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The Concept of Jurisdiction in the Air: To What Extent Can It Be Upheld Against Unruly Passengers in International Air Transport?

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ABSTRACT

Jurisdiction is essential for statehood along with the right to prescribe and enforce laws. Unruly behaviour may threaten air transportation security and safety, including the passenger safety, disrupts other passengers and crew causing delays and diversions. But due to loopholes on the existing laws, and lack of choice of jurisdiction, such offenses often remain unpunished. This article aims to seek the best role that Indonesia should take to implement its jurisdiction on aircrafts in international flights and to protect its citizens in international flight. It provides an overview and analysis of existing international and Indonesian legal instruments in handling unruly passengers and to support extended jurisdiction choices so unruly passengers and other related criminal activities can be regulated and punished as necessary to ensure the safety and security, including the Chicago Convention 1944 and the Annex 17 on Security, The Tokyo Convention 1963 and the Montreal Protocol 2014.

Keywords: Air Law, Aviation, Aviation Security, Jurisdiction, Unruly Passengers

Konsep Yurisdiksi di Udara: Sejauh Manakah Yurisdiksi dapat Ditegakkan terhadap Penumpang yang Sulit Diatur dalam Transportasi Udara Internasional?

ABSTRAK

Esensi dari yurisdiksi penting bagi negara dalam menjalankan dan menegakan hukum. Perilaku tidak tertib dapat mengancam keamanan dan keselamatan transportasi udara, dimana di dalamnya terdapat unsur keselamatan penumpang, gangguan terhadap awak dan penumpang lainnya, serta dapat mengakibatkan keterlambatan dan diversifikasi. Namun demikian, dengan adanya celah dalam hukum dan peraturan, serta minimnya pilihan yurisdiksi, tindakan tersebut sering tidak dikenakan hukuman. Artikel ini bertujuan mencari peran terbaik yang harus diambil Indonesia, dalam mengimplementasi yurisdiksinya di pesawat dan melindungi warga negaranya dalam penerbangan internasional. Artikel ini memberikan tinjauan umum dan analisis instrumen hukum Internasional dan hukum Indonesia yang menangani penumpang yang sulit diatur, termasuk di dalamnya Konvensi Chicago 1944 dan Annex 17 tentang Keamanan, Konvensi Tokyo 1963 dan Protokol Montreal 2014.

Kata Kunci: Aviasi, Hukum Udara, Keamanan Penerbangan, Penumpang yang Sulit Diatur, Yurisdiksi

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A. INTRODUCTION

In public international law, the concept of jurisdiction traditionally has a strong link with the notion of sovereignty. It is an essential component of statehood and the right to prescribe and enforce laws. In the classic Westphalian understanding, this right has been limited to a State's territory; a limitation that at the same time ensures that no State intervenes in another State's affairs. This idea is no longer strictly applied, if it ever was. Exceptions that allow for limited extraterritorial jurisdiction have been carved out, and, moreover, the territoriality principle has been construed rather liberally.¹

Unlike the law of the sea which clearly states that the law that applies on board is the flag state, the air law considers many aspects including the sovereignty of the territory overflowed; the registration of the aircraft; ownership and control of the airline company; and different nationals of the crews and passengers. In practice, it often depends on the national law of each state to regulate its own jurisdiction over their aircrafts.²

An uncertainty in jurisdiction on the air may cost civil aviation as it needs to overcome not only the hazards and safety deficiencies intrinsic to its own system in areas such as personnel, equipment and facilities, but must also resist extrinsic threats and dangers, such as the man-made threats of terrorists or other actors of unlawful interference and criminal acts.³ In

2017, the International Aviation Transport Association (IATA) published data that stated 58,000 unruly passenger incidents were reported on aircraft in-flight during the last decade.⁴ Unruly behaviour may threaten air transportation security and safety, including the passenger safety, disrupts other passengers and crew causing delays and diversions. But due to loopholes on the existing laws, and lack of choice of jurisdiction, such offenses often remain unpunished.

There is no exception regarding unruly air transport passengers behaviour in Indonesia. One of the most well-known cases happened in April 2014, when a passenger stormed into the cockpit of a Boeing 727-800 of the Australian Virgin Air from Brisbane to Bali. The crew informed Denpasar Airport about the possibility of terrorists in the aircraft. The aircraft later landed on the Denpasar Airport and the authority closed the airport. All other flights were diverted to other airports. Five vehicles including military-style trucks, filled with men in uniform, were rushing towards the plane. Then the Virgin plane taxied away, followed by the convoy of security forces and the unruly was later arrested. The investigation found that he was an intoxicated passenger, but he was not prosecuted in Indonesia. He was flown back to Australia on his own cost, and the Australian system also failed to prosecute him.⁵

This incident is not an extraordinary case. There are over 66.000 cases reported

¹ Ryngaert, Cedric. *The Concept of Jurisdiction in International Law*. Utrecht University, 2014, at 1.

Available at:
<https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>.

² Oduntan, Gbenga. *Sovereignty and Jurisdiction in Airspace and Outer Space: Legal Criteria for Spatial Delimitation*. 1st ed., Routledge, 2012, at 299.

Available at:
<http://routledge.com/Sovereignty-and-Jurisdiction-in-Airspace-and-Outer-Space-Legal-Criteria/Oduntan/p/book/9780367865047>.

³ Huang, J. *Aviation Safety and ICAO*, Alphen aan den Rijn: Kluwer Law International, 2009, at 150;

Abeyratne, Ruwantissa, *Aviation Security Law*, 1st Ed., Springer-Verlag Berlin Heidelberg, 2010, at 55.

⁴ IATA, "Unruly Passengers", <https://www.iata.org/en/policy/consumer-pax-rights/unruly-passengers/>. Accessed 1st November 2020.

