

THE IMPACT OF INTERNATIONAL CONVENTIONS ON THE INDONESIAN LEGAL POLICY REGARDING THE PREVENTION AND THE SUPPRESSION OF AIRCRAFT HIJACKING

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ABSTRACT

Acts of terrorism have been recognized as a major threat to international peace and security. One form of terrorism that is very disturbing and threatens all countries around the world is aircraft hijacking. Indonesia is also not free from aircraft hijackings incident. As a member of international community and in order to realize the Aims of RI, the Government of Indonesia has the obligation to make laws governing the protection from, the prevention and the suppression of aircraft hijacking. This paper will further discuss about "the impact of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking". The impact of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking can be seen from the ratification of various international conventions on aviation or other international conventions in which has relation to the prevention and the suppression of aircraft hijacking. This ratification may take place in the form of acts on the ratification of international conventions (e.g. Act Number 2 of 1976 ; and Act Number 5 of 2006); or in the formulation and enactment of new acts which have incorporated the provisions of relevant international conventions (e.g. Act Number 4 of 1976 ; Act Number 1 of 1979; Act Number 15 of 2003; and Act Number 1 of 2009). Thus it can be conclude that the impact of of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking can be clearly seen in the Instrumental Legal Policy of Indonesia. As a recommendation, Indonesia should continue to make changes and renewal of existing legislation regarding aviation and also actively participating in the ICAO, particularly with regards to the prevention and the suppression of aircraft hijacking.

Key words: impact, international convention, Indonesian legal policy, aircraft hijacking.

Introduction

Acts of terrorism have been recognized as a major threat to international peace and security.¹ According to Paul Stephen Dempsey, "terrorism is ideologically, politically or religiously motivated violence directed against civilian targets", and that "terrorism is unconventional psychological warfare designed to instill fear and capitulation".² In fact terrorism has become the worst nightmare for all countries all over the world.

One form of terrorism that is very disturbing and threatens all countries around the world is terrorism using aircrafts, known as aircraft hijacking. The history of aircraft hijacking can actually be traced backward into the 1930s since many airplanes began to be flown commercially.³ The first recorded aircraft hijacking was on 21 February 1931 in Arequipa, Peru.⁴ And since then, there have been many incidents of aircraft hijacking in various countries, involving various airlines, and of course causing harm, both material and casualties. The latest incident of aircraft hijacking was the hijacking of Afriqiyah Airways Flight 8U209 on 23 December 2016 at Libya.⁵

¹ Tim Stephens, (2004), "International Criminal Law and the Response to International Terrorism", *University of New South Wales Law Journal*, Volume 27 (2).

² Paul Stephen Dempsey, (2014), "Aviation Security: The Role of International Law", Institute of Air and Space Law, McGill University, Canada, downloaded from https://www.mcgill.ca/iasl/files/iasl/aspl_633_dempsey_aviation_security.ppt on Monday, 9 May 2016.

³ Poushali NA Nandi, "International Terrorism by Way of Aircraft Hijacking", 20 February 2016, as cited in Muhammad Hassan Idrees, "Critically Analyze: The Laws Relating to Hijacking", 11 March 2016, pp. 2 – 3, downloaded from <http://ssrn.com/abstract-2746397> on Thursday, 2 September 2016.

⁴ Philip Baum, *Violence in the Skies, A History of Aircraft Hijacking and Bombing*, West Sussex, UK: Summersdale Publishers, Ltd., pp. 192 – 209. See also: Hardeep Singh, "Constitutionality of India's Anti Hijack Policy" in Ranbir Singh,

Sanat Kaul and SriKrishna Deva Rao, (2012), *Current Developments in Air and Space Law*, New Delhi: National Law University Delhi Press, pp. 69.

⁵ Angela Dewan, Ian Lee, and Eugenie Lambert, "Malta Hijackers Surrender after Releasing Libyan Passengers", CNN, Saturday, 24 December 2016, downloaded from <http://edition.cnn.com/2016/12/23/europe/malta-libya-plane-hijack/> on

As a mean of transnational transportation, then the global and universal nature is attached to the aircraft, which is therefore also attached to aircraft hijacking. Thus, the international community through the International Civil Aviation Organization (ICAO) has laid down the basic rules of civil aviation, including the rules on the prevention and suppression of aircraft hijacking as follows: (1) Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963); (2) Convention for the Suppression of Unlawful Seizure of Aircraft (Den Haag, 1970); (3) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971); and (4) Convention on the Marking of Plastic Explosive for the Purpose of Detection (Montreal, 1991).

