EVOLUTION OF TERRORISM ACT AGAINST CIVIL AIRCRAFT

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Abstract

Since an aircraft was invented, an aircraft is not only used for transporting person from one place to another, but also can be used in war until revenge terrorism ideology and faith against a state. Furthermore, an aircraft is a representative of state where the aircraft is registered, which is also defined by terrorist as a target to attack a state. Attacking a civil aircraft is categorized as an international crime. Hereinafter, since Tokyo Convention 1960 declared, the evolution of crimes against civil aircraft has been evolved. The main target of offences is still an aircraft, however, the offence is diverted by attacking others target such as all facilitations relating to the security in civil aviation including airport and air navigation. 9/11 accident in USA is a picture how terrorism offence is still evolving. Now, aircraft and ground navigation facilitations are not the only main object in attacking by terrorist. The aircraft now is used to attack others ground target which are represented a state. The evolving of terrorism acts, in the end, is the reason why Beijing Convention 2010 on the Suppression of Unlawful Acts Relating to International Civil Aviation was made.

Sejak pesawat diciptakan, pesawat tidak hanya digunakan untuk mengankut penumpang dari satu tempat ke tempat yang lain, akan tetapi pesawat juga dapat digunakan dalam perang hingga muncul ideologi terorisme terhadap suatu negara. Lebih lanjut, pesawat merupakan salah satu perwakilan dari sebuah negara dimana pesawat tersebut didaftarkan, yang mana ditafsirkan oleh teroris sebagai target untuk menyerang sebuah negara. Melakukan penyerangan terhadap penerbangan sipil dikategorikan sebagai kejahatan internasional. Dalam hal ini, sejak Tokyo Convention 1960 di deklarasikan, evolusi kejahatan terhadap penerbangan sipil berkembang. Target utama dari kejahatan ini adalah pesawat, meskipun begitu, tindakan tersebut dialihkan dengan cara menyerang target lain seperti seluruh fasilitas terkait keamanan dalam penerbangan sipil termasuk Bandar udara dan navigasi udara. Peristiwa 9/11 yang terjadi di Amerika Serikat merupakan sebuah gambaran bagaimana tindakan terorisme berkembang. Sekarang, pesawat dan fasilitas navigasi darat tidak hanya menjadi alat yang diginakan untuk melakukan serangan dalam tindakan terorisme. Pesawat kini digunakan untuk menyerang target-target darat dalam wilayah suatu negara. Perkembangan atas tindakan-tindakan terorisme, pada akhirnya, merupakan alasan mengapa Beijing Convention 2010 on the Suppression of Unlawful Act Relating to International Civil Aviation was made.

***Keywords**: terrorism offence, civil aviation, aircraft, beijing convention 2010.*

I. INTRODUCTION

Crimes against civil aircraft are always changing from the model,

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method, and target. Since Tokyo Convention 1963 has been applied as an international legal instrument against terror, many developed criminal act have been established.

The Hague Convention 1970 which applies to hijacking crime an aircraft in flight, the Montreal Convention 1971 and the Protocol 1988 for crimes against facilitation of air navigation and person in the airport, the Montreal Convention 1991 for marking of Plastic Explosives, and Beijing Convention 2010 as an initiative to respond 9/11 crimes against terrorism which was happened in USA are kind of the convention which established by several evolution act of crime.

An act against terror to attack or use an aircraft as a target is agreed by all states as an international crime. However, this act has to be legislated by state in accordance with the interest and necessity of states.

II. UNRULY PASSENGER AND THE FIRST ISSUES IN CRIMINAL AIR LAW

Before 1963, the issues in protecting the interest of the aircraft for safety reasons during the flight and on board were discussed for many times. This is because there were no international provisions relating to the criminal acts for the aircraft during in flight and on board which this conditions are used by the offender to achieve their aims by using an aircraft as a tool for negotiation.

Case USA vs. Cordova[2]and R vs. Martin[3] illustrated that how lawless can be happened when the aircraft is flying over the high seas. The Court decided that an aircraft was not like a vessel which the national law applies. This was because on that moment, many states had not extended their national law to aircraft of their nationality where the aircraft was flying outside their territory. The jurisdiction of national law only applies to the land and territorial sea which can be extended to the flag of national vessel.