⁵ Chu, Mei Mei. "The Full Story About Virgin Airlines Plane 'Hijack' Scare." *SAYS.Com*, 2014, <https://says.com/my/news/the-full-story-about-virgin-airlines-plane-hijack-scare>; DetikNews, "Matt Christopher 'Pembajak' Virgin Tak Bisa Diproses Hukum Pidana RI?", 2014, <https://news.detik.com/berita/d-2566438/matt-christopher-pembajak-virgin-tak-bisa-diproses-hukum-pidana-ri>, accessed on the 17th of December 2020.

to IATA of unruly passenger behavior between 2007 and 2017. While overall there has been a small reduction in the overall number of cases reported in the last few years, the issue remains significant. In 2016, 9.837 incidents compared to 10.854 in 2015 were reported to IATA, equivalent to 1 incident for every 1.424 flights in 2016 and 1 per 1.205 flights in 2015. However, the proportion of more serious incidents has increased. Specifically, in 2017, there was an incident for every 1.053 flights.⁶

All Indonesian airlines, including Garuda Indonesia, Lion Air, and Air Asia have been voicing the issue of unruly passengers in several forums. In the Focus Group Discussion on the Implementation of Beijing Convention 2010 and its Benefit for Indonesia held in Yogyakarta on 17 April 2018, the Head of Air Security Officer of Garuda Indonesia Airlines and the head of legal Department of AirAsia stated that the unruly passengers' issue is their number one concern. Both airlines encourage the government to ratify the 2014 Montreal Protocol that amended Tokyo Convention 1963.⁷ It holds priority for these airlines compared to other International Instruments.

The airlines also found that the criminal acts on the aircraft is not limited to drunk or mentally disturbed passengers, but also several organized crimes, such as syndicate of thieves, human trafficking, and drug trafficking. Therefore, the Airlines saw the need to uphold the jurisdiction and the law and not let these criminal activities grow.

The main "game changer" articles in the 2014 Montreal Protocol provide jurisdiction extensions over criminal offences on board of aircraft. Under this Protocol, the landing state law can be applied to unruly passengers' cases in addition to the state of aircraft registration. The Montreal Protocol 2014 also clarifies the definition of unruly behavior and reinforces the right of airlines

to seek recovery of the costs arisen from the unruly conduct.

This paper will explain the concept of sovereignty and jurisdiction over airspace and on the aircraft (on board) including the jurisdiction extension, unruly passengers, and terrorism on civil aviation and how it will affect the sovereignty and the authorities. This paper also will discuss. This paper will also seek the best policy for Indonesia including the ratification of the Montreal Protocol 2014 and the how-to implementation of regulations, including the formation of the team, regular meeting and international cooperation within the International Civil Aviation Organization (ICAO).

B. LEGAL PROVISIONS ON JURISDICTION IN RELATION TO UNRULY PASSENGERS

This part of the article will firstly address the definition of terms and concepts for the readers' understanding. It touches upon sovereignty in the air and its development in relation to actionable rules, including punishments, towards unruly passengers. It will also give a general overview of what issues are already regulated. The first part of this subchapter will display the aforementioned using both international and national legal instruments.

The second sub-chapter provides an analysis on weaknesses or legal voids based on the findings displayed in the first sub-chapter.

The third and last sub-chapter will provide recommendations on possible options to better enforce jurisdiction in domestic and international flights with conflicting jurisdiction. It will also discuss the opportunities for cooperation between countries, including the ones that are done under ICAO.

⁶ IATA, *supra* note 4.

⁷ The Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Montreal 4 April 2014 (Montreal Protocol

2014) amends the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963 (Tokyo Convention, 1963).

1. Definition of Terms and Concepts

a. The Concept of Sovereignty over Airspace

Centuries ago, before mankind thought of the flying machine, the Rome Law (*Latin maxim*) came up with the principle "*cujus est solum ejus usque ad coelum*". This property principle translates as "Whose is the soil, his it is up to the sky", or in a more simple explanation "He who possesses the land possesses also that which is above it".⁸

The strict formulation of *ad coelum* was solidified in English common law in the case of *Bury v. Pope* in 1587, when one property owner was held to have the right to build up against the window of his neighbour. The concept later developed into sovereignty over the airspace and was later codified into the Civil Law adopted in 19th and 20th century Europe, and was included in the Grotius's "*De iure belli ac pacis*".⁹

In Air Law, The Chicago Convention on Civil Aviation 1944 starts with the unequivocal proclamation of the principle of sovereignty as previously sounded in Paris Convention 1919 on the Aerial Navigation Regulations. Article 1 states that "*The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory*". However, it must be noted that the sole reliance upon the above principle would make the objectives of the Chicago Convention 1944

useless and would undermine the legal force of all other provisions of the Convention, its Annexes as well as the subsequent bilateral and multilateral treaties.¹⁰ In international aviation, a state uses the concept of sovereignty in order to keep control of their national aviation sector, as often articulated by the development of determining the jurisdiction on the aircraft.

b. Jurisdiction on Board of Aircrafts

Jurisdiction is the power and authority constitutionally given to execute law, including providing legal remedies.¹¹ It concerns the reach of a State's law, meaning its ability to impose national regulations on entities, and is an aspect to sovereignty. Jurisdiction mainly relied on the territorial dimension but has developed a limited allowance of extraterritoriality, such as seen in law of the sea and air law.¹²

Article 1 of Chicago Convention 1944 implicitly establishes national jurisdiction over a state's airspace upwards from ground level of its existing territory. Specifically, according to Article 2, if there is suspicion an aircraft is used in violation of the Chicago Convention, it is entitled to require the landing at some designated airport or order other actions to end the violation.

The implementation of the Article 1 and 2 of the Chicago Convention often differs for every member. The United States (US) applied the system of dual sovereignty existing under the US

⁸ Klein, Herbert David. "Cujus Est Solum Ejus Est...Quousque Tandem." *Journal of Air Law and Commerce*, vol. 26, no. 3, 1959, at 237.