But it must be admitted that the 9/11 Tragedy in the United States (2001), when four American commercial aircraft were hijacked and crashed into the WTC twin Towers in New York, as well as the Pentagon building that have been leading to the fall of many victims, is an important milestone in aviation security history. This tragedy not only affects the United States in various fields, but also has a major impact on other countries around the world. From this tragedy can be concluded that aircraft hijacking is one of the most effective way for the perpetrator to draw public attention around the world for its existence.

As a reaction to the 9/11 Tragedy, the ICAO established the *Convention for the Suppression of Unlawful Acts Relating to International Civil Aviation* in Beijing on 2010. This convention constitutes the amendment and addition of the Tokyo Convention 1963, the Den Haag Convention 1970, and the Montreal Convention 1971, and also as a response to the changes and current developments, especially related to acts of terrorism in the form of aircraft hijacking.⁶

Indonesia is also not free from aircraft hijackings incident. The first incident was the hijacking of Merpati Nusantara Airlines from Surabaya to Jakarta on 4 April 1972, and the second was the hijacking of Garuda Indonesia GA-488 from Jakarta to Surabaya on 5 September 1977. Both of these hijacking can be overcome without any casualties.⁷ The most serious case was the hijacking of Garuda Indonesia Flight 206 (popularly known as Woyla Incident) on Saturday, 28 March 1981. The aircraft whose original route was from Jakarta to Medan, controlled by the hijackers and finally landed at Don Mueang Airport, Thailand. This incident can be successfully resolved through a military operation carried out by Kopassandha forces of Indonesian Army, with the approval of the Thai Government.⁸

Looking at this historical fact, and considering the Aims of the Republic of Indonesia which has clearly stated in the Fourth Paragraph of the Preamble of the 1945 Constitution, which said that “to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia, and ..., and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, ...”, thus the Government of Indonesia has the obligation to make laws governing the protection from, the prevention and the suppression of aircraft hijacking.

Based on the background described above, this paper will further discuss about “the impact of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking”.

Discussions

Article 1 Paragraph (3) of the 1945 Constitution stated that “The State of Indonesia is a state based on law”. It means that in the administration of the State life in every aspect must be based on the rules of law applicable in Indonesia, which establishes a National Legal System bound by legal principles as the *ratio legis* of the rules of law.

This is in accordance with *Stufenbautheorie* of Hans Kelsen, which said that the legal system existing within a country is not a system of norms that are equal and can be coordinated. But rather a hierarchical system in which lower legal norms are determined, applied, sourced and based on higher legal norms, and so on until it ends at the highest basic/fundamental norm known as *Grundnorm*.⁹ This theory is strengthened by Hans Nawiasky with a theory entitled *die Theorie vom Stufenordnung der Rechtsnormen*. Furthermore Nawiasky argues that in addition to being hierarchical, legal norms are also in groups, which can be divided into 4 major groups namely: (1) *Staatsfundamentalnorn* (the fundamental norms of the state); (2) *Staatsgrundgezets* (the basic rule of the state); (3) *Formellgezets* (formal law); and (4) *Verordnung & Autonome Satzung* (implementing rules and autonomous rules).¹⁰

, 7 February 2017. See also: Herman Grech and Rosanne Zammit, “Plane Hijack Drama in Malta Ends; All Hostages

Released”, timesofmalta.com, Friday, 23 December 2016, downloaded from <http://www.timesofmalta.com/article/view/20161223/local/hijacked-libyan-plane-lands-in-malta.634664> on Tuesday, 7 February 2017.

6 CN. Ghosh, “Analysis of the Hijackings on 11 Sept 2001, Suggested Measures for Prevention”, downloaded from [http://www.satp.org/satporgtp/publication/ldr/vo:17\(2\)/CN_ghosh.htm](http://www.satp.org/satporgtp/publication/ldr/vo:17(2)/CN_ghosh.htm) on Monday, 5 September 2016.

7 Sandro Gatra (Editor), “Indonesia Tidak Pernah Kalah Melawan Pembajakan”, Harian Kompas, Friday, 1 April 2016, accessed on <http://nasional.kompas.com/read/2016/04/01/05350061/Indonesia.Tidak.Pernah.Kalah.Melawan.Pembaja?page=2> on Tuesday, 17 January 2017.

8 Sandro Gatra (Editor), *ibid.* See also: Julius Pour, (1993), *Benny Moerdani: Profil Prajurit Negarawan*, Jakarta: Yayasan Keuangan Panglima Besar Sudirman.

