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Conditions for lawful shooting down a civilian aircraft in light of Article 3bis (a) of the Chicago Convention

Abstract

This study aims to review potential issues when applying Article 3bis (a) of the Chicago Convention. This provision sets a number of conditions that have to be fulfilled when using weapons against a civil aircraft in flight. The most controversial issue concerns the possible exception from the general prohibition of downing an aircraft pursuant to the UN Charter. There are some interpretative controversies linked to the possibility of invoking the right to self-defence by states (e.g., whether the state that is neutralizing the potentially rogue aircraft can act in anticipation of an armed attack) and these inaccuracies will be addressed by the author. All of these issues implicate the character of the prohibition enshrined in Article 3bis (a) as such and thus have a huge impact on states' real abilities of protecting their people, for example in situations of terrorist threats.

Keywords: civil aviation, self-defence, terrorism, Chicago Convention, downing an aircraft

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Introduction

Civil aviation has been exposed to different forms of abuse or misuse from the very beginning of its history.¹ The Convention on International Civil Aviation (hereinafter: the Chicago Convention or the Convention), drafted in 1944 by 54 nations, was established to promote cooperation and “create and preserve friendship and understanding among the nations and peoples of the world.”²

Numerous interstate accidents concerning downing of civil aircrafts in foreign territorial airspace have disrupted safety of international civil aviation as well as international peace and security.³ The aircrafts were often neutralized not because they constituted an actual or potential threat of attack, but because they were overflying a militarily area and were suspected of espionage or surveillance operations.⁴ In light of such fatal and blameworthy situations, a strong international reaction was needed.

Article 3bis of the Chicago Convention was introduced by a Protocol⁵ on 10 May 1984 and entered into force in October 1998 when two-thirds of the International Civil Aviation Organization’s member states ratified it. This provision followed *inter alia* the fateful destruction of the Korean

¹ The seriousness of this issue is confirmed for example by the practice of the UN that dedicated seven out of nineteen instruments to deal with terrorism in the context of civil aviation; see also: the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991).

² Chicago Convention (1944): Preamble.

³ Hughes W. (1980): 595.

⁴ For example: shooting down of an El Al airliner in 1955; downing of a Libyan Arab Airlines aircraft in 1973; destruction of the Korean Airlines Flight 902 in 1978; and the Korean Airlines Flight 007 in 1983.

⁵ Protocol Relating to an Amendment to the Convention on International Civil Aviation [Article 3 *bis*], ICAO Doc 9436, incorp. in Doc 7300.

Airlines flight no. 007 in 1983 and the aim of its introduction was to prevent perilous situations in airspace and ensure safety of civil aviation.⁶

The preamble to the Protocol reaffirms the principle of the non-use of weapons against civil aircraft in flight and amends the Chicago Convention through new Article 3bis, which in its point (a) states that:

“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 character of the obligation of states

The Convention is applicable regardless of the scheduling status of flight or its nationality⁷ unless the aircraft is used in military, customs or police services.⁸ Pursuant to Article 3(a) of the Convention aircrafts are divided into civil and state ones.⁹ While a state aircraft is defined as “used in military, customs and police services”, while civil means those of a non-state character. It should be underlined that

⁶ Kido M. (1997): 1069; Report (1993): passim.

⁷ Brown R. (2007): 82.

⁸ Chicago Convention (1944): Article 3(a).

⁹ This kind of differentiation has its roots in the first international convention addressing the international aerial navigation: The Paris Convention of 1919.

the Convention states about “services” instead of “purposes”, suggesting that non-civil services can be performed only by states and not by non-state actors.¹⁰

When identifying the scope of protection under Article 3bis (a), the wording of this provision has to be carefully analysed. In particular, whether the term “refrain” has been used to allow certain exceptions from the general rule and, if so, what are the possible exceptions from this prohibition.