⁹ Abramovitch, Yehuda. "The Maxim 'Cujus Est Solum Ejus Usque Ad Coelum' as Applied in Aviation." *McGill Law Journal*, vol. 8, no. 4, 1961, pp. 247-69, <http://lawjournal.mcgill.ca/userfiles/other/8509457-abramovitch.pdf>.

¹⁰ Diederiks-Verschoor, and Isabella Henrietta Philepina. *An Introduction to Air Law*. Edited by Pablo Mendes de Leon and Michael A. Butler, 9th ed., Kluwer Law International, 2012.

¹¹ "What Is JURISDICTION?" *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, 2021, <https://thelawdictionary.org/jurisdiction/>.

¹² Ryngaert, *supra* note 1.

Constitution. The aviation falls under federal law and the Federal Aviation Administration (FAA) is the designated governmental body with powers to regulate all aspects of civil aviation.¹³ The FAA has jurisdiction over US citizens, which is a general term for individuals and businesses. According to Sec. 101 of the Federal Aviation Act of 1958, citizen of the United States includes:

- 1) A US citizen or of one of its possessions;
- 2) A partnership of which each member is a US citizen; and
- 3) A corporation or association created or organized under the US laws or of any State, Territory, or possession of the US, where the president and two-thirds or more of the board of directors and other managing officers thereof are US citizens and in which at least 75 per centum of the voting interest is owned or controlled by US citizens or of one of its possessions.

Indonesia's jurisdiction in the air is contained in its national umbrella law for aviation, Law No.1 of 2009 on Aviation. The scope of it based on Article 4 is applicable for:

- 1) All activities using the airspace, flight navigation, airplanes, airports, air base, air freight, safety and security issues, and other related general and supporting facilities, including for environmental sustainability, in Indonesia's territory;
- 2) All foreign aircrafts operating from and/or Indonesia's territory; and

- 3) All Indonesian aircrafts outside Indonesia's territory.

The Convention on Offences and Certain Other Acts Committed on Board Aircraft (The Tokyo Convention 1963, that came into force in 1969 then specifically gives the Registration State competency to exercise jurisdiction over offences and acts committed on board in Article 2, with no exclusion to national criminal jurisdiction if it were to happen on board. According to Articles 5-6, when the last point of takeoff or the next point of intended landing is not the Registration State, or if the aircraft flies in another state's airspace with the perpetrator on board, then the aircraft commander is allowed to take measures to protect the aircraft's safety and maintain good order and discipline on board, including restraint.

c. **Chicago Convention 1994**

The Annexes of the Chicago Convention 1994 are known as the Standard and Recommended Practices (SARP). The International Civil Aviation Organization (ICAO) monitors state compliance to SARP through a mandatory and scheduled Universal Safety Oversight Audit Program (USOAP) and Universal Security Audit Program (USAP), though it is not legally binding.

Territorial application of the main rules of the air is stated in the Chapter 2, Annex 2 of the Chicago Convention 1944 on the Rules of the Air. The paragraph 2.1 states *"the rules of the air shall apply to aircraft bearing the nationality and registration marks of a Contracting State, wherever they may be, to the*

¹³ Harriman, Edward A. "Federal and State Jurisdiction with Reference to Aircraft." *Journal of Air Law and Commerce*, vol. 2, no. 3, 1931, pp. 299-324.

extent that they do not conflict with the rules published by the State having jurisdiction over the territory overflown".¹⁴

Meanwhile, paragraph 2.4 states that the pilot-in-command of an aircraft shall have final authority as to the disposition of the aircraft while in command, including in handling unruly passengers.

The definition for unruly passengers is also stated in Annex 17 of the Chicago Convention on Aviation Security. It is defined as a passenger who fails to respect the rules of conduct at an airport or on board an aircraft or to follow the instructions of the airport staff or crew members and thereby disturbs the good order and discipline at an airport or on board the aircraft.

Safety and security are considered the airline industry's top priorities. However, disruptive passengers have been, over the past several years, consistently prevalent. Thus, unruly passenger incidents are currently a very real and serious threat to both.

d. **The Tokyo Convention 1963**

The Convention on Offences and Certain Other Acts Committed on Board Aircraft (The Tokyo Convention 1963) is the first multilateral treaty adopted by the international community to combat hijacking. Since numerous acts of hijacking were carried out by terrorists, the Convention is also regarded as the first worldwide

treaty on counter-terrorism. In fact, its significant contributions to aviation safety go beyond the realm of counter-terrorism.

The Tokyo Convention 1963 makes it unlawful to commit "*Acts which, whether or not they are offences [against the penal law of a State], may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.*" The terms "safety", "good order", and "discipline" are clearly not just aimed at terrorism, but are also broadly designed to maintain laws and public orders on board civil aircraft. To fulfill this purpose, the Convention clarifies the issue of the jurisdiction of the State of "registration" and empowers the aircraft commander with certain authority on board aircraft. The existence of jurisdictional vacuum or lacunas on board aircraft may compromise aviation safety, as demonstrated by the case facts of *US v. Cordova* (1950).

In the case of *US v Cordova*, two drunken passengers started a fight on board an aircraft during a flight from Puerto Rico to New York, with other passengers crowding to watch them, causing the plane to become tail heavy and to lose balance. The pilot tried to intervene, but Cordova bit him on the shoulder and struck another crewmember. When Cordova was prosecuted, a US Federal Court

¹⁴ The Council of the International Civil Aviation Organization resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention. Over the high seas, therefore, these rules apply without exception. 2.1.2 If, and so long as, a Contracting State has not notified the International Civil Aviation Organization to the contrary, it shall be deemed, as regards aircraft of its registration, to have agreed as

follows: For purposes of flight over those parts of the high seas where a Contracting State has accepted, pursuant to a regional air navigation agreement, the responsibility of providing air traffic services, the "appropriate ATS authority" referred to in this Annex is the relevant authority designated by the State responsible for providing those services. The phrase "regional air navigation agreement" refers to an agreement approved by the Council of ICAO normally on the advice of a Regional Air Navigation Meeting

declared that it had no jurisdiction over the offence alleged to have been committed on board a US registered aircraft flying over the high seas. Judge Kennedy stated in his judgement that the acts of Cordova “were vicious in the extreme”. “He jeopardized the lives of others on the plane, including a considerable number of infants.” However, “as current law stands, acts like those committed by Cordova will go unpunished”. He strongly felt that the government should review this case and take action for correction of jurisdiction.