9 Hans Kelsen, (1935), *General Theory of Law and State*, New York: Russel&Russel, pp. 35 as cited in Maria Farida Indrati S., (2007), *Ilmu Perundang-undangan: Jenis, Fungsi, dan Materi Muatan*, Buku 1, Yogyakarta: Kanisius, pp. 41. See also: Salim HS and Erlies Septiana Nurbani, (2014), *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi*, Jakarta: PT RajaGrafindo Persada, pp. 57.

As well as in Indonesia whose legal system is hierarchical in nature, where the existing legal norms are arranged in a hierarchical manner, starting from the lower legal norms which are determined, applied, sourced and based on higher legal norms, and so on until it ends at the highest basic/fundamental norm known as Pancasila. Thus all the legal norms that exist in Indonesia must be determined, applied, sourced, based on and should not be contrary to Pancasila as the Fundamental Norms of the State, and the 1945 Constitution as the Basic Rule of the Republic of Indonesia.

All of these legal norms that exist in Indonesia is within the framework of the National Legal System built to realize the Aims of the Republic of Indonesia. In order to realize the Aims of the Republic of Indonesia, the development of the National Legal System is based on a framework or orientation desired by the whole Indonesian nation or in other words based on a National Legal Policy.

According to Padmo Wahyono, legal policy is defined as “the policy of state organizers that are fundamental in determining the direction, form, and content of the law to be established, and on what is used as criteria to make something as law”.¹¹ Meanwhile Sunaryati Hartono said that legal policy is “the means used by the government to create a national legal system desired by the Indonesian nation”, and therefore cannot be separated from the social and traditional reality of the Indonesian nation, and also cannot be released from the reality and the international legal policy.¹² Whilst Imam Syaukani and A. Ahsin Thohari defines legal policy as “the basic policy of the state organizers in the field of law that will apply, is in effect, and has been applied, derived from the values prevailing in society to achieve the intended state objectives/aims”.¹³

Thus based on the previous definitions, legal policy can be define as “the legal policy that has been applied, is in effect, and will be apply by the government of a state that derived from the values prevailing in the society, that cannot be released from the impact of international legal policy”.

Regarding the *Stufenbautheorie* and the *die Theorie vom Stufenordnung der Rechtsnormen*, according to Arief Hidayat, the National Legal Policy of Indonesia is arranged hierarchically and devided into three levels namely Ideal Legal Policy, Basic Legal Policy, and Instrumental Legal Policy.¹⁴

The Ideal Legal Policy of Indonesia contained in Pancasila, as the fundamental norm of Indonesia, which also happened to be the legal aspiration of Indonesia (*rechtsidee*) which is permanent and impossible to be change as it is a belief framework that is normative and constitutive in nature.¹⁵

Furthermore as the Ideal Legal Policy of Indonesia, Pancasila is then interpreted and elaborated into the basic rules of the state in the form of a constitution, which contains the Basic Legal Policy of Indonesia. This constitution is semi -permanent in nature, because even though the validity period is quite long, there is always a possibillity to be amend according to the current development. For example the 1945 Constitution of the Republic of Indonesia that has undergone four amendments to date.

Even farther, due to the very basic nature of the constitution and therefore difficult to implement in the life of society, nation and state, thus these norms then interpreted and elaborated into acts, which contains the Instrumental Legal Policy. These acts is both specific and temporary, as it may be revoked or changed in order to adapt to the currente development. Whereas the various implementing regulations of the act do not contain any legal policy, as they are merely the operational and technical regulations of the act.

Regarding the impact of international law to the Indonesian Legal Policy, Indonesia cannot be separated completely from the influence of external factors derived from international law. This is a consequence of Indonesia’s intercommunication as a member of the international community. This also in accordance with the opinion of Sunaryati Hartono which states that Indonesian legal policy cannot be separated from the reality and international legal policy, as described previously.

With regards to the current era of globalization, where the world becomes borderless, the influence/impact of international law is very visible in the form of the inclusion of various rules of international law into national legislation. Likewise in the field of air law, by joining the ICAO in 27 April 1950, Indonesia must comply with the ICAO standard rules and regulations concerning civil aviation. This is done, among others, by ratifying various international conventions on aviation into

¹⁰ Maria Farida Indrati S., (2007), *Ilmu ... ibid.*, pp. 44 – 45, and Salim HS and Erlies Septiana Nurbani, (2014), *Penerapan ... ibid.*, pp. 58.

¹¹ Imam Syaukani and A. Ahsin Thohari, (2015), *Dasar-dasar Politik Hukum*, Jakarta: Rajawali Pers, pp. 26 – 27.