The phrase “must refrain” raises doubts as to the character of the obligation of states. Namely, it is unclear whether states are required to generally avoid using weapons or must avoid using weapons against civil aircraft. This is for two reasons: first, the term “refrain” does not seem to be the most effective way of creating an unconditional obligation (it is less powerful than for example ‘abstain’);¹¹ and, secondly, Article 3bis (a) itself differentiates the kinds of the obligations states – “must refrain” is compared to “must not” (the second phrase is related to the lives and safety of passengers in case of interception) within the text of the provision.¹²

When interpreting a treaty, the Vienna Convention on the Law of Treaties (hereinafter: VCLT), which is the most authoritative text governing the interpretation of treaties, allows the preparatory work of the treaty and the circumstances of its conclusion, to be taken into consideration as a supplementary means of interpretation.¹³ *Travaux préparatoires* of the Convention points out that this formulation was not

¹⁰ Geiss R. (2005): 239.

¹¹ Cheng B. (1985): 61.

¹² Ibidem: 62.

¹³ VCLT (1969): Article 32

accidental.¹⁴ Other options were considered, but the final decision was made after analysing possible legal issues and loopholes related to accepting a different wording describing the obligation of states. The final formulation seems to be an adequate means to define, on the one hand, the kind of the obligation of a state not to use weapons against an aircraft in flight, but on the other it confirms the non-absolute character of Article 3bis (a) in conjunction with the Charter of the United Nations (hereinafter: UN Charter). Pursuant to the said provision: “[it] shall not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations”.

To conclude, Article 3bis (a) cannot be perceived as an absolute one since there are certain situations in which states may neutralize an aircraft and the conditions of this exception are provided by the UN Charter.¹⁵ States have to act on the basis, but also in accordance with this act. As a result, a general obligation to refrain from using weapons exists and as such has to be respected; a potential decision on using weapons against an aircraft in flight can be made only after specific conditions under the UN Charter are met.

Exception under the Charter of United Nations

The last sentence of Article 3 bis (a) of the Chicago Convention makes an explicit reference to the Charter of the United Nations; namely, to the rights and obligations of states set forth therein. This idea was proposed in the Austria-France and United States drafts; however, those drafts referred

¹⁴ ICAO Executive Committee (1984): 29, 30, 46, 182.

¹⁵ Augustin J. (1998): 203.

directly to Article 51 of the UN Charter (the right to self-defence).¹⁶ Finally, Article 51 was not mentioned in the text of the Convention, nonetheless the intent of the second part of Article 3bis (a) was to provide an exception to the prohibition of the use of force against civil aircraft in flight, specifically, on the basis of the right to self-defence pursuant to Article 51 of the UN Charter.

There were two reasons for dropping the idea of incorporating Article 51 of the UN Charter in the text of the Convention. First, there were voices that an explicit reference to this provision could be too restrictive in some cases and, secondly, there was concern that the right to self-defence under the UN Charter is not applicable in cases of using force against civil aircraft in flight.¹⁷ Moreover, the reference to Article 51 of the UN Charter could be interpreted as a license to use weapons, which would be certainly in contravention to the purpose and object of the Chicago Convention.¹⁸

Several states claimed that due to the limited scope of Article 51 of the UN Charter, the prohibition on the use of force against civil aircraft in flight would be *de facto* absolute and thus unreasonable. By providing reference to Article 51 explicitly, states would not be allowed to take any appropriate measures when civil aircraft breached their territorial integrity.¹⁹ It was generally accepted, that the UN Charter does not allow the use of weapons solely in the purpose of protecting states, except in response to an armed attack – to the extent and for the time necessary to neutralize the danger.²⁰

¹⁶ Draft (1983): 1; see also: Stokdyk S. (1991): 1305–1309.

¹⁷ ICAO Executive Committee (1984): 25.

¹⁸ Ibidem: 38.

¹⁹ Ibidem: 25.

²⁰ Ibidem: 40.

An explicit invocation of Article 51 of the UN Charter would result in a very strict and clear limitation of the powers of states and therefore was agreed to remain avoided.