Article 3 of the Tokyo Convention was intended to close this type of jurisdictional gap. The paragraph 1 of the Article 3 provides that the State of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

e. Montreal Protocol 2014

This Tokyo Convention 1963 has served the aviation industry well for more than 50 years. Nonetheless, despite the extension of jurisdiction, the number of unruly passenger in-flight incidents has been dramatically increasing in the last decades, and often remain unpunished. The Survey of IATA Member Legal Departments in 2013 concluded that 60% said that lack of jurisdiction was the reason for lack of prosecutions of unruly passengers. To address the rising tide of unruly passenger incidents, a Diplomatic Conference was held in 2014. The Conference considered proposed revisions to the Tokyo Convention, aimed at ensuring that the Convention continues to work as an effective deterrent to unruly in-flight behavior. The result of this conference is called the “FINAL ACT of the International Conference on

Air Law to Consider Amending the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) held under the auspices of the International Civil Aviation Organization at Montréal, 26 March to 4 April 2014”.

And so the 2014 Montreal Protocol was born and amended the 1963 Tokyo Convention. The Protocol makes key improvements to the Tokyo Convention, including:

1) The Extension of Jurisdiction

The discussion within the Diplomatic Conference in 2014 went about how far the extension of jurisdiction shall be given in order to make sure the flight safety and security is maintained. The Montreal Protocol 2014 extend the jurisdiction to:

- a) State of (aircraft) registration (Article 3);
- b) Landing State (Article 4);
- c) State of the Operator (principal place of business or permanent residence); and
- d) Any State, as regulated by national regulation.

There are also more detailed explanations on what could constitute this status, such as scenarios that may give competency as a state of landing. Another note on jurisdiction is the differentiation made in Article 3 to distinguish a state’s competence to exercise jurisdiction and its obligations to establish jurisdiction.

2) Definition of Offenses

The Protocol clarifies certain behaviours, which should be considered, at a minimum, as an offense and encourages States to take appropriate criminal or other legal proceedings. These include physical assault or a threat to commit such assault against a crewmember and refusal to follow

a lawful instruction given by or on behalf of the aircraft Commander (for safety purposes). The elaboration of the types of conduct prohibited will improve certainty for passengers, law enforcement authorities and airlines.

3) Right of Recourse

Airlines usually have to bear the costs incurred as a result of unruly passenger incidents. Where this involves diversions to disembark an unruly passenger, the cost can be substantial, in some instances over US\$200,000. The Protocol recognizes that airlines may have a right to seek compensation for costs incurred as a result of unruly passenger behavior. The presence of this clause should have strong deterrent value.

4) The Role of In-flight Security Officers (IFSO)

This convention reaffirms the authority of the commander and the role and immunity of the crew and IFSO in order to maintain the safety and security on the flight. Article 6 of the Protocol also highlighted that the IFSO placement on international flight can only be applied based on bilateral and multilateral agreement or arrangement between the relevant Contracting States. There are different definitions of IFSO, however the Annex 17 of the Chicago Convention 1944 defined IFSO as *“A person who is authorized by the government of the State of the Operator and the government of the State of Registration to be deployed on an aircraft with the purpose of protecting that aircraft and its occupants against acts of unlawful interference”*.

The 2014 Montreal Protocol finally entered into force on 1 January 2020 after Nigeria deposited the instrument of Ratification on 26

November 2019, making it the 22nd state to do so, and thus fulfilling Article XVII’s provision on the minimum number of deposits for the Protocol to enter into force.

f. Other ICAO Documents

Aside from treaties and working papers, ICAO also formulates and updates manuals to better help enforce its laws and provide recommendations for practices. The issue of unruly passengers is also addressed in several documents.

To support the 2014 Montreal Protocol, the Manual on the Legal Aspects of Unruly and Disruptive Passengers (ICAO Document 10117) was formed in 2019 to give information on how civil and administrative fines and penalties can be used to supplement criminal prosecutions. It guides legislation covering acts and offences, along with any administrative sanctions regime elements, to assist the implementation of legal measures to prevent and act on unruly and disruptive passenger incidents.

This manual serves as an update to “ICAO Circular 288 — Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers”, its predecessor document. Circular 288 was deemed comprehensive enough by the Task Force on Legal Aspects of Unruly Passengers (UPAXTF) to address the scope of unruly and disruptive behaviour, with additions falling in the scope of provisions on the refusal to follow a lawful instruction of the aircraft commander, or of a crew member on behalf of the aircraft

commander.¹⁵ Simply put, ICAO Document 10117 tweaked ICAO Circular 288 and completed it so it would be more in tune with the 2014 Montreal Protocol. It also refers to other ICAO instruments in Section 4.6 titled "Other Measures Within the Civil Aviation Regulatory System to Address Unruly and Disruptive Passenger Behaviour" for specific guidance which may not be covered in the manual.

Compliance is the focal point of the Aviation Security Manual (ICAO Document 8973), which elaborates on how States could comply with Annex 17 of Chicago Convention 1944, particularly the SARPs. It addresses threat levels and crew response, crew training, information dissemination to passengers, and reporting of unruly passenger incidents. It also calls for aircraft operators to undertake measures so that accurate and actual statistics are annually reported to the assigned authority.

