Repüléstudományi Közlemények,

Sulyok, Gábor, 2019, A terrorcselekmény elkövetéséhez használt polgári légi jármű lelővésének alkotmányjogi megítélése az új szabályozási környezetben, Budapest: Gondolat Kiadó.


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.


Zakariás, Kinga, 2019, Az emberi méltósághoz való alapjog. Összehasonlító jogi elemzés a német és magyar alkotmánybírósági gyakorlat tükrében, Budapest: Pázmány Péter Katolikus Egyetem.

Zoltán “Az MH-17 légi járat lelövésének nemzetközi jogi megítélése a nemzetközi polgári repülésről szóló Chicagói Egyezmény tükrében”, Debreceni Jogi Műhely.

**B. Book**

Maurice Pearton. Diplomacy War and Technology Since 1830. University Press of Kansas

Gaurav Lomes. (2020). Legal Dimensions of Use of Force against Civilian Aircraft. Available at SSRN

**C. Regulation**

San Remo Manual

Chicago Convention

**D. Internet**