It was a topic raised when the passengers in the aircraft were not protected by law in case criminal acts happened for international flight.

[2] U.S. District Court E.D.New York, 1950. 89 F. Supp. 298
[3] R. v. Martin [1956] 2 Q.B. 272.

Hence, the offenders can be free in case the offence in the aircraft and the landing state had no willingness to apply its jurisdiction on them.

A. Tokyo Convention 1963[4]

In answering many cases raised before 1960's, several states agreed to apply its national jurisdiction over the aircraft where the aircraft registered. The national law of where the aircraft registered applies in case the purpose of take-off until the moment when the landing run ends.[5]However, the national jurisdiction where the aircraft registered only applies to "in flight" moment. Therefore, the convention also gives the definition of 'In flight'which is defined as a situation when the external doors are closed[6]which is also automatically the power of the air commander is also applied.[7]In here, when the external doors are opened, the landing state's jurisdiction applies, which means the aircraft commander has no power to arrest the offender longer and has to provide the offender to the landing state authorities. However, the convention shall not apply for domestic flight, where the aircraft is flying in the territory of the aircraft is registered.[8]

For Tokyo convention, it must be understood that the landing state of the aircraft, as long its national interest not in danger or unwilling to process under its jurisdiction, has an option to prosecute or not the offender. The offender, according to the convention, can be free while the landing state does not have an extradition agreement with registered state. Thecrimeunder this convention, however, is classified as a national crime by stating that 'the convention shall apply in respect of offences against penal law'[9] where the other states outside the registration state do not have a jurisdiction.

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[4] Convention on Offences and Certain Other Acts Committed on Board Aircraft, opened for signature 14 September 1963, entry into force 4 December 1969.

[5] Art. 1 (3) Tokyo Convention and Certain Other Acts Committed on Board Aircraft 1963

[6] Art. 5 (2) of the Tokyo Convention 1963

[7] Art. 1 (2) of the Tokyo Convention 1963

[8] Art. 3 (3) of the Tokyo Convention 1963

[9] Art. 1 (1) (a) of the Tokyo Convention 1963

B. The Hague Convention 1970[10]

The Hague Convention 1970 was born to cover the weaknesses of the Tokyo Convention. As stated above, Tokyo Convention cannot cover the crime outside the state registration of the aircraft, based on sovereignty principle. Hence, prosecuting the offender or hijacker of the aircraft, is depended on the landing state.

Realizing to that situation, the convention introduced the concept of international law crime through hijacking crime. Landing states, in order to stop hijacking crime, have an obligation to implement its jurisdiction to the offender. They have options by prosecute the offender or extradite him/her to other states.[11] However, in case a state extradites the offender, extradition general principle must be considered in wherea person on political crime is not allowed to extradite.[12]

According to the state-sovereignty principle, sovereignty of state is limited by other's state sovereignty[13] and its obligation to international law.In here, when a state becomesa party of the international convention, the state is legally binding through the provisions of the convention, which we call as a *pactasuntservanda* principle. The Hague Convention in this step, moreover, brings the crime of hijacking an aircraft as an international crime, when the crime is happened to its member with two options. As a landing state, on the name of international law has to implement its jurisdiction to execute the offender if the landing state has no willingness to extradite the offender.

C. The Montreal Convention 1971[14]

When international communities focus on protection of the aircraft, the terrorists divert their target to attack airport and navigation facili-

[10] Convention for the Suppression of Unlawful Seizure of Aircraft, open for signature at the Hague, on December 16, 1970.
[11] Art. 7 of the Hague Convention 1970
[12] See below about political crime.
[13] Malcom N. Shaw, International Law, 6th edition, 2008. p.331
[14] Convention for the suppression of Unlawful Acts Against the Safety of Civil Aviation, Signed at Montreal on September 23, 1971.

ties. Hence, the Montreal Convention was established by answering the question of sabotage crime. In the beginning, it was hard to understand when attacking the airport and navigation facilities are kind of international crimes. This is because for both targets are attached to the land of state which land state jurisdiction (national law) automatically applies.

However, international communities agreed that the evolution crime to the civil aviation which also attacks an airport and navigation facilities is not only crimes against national law but also crime against international law.