¹² Sunaryati Hartono, (1991), *Politik Hukum Menuju Satu Sistem Hukum Nasional*, Bandung: Penerbit Alumni, pp. 1.

¹³ Imam Syaukani and A. Ahsin Thohari, *op. cit.*, pp. 32.

¹⁴ Interview with Arief Hidayat, Chief Justice of the Indonesian Constitutional Court, done at the Indonesian Constitutional Court on Monday, 18 December 2017.

¹⁵ Arief Hidayat, “Negara Hukum Berwatak Pancasila”, presented at Seminar Nasional dalam rangka Pekan Fakultas

Hukum 2017, at Atmajaya University Yogyakarta, on 9 September 2017, pp. 3.

the National Legal System. This ratification may take place in the form of acts on the ratification of international conventions, as well as in the formulation and enactment of new acts which have incorporated the provisions of relevant international conventions.

Especially in regards to the prevention and the suppression of aircraft hijacking, Indonesia has ratified some international conventions in the form of national acts as follows:

1. Act Number 2 of 1976 on the Ratification of Tokyo Convention 1963, Den Haag Convention 1970, and Montreal Convention 1971.
2. Act Number 5 of 2006 on the Ratification of the International Convention for the Suppression of Terrorist Bombings, 1997.

Besides that, Indonesia has also formulated and enacted some acts new acts which have incorporated the provisions of international conventions in regards to the prevention and the suppression of aircraft hijacking, such as:

1. Act Number 4 of 1976 on the Changes and Addition of Some Articles in the Penal Code related to the Extension of the Criminal Legislation, Crimes against Aviation and Crimes against Aviation Facilities/Infrastructure.

This act added a new chapter to the Penal Code namely Chapter XXIX A on crimes against aviation and crimes against aviation facilities/infrastructure. Specifically on the aircraft hijacking is regulated in Article 479j as mentioned clearly in the Explanatory Section of this Act.

2. Act Number 1 of 1979 on Extradition

Aircraft hijacking, crimes against aviation, and crimes against aviation facilities/infrastructure are explicitly mentioned in the List of Crimes which the Perpetrator May Extradite in the Appendix of Article 4 of this Act. This is in accordance with the provisions of Article 16 Paragraph (1) of Tokyo Convention 1963 and Article 7 of Den Haag Convention 1970.

3. Act Number 15 of 2003 on the Eradication of Acts of Terrorism

Although not explicitly mentioned, but this Act regulates the acts of terrorism committed on aircrafts in Article 4, Article 8i and Article 8j.

4. Act Number 1 of 2009 on Civil Aviation

Article 344 of this act specifically regulated the acts of unlawful interference that could harm the safety of aviation.

Concluding Remarks

The impact of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking can be seen from the ratification of various international conventions on aviation or other international conventions in which has relation to the prevention and the suppression of aircraft hijacking. This ratification may take place in the form of acts on the ratification of international conventions (such as Act Number 2 of 1976 on the Ratification of Tokyo Convention 1963, Den Haag Convention 1970, and Montreal Convention 1971; and Act Number 5 of 2006 on the Ratification of the International Convention for the Suppression of Terrorist Bombings, 1997); as well as in the formulation and enactment of new acts which have incorporated the provisions of relevant international conventions (such as Act Number 4 of 1976 on the Changes and Addition of Some Articles in the Penal Code related to the Extension of the Criminal Legislation, Crimes against Aviation and Crimes against Aviation Facilities/Infrastructure; Act Number 1 of 1979 on Extradition; Act Number 15 of 2003 on the Eradication of Acts of Terrorism; and Act Number 1 of 2009 on Civil Aviation).

Thus it can be conclude that the impact of of international conventions on the Indonesian Legal Policy regarding the prevention and the suppression of aircraft hijacking can be clearly seen in the Instrumental Legal Policy of Indonesia.

Recommendation

In order to realize the Aims of the Republic of Indonesia which has clearly stated in the Fourth Paragraph of the Preamble of the 1945 Constitution, which said that “to form a Government of the State of Indonesia which shall protect the whole Indonesian nation and the entire native land of Indonesia, and ..., and to participate in the execution of world order which is by virtue of freedom, perpetual peace and social justice, ...”, and in the context of carrying out its obligations as a member of the international community, Indonesia should continue to make changes and renewal of existing legislation regarding aviation and also actively participating in the ICAO, particularly with regards to the prevention and the suppression of aircraft hijacking.

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Act Number 15 of 2003 on the Eradication of Acts of Terrorism.

Act Number 1 of 2009 on Civil Aviation.

Convention on International Civil Aviation.

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Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal on 23 September 1971.

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