For more specific training guidance, the Cabin Crew Safety Training Manual (ICAO Document 10002) targets the ways to develop cabin crew training so they are able to manage unruly and disruptive passenger situations. Meanwhile, the Manual on the Investigation of Cabin Safety Aspects in Accidents and Incidents (ICAO Document 10062) contains guidance for investigating unruly and disruptive passenger events, including what information should be collected and included in an incident report. The Manual on Information and Instructions for Passenger Safety (ICAO Document 10086) sets out guidance on instructions that an

aircraft operator should provide to passengers, including what information passengers should know during safety demonstrations.

g. The Role of the National Law and Indonesian Law in Civil Aviation

Indonesia ratified the Tokyo Convention 1963 with the Law No. 2 of 1976, together with The Hague Convention 1970 on Hijacking and the Montreal Convention 1971 on Unlawful Seizure of Aircraft (Sabotage). These three conventions on Aviation Security also included into the Indonesian Criminal Law Book (KUHP) by the Law No. 4 of 1976.

In September 2010 Indonesia signed the Beijing Protocol 2010 to amend The Hague Convention 1970; and The Beijing Convention 2010 to replace the Montreal Convention 1971. In April 2014 Indonesia signed the Montreal Protocol 2014 to amend the Tokyo Convention 1963. The ratification of these conventions and protocols are currently on discussion and process.

Law No.1 of 2009 on Aviation also regulates similar offences. Article 54 states that during flight, every person in the aircraft is forbidden to do any act that may endanger security and safety of the flight, disturb the good order, theft or vandalism to any part of the aircraft, immoral acts, actions that would disrupt peace, and operate any electrical device that would interfere with flight navigation. To ensure this, Article 55 gives the aircraft's captain authority to take action to ensure safety, security,

¹⁵ Huay, Tan Siew. *The Montreal Protocol 2014 - What Changes Will It Bring?* ICAO Legal Seminar, <https://www.icao.int/Meetings/LegalSeminar/Docum>

ents/TSH_Montreal Protocol 2014 (28Nov17).pdf. Accessed 1st November 2020.

and order is maintained in the flight.

Furthermore, Article 412 sets the penalty up to Rp500.000.000 or 2 years of jail time. This is less than the penalty stated in its predecessor, Law No. 4 of 1976, with the maximum punishment to up to 20 years. However, if the unruly act results in damages to the aircraft or an aircraft incident, then the penalty is increased. The passenger could be charged with up to 5 years in prison and a maximum fine of Rp2.500.000.000.

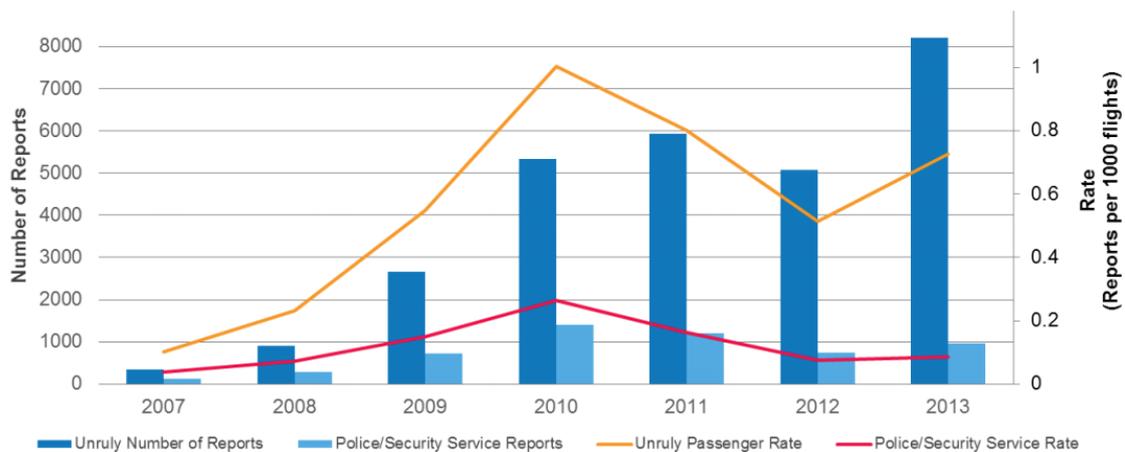
The Law No.1 year 2009 on Aviation also regulates the possibility for the government to

assign IFSO based on bilateral agreement.

2. Lack of Jurisdiction and Its Impacts in Prosecuting Unruly Passengers

In the IATA's representative survey of over 50 airlines in 2013, over 60% indicated that lack of jurisdiction was the key reason for failure to prosecute unruly passengers at foreign destinations. In other cases, the lack of specific language within their penal codes to allow for the arrest and prosecution of unruly passengers is also a problem, even when jurisdiction is not an issue.¹⁶

Unruly Passengers Incidents requiring police/security service intervention 2007-2013



Source: IATA Joint Position

The Tokyo Convention grants jurisdiction over offenses and other acts committed on board aircraft to the State of registration of the aircraft in question. This causes issues when the Captain of the aircraft delivers or disembarks an unruly passenger to the competent authorities who often determine that they do not have

jurisdiction (as the State of landing) when the aircraft is registered in another State.