D. The Protocol of 1988 to The Montreal Convention of 1971[15]

The protocol was born as a reaction in attacking persons in airport. Similar with the Montreal Convention 1971, protecting airport and persons inside of it are kind of international protection. Even an airport is under national protection, however, international civil aviation is a part of international interest which means the provisions regarding to the airport protection is a common interest.

E. Convention on The Marking of Explosives for the Purpose of Detection 1991[16]

Evolution crime against international civil aviation was established in 1988 when Pan Am Flight 103 over Lockerbie[17] was attacked by plastic bomb. This is because plastic explosives have been difficult material in detecting by common airport security equipment. According to that, international community recognized that plastic material became a dangerous material when air carrier is flying. Hence,in response the

[15] The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, (open for signature 24 February 1988, entry into force.

[16] Convention on the Marking of Explosives for the Purpose of Detection 1991, (open for signature 1 March 1991

[17] Pan Am Flight 103 was a Pan Am transatlantic flight from London Heathrow Airport to New York's John F. Kennedy International Airport which was destroyed by a bomb on Wednesday, 21 December 1988, killing all 243 passengers and 16 crew members. Large sections of the plane crashed into Lockerbie, Scotland, killing an additional 11 people on the ground.

situation happened in Lockerbie, on 1 March 1991, 41 states agreed to sign a *Convention on the Marking of Plastic Explosives for the Purpose of Detection*.

The aims of the convention is obliging a state to prohibit and prevent the manufacture[18] and movement[19] in or out its territory unmarked explosives. However, the implementation of preventing plastic bomb internationally regulated on Annex of Chicago Convention 1944.

III.THE LATEST EVOLUTION ON BEIJING CONVENTION 2010[20]

Since 1960s, a number convention published as an international instrument on preventing crimes against aircraft and sabotage navigation facilities. When international provisions focus on how to protect aircraft and navigation facilities, international community was shocking by terrorism attack which used aircraft.

9/11 which was happened in United State of America realized us that aircraft can be used as a weapon to attack target on the ground. Responding the attack, international community agreed that using civil aircraft as a weapon and using dangerous materials to attack aircraft or other targets on the grounds are categorized as an international crimi-nalact. Security Council of the United Nations in its responded asked to states to take steps in countering terrorist acts including to 'ensure that any person who participates in the financing, planning, preparation, perpetration of terrorist acts or in supporting terrorist acts is brought to justice'.[21]

Beijing Convention 2010 accommodated the offence which was happened in the USA. Furthermore, the convention regulates many

[18] Art. II of Convention on the Marking of Plastic Explosives for the Purpose of Detection

[19] Art. III (1) of Convention on the Marking of Plastic Explosives for the Purpose of Detection

[20] Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, done at Beijing on September 10, 2010.

[21] Article 2(e), SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001)

kinds of offences, including crimes which were regulated on Tokyo Convention until Montreal Convention 1991. Different with previous conventions which is focus on specific offence, the Beijing Convention 2010 incorporate all kind of offence for endanger safety and security.

The first offence in Beijing Convention 2010 is the offence by person performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft.[22]Like Tokyo Convention 1960, there are some elements are same and must be noticed. *First*, the offence and the person must be committed *on board* an aircraft, *Second*, the aircraft has to be *in flight*, Lastly, the offence should endanger the safety of the aircraft.

Like Tokyo, Hague and Montreal 1971, the second offence in Beijing Convention is committed when a person destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight.[23]The "aircraft in service" is defined as situation from the beginning of the flight preparation of the aircraft by ground personnel or by the crew for specific flight until twenty-four hours after any landing.

The third offence defined by the Convention that person who places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.[24]

The fourth offence is similar with Montreal Convention 1971 when a person destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight.[25]By seeing the offence model, cyber-attack to navigation facilities can be categorized as a kind of this attack which the offence only use low budget in interfering with the computer programme of an air transport system. The aircraft collision which caused by intervening cyber-terrorism, in the development of international crime is categorized as a crime against international law since the offence against international

[22] Art. 1 (a) of Beijing Convention 2010
[23] Art. 1 (b) of Beijing Convention 2010
[24] Art. 1 (c) of Beijing Convention 2010
[25] Art. 1 (d) of Beijing Convention 2010

civil aviation as stated on the preamble to the Chicago Convention 1944.

