Indonesian Theoretical and Practical Approaches to the Development of International Air Law

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Abstract

As international air law has developed in recent decades, several states committing to laws which may compromise their sovereignty for the good of the international community, has become a trend. Such international norms include states' voluntary concessions under international agreements, as well as unilaterally giving special rights and immunities to other states. Additionally, because of the advancement of global air traffic, states have had to cooperate to ensure safety and security. which require more stringent measures. Therefore, it has become a necessity for all the states participating in international civil aviation to pay attention to the dynamic regulation system (International Civil Aviation Organization / Chicago system), which has been considered as a constructive element in the air sovereignty concept. At the national level, air law is faced with the challenge in managing and securing the natural resources within the airspace, both in air sovereignty and jurisdiction. This scientific review aims to illustrate the emerging issues on managing and securing the airspace, using Indonesian theoretical and practical approaches.

Keywords: *international air law, airspace, jurisdiction in airspace, Indonesian air law, Indonesian aviation law.*

I. INTRODUCTION

International law has continued developing ever since the Treaty of Westphalia in 1648. The development of international law has been sparked by globalization, liberalization, regional integration, and privatization. Recent developments as identified by the advancement in the international treaties has resulted in a new legal order in the international law. This development has led to a redefinition of the character and role of law, both at the domestic and global levels. So does with the international air law, the new legal order is established in a different level, either those generated through the bilateral, multilateral, or plurilateral agreement. Such international treaties have standardized and harmonized the domestic law.

After the establishment of Chicago Convention of 1944, International treaties on aviation have developed, both in the form of technical aviation operations and economic affairs. Those international treaties have evolved into the sources of international air law. Consequently, all international requirements need to me merged into a domestic law. Nations are bounded, legally or politically, to agreements made by an International Organization in which the nation becomes the member of it. Before discussing further about the development of International Treaties as the source of International Air Law, the author would analyze a theory on the relationship between national and international law.

There have been many theories developed to determine the position and interaction between international and domestic law. Generally, two related theories are widely acknowledged among the experts in Indonesia. First, the dualism theory which perceives international and domestic law as two separate law systems, thus requires treaties to be re-written into the national legislation to be implemented in the domestic law.[1] This view argues that international and domestic law owns and regulates its distinct objects, while International law focuses on the relationship among states, domestic law deals with the rights and responsibilities of individuals (citizens) within a country.[2] International requirements are not bound to alter or annul domestic law or vice versa.[3]

Alternatively, the theory of monism states that international and domestic law is one unity of law system that international law is deemed valid in the domestic law as it is qualified as an international norm.[4] According to this theory, there is no separation between the implementation of an international treaty because both are in one system[5]. The binding of a nation to a treaty (e.g., through ratification) is the incorporation of the treaty into the domestic law and it does not require any same national legislation to implement it in the domestic law. Should there be a national regulation that governs the same issue, then the concerned national legislation is the implementation of the related international rule of the law. In this case, the

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1 Damos Dumoli Agusman, "Status Perjanjian Internasional menurut Pandangan Mahkamah Konstitusi RI (Kajian Kritis terhadap Keputusan MK tentang Piagam ASEAN)," in *Peran Hukum Dalam Pembangunan di Indonesia: Kenyataan, Harapan dan Tantangan,* eds. Idris et. al. (Bandung: Remaja Rosdakarya, 2013), 259.

2 Atip Latifulhayat, "Hubungan Hukum Internasional dalam Teori dan Praktik" in *Negara Hukum yang Berkeadilan,* ed. Susi Dwi Harjanti, (Bandung: Pusat Studi Kebijakan Negara Fakultas Hukum Universitas Padjadjaran, 2011), 180. Furthermore, it is also explained that according to Tripel, one of the supporters of dualist concept, there are two main differences between domestic law and inter-domestic law, those are: 1) the subjects of domestic law are individual, while the subjects of international la are nations; 2) the source of law in domestic law is the will of the state itself, while inter-domestic law is composed from the common will of the states.

3 *Ibid.*

4 Agusman, "Status Perjanjian Internasional", 259.

5 It is possible for law enforcers to directly implement the norms of treaties as the manifestation of international norms. Interdomestic law and domestic law, inherently, regulates the same objects, individuals. Even though interdomestic law is commonly known to be the law that regulates the relationship among states, but basically, the relationship referred here is also concerned about the relationship among individuals since a state is nothing but a group of individuals.

international law applied in the domestic law will remain on its characteristics as the international law. The belief of monism creates three schools: 1) the primacy of municipal law, 2) the primacy of international law, and 3) naturalist monism.