Likewise, the police and authorities in the State of registration may have little connection with an incident taking place in another country. The result is that the unruly passenger may be released to continue their journey

¹⁶ AFRAA, A4A, AACO, Association of Asia Pacific Airlines, Association of European Airlines, European Regions Airline Association (ERA), IATA, and ALTA Joint Position

Calling for States to Ratify the Montreal Protocol 2014 to Deter Unruly Passenger Incidents and Promote a Safer Air Travel Experience for All.

without facing punishment for their misconduct. The Montreal Protocol 2014 gives the States the tools they require to deal with unruly passengers cases, whilst preserving the possibility of prosecution discretion.¹⁷

In Indonesian soil, the lack of jurisdiction, and lack of foreign language authorities may not be the only main problems. Even though the Criminal Law (KUHP) and the Law No. 1 of 2009 on Aviation regulate severe punishment for different offences, the criminal process is proven to be difficult not only in international flights, but also domestic flights. As informed by the airlines in Indonesia, the problem lies to the lack of implementation and procedural regulation. Furthermore, the airlines also see the need for disbursement of information and capacity building for security officers in the airports (PPNS, Polri and Aviation Security), as soon as the regulation is passed.

Articles 399 and 400 of Law No. 1 of 2009 on Aviation states that the Civil Investigator (PPNS) has the authority for any offences, regulated in the law. PPNS also work under the cooperation and supervision of the Indonesian Police (Polri). There is no further procedural law on how to do a proper investigation, and where to detain the perpetrator, since the Airport most probably does not have any facility.

A recent case is the bomb joke on Lion Air JT 687 on 28 August 2018. Frans Nirigi jokingly pronounced to the crew that he brought a bomb. The bomb joke that day caused a panic and injured several passengers. On the district court Nirigi filed a pre-trial on the process by the PPNS. Nirigi also argued that several previous bomb joke cases

were never processed, including the three Provincial Parliamentarians in a departing Garuda flight from Banyuwangi Airport on 23 May 2018. The parliamentarians were not processed accordingly nor detained by both the civil aviation and the Police.¹⁸

The Government of the Republic of Indonesia may use the opportunity of the process of ratification of the Montreal Protocol to harmonize and legalize a series regulation and set a system to deal with unruly passengers more effectively; and to ensure the jurisdiction and authority in processing aviation offences. Bear in mind that aviation offences are often unique. The witnesses may not stay in one location; and it is also often that the perpetrator is an important person such as government officials, legislatives, celebrities, and/or foreigner, so their rights shall not be forgotten.

To make sure that the protocol can be implemented the government institutions (K/L) must sit together and define the distribution of the authority, information sharing, and come out with a strict procedural regulation and a system of security in the air, and after the airplane has landed. It is best for the authorities to put aside the sectoral ego and work in an integrated team in the airport consisting of the civil investigators, police, and immigration, this team will also serve as the IFSO for Indonesia based on intelligent information. The Ministry of Foreign Affairs may also come up as an initiator and a team member that meets regularly to ensure the safety on the air from before the flight. Potentially unruly passengers can be identified through past records and data interchange.¹⁹

¹⁷ *Ibid.*

¹⁸ Irawan, Yohanes Kurnia. "Kasus Candaan Bom, Frantinus Nirigi Ajukan Praperadilan." *Kompas.Com*, 2018, <https://regional.kompas.com/read/2018/08/03/1429>

2431/kasus-candaan-bom-frantinus-nirigi-ajukan-praperadilan. Accessed 1st November 2020.

¹⁹ International Civil Aviation Organization (ICAO). "Year of Security Culture 2021." *ICAO.Int*, 2020, <https://www.icao.int/Security/Security->

3. Other Options

The Montreal Protocol 2014 contained the needs of extended jurisdiction that may help in the criminal process of the unruly passengers. However, it is not winning the current popularity contest when compared to the Tokyo Convention 1963. The Convention entered into force on 4 December 1969, currently ratified by 187 parties.²⁰ Other than the protocol is relatively “new”, some states including Canada, the US and UK are not signatories. One of the reasons that they may not agree on the provision on the authority of the IFSO.

Article 6 of the Montreal Protocol 2014 positioned the IFSO under the aircraft commander. IFSO may assist the aircraft commander to restrain any person whom the commander is entitled to rest. However, IFSO can only take preventive measures without the commander's authorization only when such action is immediately necessary to protect the safety of the aircraft.²¹ This provision may not be in line with the domestic practice of some countries that put the IFSOs or Air Marshals are employed by the state and have their own authority and align with the aircraft commander.²² For this case the arrangement that stated in the Annex 17-Security of the Chicago Convention 1944 still should be fulfilled. The contracting states are permitted to deploy IFSO under bilateral agreement and shall ensure that the carriage of weapons is strictly regulated and stowed in a place inaccessible to other persons during flight.

To minimize the act of unruly passenger and the repeated offenders there are several steps that often taken by the authorities and most airlines can do, such as:

- a) Prevention and deterrence
Aviation Safety begins on the ground, and unruly passenger incidents are best to be managed by keeping unruly behavior on the ground prior to the boarding or the passenger. All crew members also need to be trained to reduce any escalating situation on board.
- b) Implementation of the Conditions of Carriage
Agreement on the conditions of carriage is a common practice in every flight ticket purchase of any airlines. The wording differs among airlines but generally state that the airline may refuse to carry passengers or baggage due to any misconduct or previous misconduct. Airlines also maintained passenger blacklists to repel any repeated offender. This condition also exists in Conditions of Carriage of Passenger and Baggage of Garuda Indonesia, Cathay Pacific, American Airlines, Qatar Airways, and Vietnam Airlines.
- c) Remedies
Air Carriers may have a claim against unruly and disruptive passengers to seek reimbursement for any loss of damage caused by the disruption.²³

Culture/Pages/YOSC-2021.aspx#:~:text=With the COVID-19 pandemic,in the history of aviation.

²⁰ International Civil Aviation Organization (ICAO). “Current Lists of Parties to Multilateral Air Law Treaties.” *ICAO.Int*, 2021, https://www.icao.int/secretariat/legal/lists/current_lists_of_parties/allitems.aspx. Accessed 1st November 2020.

²¹ The Tokyo Convention 1963 does not regulate IFSO, the inclusion of IFSO was made in the Montreal Protocol 2014, however the placement of IFSO has

been a common practice in domestic flights and international flights under bilateral agreement.