Potential issues related to Article 51 of the UN Charter

Although states did not agree to put Article 51 of the UN Charter directly in the text of Article 3bis (a) of the Chicago Convention, the drafters were aware that the right to self-defence under the UN Charter constitutes the only exception to the prohibition under the Chicago Convention.²¹

Article 51 of the UN Charter provides some conditions that have to be met when exercising the “inherent right to self-defence”; however, there are also additional conditions that were pronounced by the International Court of Justice in its jurisprudence as necessity²² or proportionality²³ of a state’s reaction.

Pursuant to the wording of Article 51 (“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.”) the right to self-defence is applicable only in the situations when: (1) the rogue activity against a Member State has a character of an armed attack; and (2) this armed attack is actually materializing.

²¹ Ibidem: 25, 40.

²² Nicaragua v. United States of America (1986): 176; Congo v. Rwanda (2002): 12; Congo v. Rwanda (2002a): 30; Wall (2014): 241.

²³ Nicaragua v. United States of America (1986): 176; Iran v. United States of America (2003): 51; Gray C. (2004): 121; Simma B. (2002): 805.

a) Aircraft as a lethal force

There are rather no doubts as to the definition of an armed attack. It is widely understood as ‘aggression’ in accordance with the United Nations General Assembly Resolution 3314 (XXIX).²⁴ Consequently, an armed attack may have a form of any activity “of such gravity as to amount to an actual armed attack conducted by regular forces.”²⁵ Therefore, due to its intensity, there is no doubt that the use of a civil aircraft as a large-scale weapon amounts to an armed attack, making the right to self-defence applicable.²⁶ In the situation of threat, the lives of people on board are often compared to thousands of lives of people on the ground. It confirms that any steps taken to neutralize this threat are justified and even required from states in order to protect vulnerable individuals.

b) Right to self-defence and non-state actors

It is broadly accepted that Article 51 of the UN Charter may be invoked if an armed attack has been committed by non-state actors as long as it is imputable to a state.²⁷ The situation is more complicated if an actor acts on their own and is not supported by any state.

The United Nations Security Council in its Resolutions 1368 and 1373 after the events of 11 September 2001 condemned “in the strongest terms the horrifying terrorist attacks” and regarded “such acts [...] as a threat to international peace and security,” but it also expressed “its readiness

²⁴ Definition of Aggression (1974): Articles 1–3.

²⁵ Ibidem: Article 3(g).

²⁶ Geiss R. (2005): 246.

²⁷ Simma B. (2002): 117; see also: Greenwood C. (2002): 301, 314.

to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations". Neither of these Resolutions limit the application of Article 51 only to terrorist attacks committed by state actors. Moreover, the wording of Article 51 itself seems to support the position that there is no limitation within the text of the said provision to state attacks only.²⁸

However, the International Court of Justice took an opposite view. In its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,²⁹ the Court stated that Article 51 of the UN Charter recognizes an inherent right of self-defence in the case of an armed attack by one state against another state³⁰ and therefore is limited to state attacks only.³¹

This view seems to be extremely restrictive and does not reflect state practice. Moreover, such an approach may clearly limit the scope of states' responses that can be undertaken in order to protect public security in the situations of terrorist threats.³² After the events of 11 September 2001, the positions of states regarding the right to self-defence and the need of having effective and available tools of protection have evolved. For example, the Attorney General of the United Kingdom, in his statement of 21 April 2004 underlined: "The resolutions passed by the Security Council in the wake of 11 September 2001 recognised both that large-scale terrorist

²⁸ Wall (2004a): 242.

²⁹ Wall (2004): 139.

³⁰ Ibidem.

³¹ Congo v. Uganda (2005): 106.

³² Müllerson R. (2019): 759.

action could constitute an armed attack that will give rise to the right of self-defence and that force might, in certain circumstances, be used in self-defence against those who plan and perpetrate such acts and against those harbouring them, if that is necessary to avert further such terrorist acts.”³³ For these reasons, the restrictive reading of Article 51 of the UN Charter would be unreasonable as too constraining. This provision should be interpreted in a certain context that will be discussed below.

c) Imminence of a threat as a context for interpretation of Article 51 of the UN Charter

Another burning issue related to Article 51 of the UN Charter concerns a state’s ability to exercise the right to self-defence before an armed attack actually occurs. Namely, whether it can perform the anticipatory self-defence that is a concept of customary international law.³⁴