IV. THE CONCERNS TO THE CONVENTION

Since the convention signed in 2010 some questions arises relating to the effect of the convention to the state's security. Beijing convention which is accommodated all kind of the offences in article 1 paragraph 1, in the next provisions, is not giving security guarantee to the state which were ratified.

Article 1 paragraph 2 of the Beijing convention, in the level of implementation, can be used by a state to detain a person based on allegations against state security. A person who destroyed some facilities in order to express his angry to the airport and airline services, by not seeing "why the offence can be happened" is can be subject of this provision. Hence, this provision must be defined clearly 'when' and 'how' on the name of Beijing convention is used and applied to the specific person.

Article 1 paragraph 3 (b), states that the person also commit an offence in case the person unlawfully and intentionally causes any person to receive such a threat, under circumstances which indicate that the threat is credible. When a person indicates unlawfully and intentionally to the offences, the question is,who has a right to determine the status?

In revealing terrorism activity in a state, government as a representative of state mostly acts by unilateral actions to detain person who alleged as a 'terrorist'. A state according to itsbelieve the offences may happens in accordance with its national law, furnish any relevant information in its possession to those States Parties can take unilateral actions.[26] However, in fact, the unilateral acts by state mostly ignore the rights of the person to give the pleading for his/her 'terrorist' status. The person who alleged as a 'terrorist' does not have any choice except accepting the circumstances. This process, in the end, eventually violates the rights of the person who alleged as a 'terrorist'. Furthermore, the 'terrorist' status also gives a burden to his/her family in society.

Similar with previous provision, article 1 paragraph 4 implies many consequences in the level of practice, particularly in violating of human

[26] Art. 18 of Beijing Convention 2010

rights. As a friend of person who alleged as a terrorist can be accused actively in terror acts if a person attempts to commit any of the offences,[27] organizes or directs others to commit an offence,[28] participates as an accomplice in an offence,[29] unlawfully and intentionally assists another person to evade investigation, prosecution or punishment, knowing that the person has committed an act that constitutes an offence or that the person is wanted for criminal prosecution by law enforcement authorities for such an offence or has been sentenced for such an offence.[30]

This convention, in the end, does not give any chance to a person who intensively a member of organization (but he/she is not a terrorist) which one of the member for instance involved in terror acts. The organization also can be blacklisting as a terrorist organization with tendentious government and international perspective. Here, a state in giving status 'terrorist' to the organization can use its national law[31] with some acts shall endeavor to ensure that the applicable criminal, civil or administrative sanctions are effective, proportionate and dissuasive. Such sanctions may include monetary sanctions.[32]

Article 1 paragraph 5 also shows how international law now can define what terrorist is. Generally, until now there has been no definition in international law about terrorism, the only one terminology is defined in the Terrorism Convention 1937 which is defined that acts of terrorism as "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public"[33] which the responsibility is applied to individual responsibility. However, this convention is never came into force because only India which received ratification into its national law. Furthermore, since 9/11 accident, the issue to define terrorism in law dictionary is constrained by disagreed many countries. Some scholars identify modern terrorism as an

[27] Art. 1 par. 4 (a) of Beijing Convention 2010
[28] Art. 1 par. 4 (b) of Beijing Convention 2010
[29] Art. 1 par. 4 (c) of Beijing Convention 2010
[30] Art. 1 par. 4 (d) of Beijing Convention 2010
[31] Art. 4 par. 1 of Beijing Convention 2010
[32] Art. 4 par. 3 of Beijing Convention 2010
[33] Art. 1 par. 1 of the Convention for the Prevention and Punishment of Terrorism, 1937.

act not just to government or military targets.[34]

'Terrorist' status, according to the Beijing Convention 2010,can be attached to the state where each state party shall also establish as offences, when committed intentionally, whether or not any of the offences agreeing with one or more other persons to commit an offence and where required by national law, involving an act undertaken byone of the participants in furtherance of the agreement,[35] contributing in any other way to the commission of one or more offences.[36]

V. EXTRADITION PROVISIONS

Extradition provision is a sensitive issue in case a state with its status in international law to protect a person based on humanity reason. When a state will extradite a person based on his/her criminal acts must be under bilateral agreement between two states. However, there is no international law provides a duty to state to extradite or prosecute. This is because international law must be respect to the state-sovereignty as a basic principle.[37]

Autdedere, autpunire (extradite or prosecute) principle which is applied to The Hague, Montreal and its Protocol in its implementation is not successfully implemented. Defining crimes against civil aircraft as a political crime implicated to the offender who can be free with state's protection from extradition or prosecution. According to that situation, some states initiated to declare international cooperation[38] for any economy relations to the states which is not extradite or prosecute the offender through civil aircraft. However, a state still has rights to protect the offender based on its rights in international law, as a sovereign state.