²² Kulkarni, Sanika. “Examining the Role and Status of IFSO Vis-à-Vis the Aircraft Commander in the Context of the Protocol to the Tokyo Convention 1963.” *HNLU Studen Bar Journal*, vol. 2, no. 1, 2016, pp. 55–68, Available at: <http://sbj.hnlu.ac.in/wp-content/uploads/2018/08/sanika-kulkarni.pdf>.

²³ Silversmith, Jol A., and Barbara M. Marrin. “Responding to Airline Passenger Misconduct.” *LEXOLOGY.Com*, 2020,

The 40th ICAO Assembly with the adoption of the Resolution 40-11 requested ICAO to develop further tools to enhance security awareness and security culture. With the COVID-19 pandemic dominating the situation of the aviation world in 2020, ICAO paused the process. The ICAO Secretary General of ICAO, Dr. Fang Liu later inaugurated 2021 as the Year of Security Culture during the closing remarks of the ICAO Global Aviation Security Symposium 2020. In 2021 ICAO will focus on following priorities:

- a) execute a global security culture campaign, which will support the organization of national, regional and global events to raise security awareness in aviation, especially in the light of COVID-19;
- b) intensify collaboration with States and industry in supporting efforts to promote security culture in the greater aviation community, where security is everyone's responsibility;
- c) issue relevant guidance on practical security culture communication strategies, plans and campaigns; and
- d) continue to offer training and assistance focused on promoting an effective and sustainable security culture within all organizations involved in civil aviation.

ICAO Member states, aviation industry, and other international and regional organizations are encouraged to support and promote Security Culture, for that purpose ICAO will do a campaign that includes publication, tools, films, and printing to encourage positive security culture and raise awareness.

C. POLICY RECOMMENDATIONS

Indonesia actively participated in the drafting process of the Montreal Protocol 2014 as one of the members of Commission of the Whole chaired by Ms. Tan Siew Huay from Singapore. However, in the beginning of 2021 Indonesia is still in the process of ratification, even after Indonesian airlines informed in several discussions and meetings that this protocol is the most significant for them.²⁴ The airlines stated their position is in line with the IATA in this matter and found the unruly passenger is too often left without being charged, and their banned and blacklisted passengers system is not the most effective. The government may use this international legal instrument to deal with unruly passengers more effectively, and to deter future incidents.

The slow process of ratification is reasonable. Prior to the ratification, the Government needs to make sure that the protocol can be implemented without violating Indonesia's national interest. The main keys are in the harmonization (including the inclusion of the offences in the KUHP); the implementation is a strong procedural regulation; intelligent information sharing between institutions.

During the process the Government of Indonesia may simultaneously or gradually consider:

1. Continuing to support the ratification of the Montreal Protocol 2014 and encouraging other countries specially the parties of the Tokyo Convention 1963 to ratify the Montreal Protocol 2014;
2. Initiating discussions on the adoption or amendment of supporting domestic legislation to secure the proper activation of jurisdictional and prosecution powers using *ICAO Circular*

<https://www.lexology.com/library/detail.aspx?g=0f734206-ba10-4c0a-93fa-35d8e9f8df64>. Accessed 1st November 2020.

²⁴ Garuda Indonesia and AirAsia Indonesia presentation at the Focus Group Discussion for the Implementation

of the Beijing Convention 2010 and its importance to Indonesia, Yogyakarta, 17 April 2008.

288 as a guide. The domestic regulations that need to be review and adopt are:

- a. The harmonization of the aviation offences law in the KUHP and the Law No.1 of 2009
 - b. The implementation regulation of Montreal Protocol 2014, including the procedural law, and standard and procedure in the field. A detailed procedure on the cooperation, authority, how to detain, transfer, trial and prosecute.
3. Initiating regular meetings on the International aviation security as well as the discussion on formatting a team of aviation authority and IFSO. Including discussing the possibility of airlines providing a seat in certain flights for the IFSO. A clearing house scheme can be helpful as a guidance to ensure the coordination and information sharing between institutions. IFSO/Air Marshal based on the bilateral agreements' routes should be activated to ensure the reciprocity
 4. The Ministry of Transport of the Republic of Indonesia recently formed the National Committee of the Aviation Security (NCAS) with the Minister of Transportation Decree No 159 year 2020 on the NCAS. The Director General of Civil Aviation is the Head of the Committee and the members includes, all the stakeholders including the related ministries, agencies, immigration, investigators, the police force, intelligence, the military, airlines, and airports. This committee is designed to act as a pool of coordination and sharing information for any aviation security issues.
 5. Raising public awareness of the consequences of failing to follow crew instructions or commit unruly behavior, especially in the international flight. In line with the ICAO Security Culture 2021, the NCAS will also do a security campaign in Indonesia airport and

airlines and will use the available digital platform and applications, not limited to the websites, social media, safe travel application.

D. CONCLUSION

Jurisdiction in the air is implemented differently by ICAO member states. The unification of jurisdiction in Tokyo Convention 1963 for unruly passengers is very limited while the number of unruly passengers were escalating before 2020. In order to reduce or eliminate the number of unruly passengers, especially in Indonesian airlines flights. In order to protect Indonesian airlines and passengers, it is important to support more jurisdiction choices in the Montreal Protocol 2014 that can ensure order in the aircraft, deterrent effects for the perpetrators, as well as protection of the airline against losses due to abnormal passengers. A set of new regulations, cooperation and procedure also need to be issued before the ratification in order to make sure the implementation. Meanwhile, to enhance the security culture during the process, it is important to train the personnel and educate the people.