In the middle of the theoretical debate between the believers of monism and dualism, the concept of 'harmonization' arises as an alternative, intermediate theory.[6] This belief denies the presence of superiority between international and domestic laws. The law system is superior in each area. This belief is recognized by many experts more as a pragmatic approach. The nations consider that international law is a special law system out of the domestic law jurisdiction, but in certain cases can be applied nationally.[7]

Treaties are one of the primary sources of international law set forth in Article 38 (1) of Statute of International Court. Article 38 point 1 of the Statute of International Court the "Judicial Foundation" to be the international treaty as one of the sources of international law. This article does not determine the position of the International Treaty to be higher than the international custom, as evidence of general practices accepted as law as well as the General Principles of law recognized by civilized nations. Article 38 point 1 of the Statute of International Court takes the same positions upon all sources of international laws.

Treaties are legal instruments that cater to the will and agreement of the nation or other international legal entities to achieve a collective goal based on international law. The international treaty is also used as the basis to govern the activities of nations or other international legal entities. The making of this treaty is a legal action so that it binds the parties concerned in the treaty.

Rebecca M. Wallace mentions that a treaty represents the most factual and trusted method of identification of what is agreed upon among the nations.[8] This is because the international treaty (in a written form) can give more legal assurance for the concerned parties as well any third parties. For example, the content, reasoning, and objectives of the parties, even the implicit ones, can be known by reading and understand the text of a treaty. Also, in terms of methods of forming treaty obligations, binding oneself, and the ending of its implementation, it is all governed formally and is recognized and respected by the nations of the world.[9] In the case of a nation consents to be bound by a treaty, we can give various methods and depending on the treaty between or among the participating nations when the treaty is made.

The assent to be bound by a treaty may be conducted by signing, ratifying, and stating accession or accepting a treaty. Nations may bind themselves by signing a

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6 *Ibid.*, 181.

7 *Ibid.*

8 Rebecca M Wallace, *International Law* (London: Sweet & Maxwell, 2002), 20.

9 I Wayan Parthiana, *Pengantar Hukum Internasional* (Bandung: Mandar Maju, 1990), 159.

treaty without ratifying if they desire so. This intention is possibly mentioned in the treaty itself or the member states, in their method, has agreed that the treaty is applied right after it is signed without waiting for ratification. Since a treaty will apply as soon as it has been signed with no ratification, it can be stated that by establishing that the treaty will apply by the time it is signed on the date when it is announced or starting on the date determined on the treaty.[10]

A nation can also state that it is bound to a treaty by an exchange of letters or notes mentioning that the concerned party decision. This is done in a situation like if the treaty is one of the simple forms that consist of an exchange of letters or notes. The exchange of signed documents signifies that the treaty already binds the two parties. This exchange should not be misinterpreted as the exchange of the treaty ratification certificate.[11] An international treaty that has already fulfilled the terms and the steps to be implemented is then must be conducted by those consented to be bound, as mentioned by Article 2-point (1) g of the Vienna Convention of 1969.

II. INTERNATIONAL TREATIES AS THE LEGAL SOURCE OF INDONESIAN AIR LAW

The term "Air Law" comes with several variations. It sometimes called Aviation Law, the Air Navigation Law, Air Transportation Law, Aeronautical law, or Air-Aeronautical Law. The term aeronautical law is often used in the Roman languages. The terms of aviation law, navigation law, air transportation law, aerial law, aeronautical law, or air-aeronautical law, have narrower meanings compared to the air law. Nicolas Matteesco Matte used the term Air-Aeronautical Law. Meanwhile, in common practice, the term air law is more common, but certain instruments have used the term aviation law. The definition of air law is broader because it covers various aspects of constitutional law, administration, civil, sales, commercial, criminal, public, transportation, and management. Verschoor, quoted by H. K. Martono in his book, defined air law as the laws and regulations that govern the use of airspace that is beneficial for aviation, public necessities, and the nations of the world.[12]

Treaties are one source of international regulation, based on its nature, is classified into two. The first is a public treaty and the other one is private.

[10] Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional* (Bandung: Alumni, 2003), 128-129.
[11] *Ibid.*, 129.
[12] H. K. Martono, *Hukum Udara Nasional dan Internasional Publik* (Jakarta: Raja Grafindo Persada, 2012), 1-2.