The text of Article 3 bis (a) of the Chicago Convention makes a clear reference to the UN Charter (to its Article 51 as discussed above). Article 51 of the UN Charter does not contain anything suggesting that States are allowed to take countermeasures in anticipation. Pursuant to its wording it is quite the contrary: an armed attack has to “occur” first and only after it “occurs” the right to self-defence becomes applicable. Such a reading would, however, remain in contravention to the object and purpose³⁵

³³ Statement of Attorney General, Lord Goldsmith, to the House of Lords (2004): 370.

³⁴ Brownlie I. (1963): 257; Higgins R. (1994): 248; Shaw M. (2003): 1208, Cassese A. (2005): 362.

³⁵ VCLT (1969): Article 31.

of the Chicago Convention that promotes peace, safety and recognizing every state's sovereignty over the airspace above its territory.³⁶

The UN Charter does not regulate directly all aspects of its content and the customary norms of self-defence are often used when interpreting Article 51. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to an armed attack and necessary to respond to it, which is a rule well established in customary international law.³⁷ In light of common and unexpected terrorist threats, states are not required to remain passive in the situation of threats to their existence.³⁸ Thus, they should be able to exercise the right to anticipatory self-defence which constitutes nothing else but a context for interpretation of Article 51.

Pursuant to the established jurisprudence³⁹ and state practice⁴⁰, anticipatory measures have always been an intrinsic part of the right to self-defence. This right, according to the drafting history of the UN Charter, is upheld and not excluded by Article 51 of the UN Charter.⁴¹ Moreover,

³⁶ Chicago Convention (1944): Article 1

³⁷ Nicaragua v. United States of America (1986): 176.

³⁸ United Nations General Assembly (1982): 124; Iran v. United States of America (2003): 76; Nicaragua v. United States of America (1986): 193; Bosnia and Herzegovina v. Serbia and Montenegro (1993): 41.

³⁹ Nicaragua v. United States of America (1986a): 173; Waldock H. (1951): 498,503.

⁴⁰ For example: Pakistan's action in the region of Kashmir in 1950; Israel's air strike on Egyptian, Syrian and Jordanian military airfields in 1967; Israel's destruction of Iraqi nuclear reactor in 1981, the US bombing Libyan territory in 1986; or the US intervention in Iraq in 2003.

⁴¹ Franck T. (1970): 809, 821; Szabó K. (2014): 94.

according to the *Caroline*⁴² test, states have the right to anticipatory self-defence when (a) necessity of self-defence is instant, overwhelming, leaving no choice of means, and no moment of deliberation; and (b) the reaction has to be limited by that necessity, *i.e.* is proportionate to the threat.⁴³

Nowadays, terrorists intentionally choose resistless civilian objects instead of well-defended military targets.⁴⁴ The most vulnerable targets would be almost unavoidably destroyed if attacks were not prevented. Thus, anticipatory self-defence may be the only effective means of preventing terrorists from succeeding⁴⁵ and states should not be denied invoking this concept as a justification for their actions.

Conclusion

The concept of the prohibition to use weapons against civil aircraft in flight is undoubtedly right, in particular given the previous tendencies of states to overuse their sovereignty. However, as indicated in this study, the ban raises many interpretative doubts, which the drafters were already aware of at the stage of preparing the Convention. This also includes a question of how much absolute is the Convention. In light of modern terrorist threats, allowing states to use weapons only in the case of self-defence based restrictively on the UN Charter may prove insufficient. Consequently, the issues as the relation between Article 51 of the UN Charter and anticipatory self-defence or the possibility of invoking self-defence against non-state actors should be urgently addressed

⁴² See also: Murphy S. (2002): 50

⁴³ Webster (1841): 1137–1138.

⁴⁴ Just as it happened in Paris (2015) or in Berlin (2016).

⁴⁵ Müllerson R. (2019): 760

with due regard to contemporary terrorist strategies and technological progress. Only then the balance between protection of human lives on board and those on the ground can be preserved.

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