In response at above situation, relating to the extradition principle, Article 12 of Beijing Convention 2010 explicitly states that all the offences according to this convention categorizes as extraditable offences

[34] Kathleen M. Sweet, Aviation and Airport Security; Terrorism and Safety Concerns, Pearson Prentice Hall, 2004, p. 83

[35] Art. 1 par. 5 (a) of Beijing Convention 2010

[36] Art. 1 par. 5 (b) of Beijing Convention 2010

[37] Ruwantissa Abeyratne, Aviation Security Law, Springer 2010, p. 252 - 253

[38] Bonn Declaration on Air – Hijacking 1978

in any extradition treaty[39] which is also this convention may at its option consider this Convention as the legal basis for extradition.[40] The provision in Beijing Convention, furthermore, is same with the provision in The Hague Convention which is the convention can be used as a bilateral agreement in extradition of the offender. However, for states which are not implement the provision by prosecuting or extraditing the offender, that state can be attached as a state which is stated in article 1 paragraph 5 of Beijing Convention.

Beijing Convention 2010, in the end, makes a state in a difficult situation by not giving free choices for a state in enforcing its sovereignty. A state, as an international community, has to implement international provision by 'giving' its rights in order to not recognized internationally as a 'terrorist state'.

Political Offence

In extradition process, a state can deny extradition in case:[41]

a. "The political offence"
b. Exclusion for prosecution relating to discriminatory ground
c. Military offences characteristic
d. Fiscal offences
e. National exclusion
f. Double risky
g. Acceptance in a statute of limitation
h. Extinction of the cause of action by amnesty pardon
i. Immunity from prosecution
j. Exception concerning certain penalties and treatment offender

From some exemptions in extradition process above, political offence is the one of Beijing Convention 2010 to be concerns. Theoretically, in political offence, there are two categories which are defined; "the purely political offence" and "the relative political offence". "The purely political offence" applies in where political acts were doing con-

[39] Art. 12 par. 1 of Beijing Convention 2010
[40] Art. 12 par. 2 of Beijing Convention 2010
[41] M. Cherif Bassiouni, The United States Model, International Criminal Law, Volume II: Procedure, Transnational Publisher, Inc., Dobbs Ferry, New York, 1986. p. 413 – 414.

stitutionally or peace movement, such as protest act for disagreement to its government policy which is also including treason and espionage.[42] Different with "purely political offence", "the relative political offence" is violence where the acts based on political motivation and goal of the actor, however, the acts were doing are unconstitutional acts by attacking innocent people or any acts to bring people in danger for instance.[43]

Since political motivation can be the reason for attacking civil aircraft, numbers of state (international community) have been rejected the political motivation for attacking civil aircraft as a political offences where the United States of America (USA), for instance only "purely political offence" which is applied for exclusion in extradition.

More interpreting by Beijing Convention 2010 according to political offences, the convention in its provisions also states that none of the offences set forth in Article 1of Beijing Convention 2010 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.[44] Consequently, a request for extradition or for mutual legal assistance from other states based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.[45]

Hence, no matter the motive offences happened, any offences bringing a civil aircraft in danger and in case a state which a party of this convention refuses an extradition or prosecution the offender, according to this convention, the status as 'terrorist state' can be attached to the state which protect the offender.

VI. CONCLUSION

The international convention relating to international crimes on civil aircraft is changed following the evolution of the model of crimes. The evolution, in Beijing Convention 2010, is trying to spread the attacking

[42] *Ibid*
[43] *Ibid*
[44] Art. 13 of Beijing Convention 2010
[45] *Ibid.*

acts definition to civil aircraft and internationalize the jurisdiction of the crimes which a state, slowly but sure, gives its rights on jurisdiction to international jurisdiction.

In case crimes attacking civil aircraft are happened, no more exclusivity of state. The implementation of exclusivity of state by a state in giving protection to the offender, in the end, can be interpreted internationally as a part of terrorism action by state.

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