REFERENCE

Books

- Abeyratne, Ruwantissa. *Aviation Security Law*. 1st ed., Springer-Verlag Berlin Heidelberg, 2010.
Available at:
Available at:
- Diederiks-Verschoor, and Isabella Henrietta Philepina. *An Introduction to Air Law*. Edited by Pablo Mendes de Leon and Michael A. Butler, 9th ed., Kluwer Law International, 2012.
<http://routledge.com/Sovereignty-and-Jurisdiction-in-Airspace-and-Outer-Space-Legal-Criteria/Oduntan/p/book/9780367865047>.
<https://openaccess.leidenuniv.nl/bits>

tream/handle/1887/13688/000-huang-diss-28-01-09.pdf?sequence=1.

Huang, J. *Aviation Safety and ICAO*. Kluwer Law International, 2009.

Oduntan, Gbenga. *Sovereignty and Jurisdiction in Airspace and Outer Space: Legal Criteria for Spatial Delimitation*. 1st ed., Routledge, 2012.

Journal

Abramovitch, Yehuda. "The Maxim 'Cujus Est Solum Ejus Usque Ad Coelum' as Applied in Aviation." *McGill Law Journal*, vol. 8, no. 4, 1961, pp. 247–69.

Harriman, Edward A. "Federal and State Jurisdiction with Reference to Aircraft." *Journal of Air Law and Commerce*, vol. 2, no. 3, 1931, pp. 299–324.

<http://lawjournal.mcgill.ca/userfiles/other/8509457-abramovitch.pdf>.

<https://scholar.smu.edu/cgi/viewcontent.cgi?article=3652&context=jalc>.

Klein, Herbert David. "Cujus Est Solum Ejus Est...Quousque Tandem." *Journal of Air Law and Commerce*, vol. 26, no. 3, 1959, pp. 237-254.

Kulkarni, Sanika. "Examining the Role and Status of IFSO Vis-à-Vis the Aircraft Commander in the Context of the Protocol to the Tokyo Convention 1963." *HNLU Studen Bar Journal*, vol. 2, no. 1, 2016, pp. 55–68, <http://sbj.hnlu.ac.in/wp-content/uploads/2018/08/sanika-kulkarni.pdf>.

Other Documents

"What Is JURISDICTION?" *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, 2021, <https://thelawdictionary.org/jurisdiction/>.

Chu, Mei Mei. "The Full Story About Virgin Airlines Plane 'Hijack' Scare." *SAYS.Com*, 2014, [https://says.com/my/news/the-full-](https://says.com/my/news/the-full-story-about-virgin-airlines-plane-hijack-scare)

[story-about-virgin-airlines-plane-hijack-scare](https://says.com/my/news/the-full-story-about-virgin-airlines-plane-hijack-scare).

DetikNews. "Matt Christopher 'Pembajak' Virgin Tak Bisa Diproses Hukum Pidana RI?" *News.Detik.Com*, 2014, <https://news.detik.com/berita/d-2566438/matt-christopher-pembajak-virgin-tak-bisa-diproses-hukum-pidana-ri>.

Duhaime's Law Dictionary. "Cuius Est Solum Ejus Est Usque Ad Coelum Et Ad Inferos Definition." *Duhaime.Org*, 2021, <http://www.duhaime.org/LegalDictionary/C/CuiusEstSolumEjusestUsqueAdCoelumetadInferos.aspx>.

Huay, Tan Siew. *The Montreal Protocol 2014 - What Changes Will It Bring?* ICAO Legal Seminar, [https://www.icao.int/Meetings/LegalSeminar/Documents/TSH_MontrealProtocol2014\(28Nov17\).pdf](https://www.icao.int/Meetings/LegalSeminar/Documents/TSH_MontrealProtocol2014(28Nov17).pdf).

IATA. "Unruly Passengers." *IATA.Org*, <https://www.iata.org/en/policy/consumer-pax-rights/unruly-passengers/>.

_____. "Year of Security Culture 2021." *ICAO.Int*, 2020, <https://www.icao.int/Security/Security-Culture/Pages/YOSC-2021.aspx#:~:text=With the COVID-19 pandemic,in the history of aviation>.

International Civil Aviation Organization (ICAO). "Current Lists of Parties to Multilateral Air Law Treaties." *ICAO.Int*, 2021, https://www.icao.int/secretariat/legal/lists/current_lists_of_parties/allitems.aspx.

Ryngaert, Cedric. *The Concept of Jurisdiction in International Law*. Utrecht University, 2014, <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf>.

Silversmith, Jol A., and Barbara M. Marrin. "Responding to Airline Passenger Misconduct." *LEXOLOGY.Com*, 2020, <https://www.lexology.com/library/d>

etail.aspx?g=0f734206-ba10-4c0a-93fa-35d8e9f8df64.

Legal Documents

AFRAA, A4A, AACO, *Association of Asia Pacific Airlines, Association of European Airlines, European Regions Airline Association (ERA), IATA, and ALTA Joint Position Calling for States to Ratify the Montreal Protocol 2014 to Deter Unruly Passenger Incidents and Promote a Safer Air Travel Experience for All.*

ICAO Circular 288 — *Guidance Material on the Legal Aspects of Unruly/Disruptive Passengers.*

Kennedy, Harold Maurice. *United States v. Cordova*, 89 F. Supp. 298 (E.D.N.Y 1950). 1950,
<https://www.courtlistener.com/opinion/2597411/united-states-v-cordova/>.

Manual on Aviation Security (ICAO Document 8973).

Manual on Cabin Crew Safety Training (ICAO Document 10002).

Manual on Information and Instructions for Passenger Safety (ICAO Document 10086).

Manual on the Investigation of Cabin Safety Aspects in Accidents and Incidents (ICAO Document 10062).

Manual on the Legal Aspects of Unruly and Disruptive Passengers (ICAO Document 10117).

The Chicago Convention on International Civil Aviation 1944, 7 December 1944, 15 U.N.T.S. 295.

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963.

The Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 4 April 2014.

The Republic of Indonesia Law No.1 of 2009 on Aviation.

The United States of America Federal Aviation Act of 1958.