Table 1

List of International Convention by ICAO ratified by Indonesia:

No	International Air Law Instrument	List of International Convention by ICAO ratified by Indonesia
1.	Convention for the Unification of Certain Rules Relating to International Carriage by Air Warsaw, 12/10/29	Date of Signature: - Date of Ratification or Accession: 02/02/1952 Effective Date: 17/08/1945 Ratification/Accession by Indonesia: Declaration: By a Note dated 2/2/52, The Government of Indonesia declared that it considered itself bound by the Warsaw Convention (before Indonesia became independent, acceptance of the Convention was affected by the Kingdom of the Netherlands on 1/7/33) National Jurisdiction regarding the ratification: -
2.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 93 *bis* Montreal, 27/5/47	Date of Signature: - Date of Ratification or Accession: 17/07/1961 Effective Date: 17/07/1961 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
3.	Convention on the Privileges and Immunities of the Specialized Agencies, 21/11/47 Application to ICAO (Annex III), 21/6/48	Date of Signature: - Date of Ratification or Accession: 08/03/1972 Effective Date: 08/03/1972 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Decree No. 50 of 1969
4.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 45 Montreal, 14/6/54	Date of Signature: - Date of Ratification or Accession: 24/11/1959 Effective Date: 17/07/1961 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
5.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 48(a), 49(e), and 61 Montreal, 14/6/54	Date of Signature: - Date of Ratification or Accession :18/10/1955 Effective Date: 12/12/1956 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
6.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 50(a) Montreal, 21/6/61	Date of Signature: - Date of Ratification or Accession: 28/07/1961 Effective Date: 17/07/1962 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -

No	International Air Law Instrument	List of International Convention by ICAO ratified by Indonesia
7.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 48(a) Rome, 15/9/62	Date of Signature: - Date of Ratification or Accession: 09/12/1963 Effective Date: 11/09/1975 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
8.	Convention on Offences and Certain Other Acts Committed on Board Aircraft Tokyo, 14/9/63	Date of Signature: 14/09/1963 Date of Ratification or Accession: 07/09/1976 Effective Date: 06/12/1976 Ratification/Accession by Indonesia: -Reservation: The Government of Indonesia does not consider itself bound by Article 24, paragraph 1, of the Tokyo Convention National Jurisdiction regarding the ratification: Act No. 2 of 1967
9.	Convention for the Suppression of Unlawful Seizure of Aircraft The Hague, 16/12/70	Date of Signature: 16/12/1970 Date of Ratification or Accession: 27/08/1976 Effective Date: 27/09/1976 Ratification/Accession by Indonesia: -Reservation: The Government of Indonesia does not consider itself bound by Article 12, paragraph 1, of The Hague Convention National Jurisdiction regarding the ratification: Act No. 2 of 1967
10.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 50(a) New York, 12/3/71	Date of Signature: - Date of Ratification or Accession: 14/06/1971 Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
11.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 56 Vienna, 7/7/71	Date of Signature: - Date of Ratification or Accession: 10/05/1972 Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
12.	Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Montreal, 23/9.71	Date of Signature: - Date of Ratification or Accession: 27/08/1976 Effective Date: 26/09/1976 Ratification/Accession by Indonesia: -Reservation: The Government of Indonesia does not consider itself bound Article 14, paragraph1, of the Montreal Convention National Jurisdiction regarding the ratification: Act No. 2 of 1976

No	International Air Law Instrument	List of International Convention by ICAO ratified by Indonesia
13.	Protocol Relating to an Amendment to the Convention on International Civil Aviation Article 50(a) Montreal, 16/10/74	Date of Signature: - Date of Ratification or Accession: 18/11/1977 Effective Date: 15/02/1980 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -
14.	Protocol Relating to an Amendment to the Convention on International Civil Aviation	Date of Signature: - Date of Ratification or Accession: - Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 51 of1991
15.	Protocol Relating to an Amendment to the Convention on International Civil Aviation 83 *bis* Montreal, 6/10/80	Date of Signature: - Date of Ratification or Accession: 29/07/1987 Effective Date: 20/06/1997 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 21 of 1987
16.	The International COSPAS-SARSAT Programme Agreement Paris, 1/7/88	Date of Signature: - Date of Ratification or Accession: 28/05/1992 Effective Date: 27/06/1992 Ratification/Accession by Indonesia: Association with the Programme as a Ground Segment Provider National Jurisdiction regarding the ratification: -
17.	Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 56) Montreal, 6/10/89	Date of Signature: - Date of Ratification or Accession: 16/11/1995 Effective Date: 18/04/2005 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 67 of 1995
18.	Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 50 (a)) Montreal, 26/10/90	Date of Signature: - Date of Ratification or Accession: 16/11/1995 Effective Date: 28/11/2002 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 66 of1995
19.	Protocol on the Authentic Quinquelingual Text of the Convention on International Civil Aviation Montreal, 30/9/77	Date of Signature: - Date of Ratification or Accession: 15/06/1994 Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -

No	International Air Law Instrument	List of International Convention by ICAO ratified by Indonesia
20.	Protocol on the Authentic Quinquelingual Text of the Convention on International Civil Aviation Montreal, 29/9/95	Date of Signature: - Date of Ratification or Accession: 29/09/1995 Effective Date: 06/05/2005 Ratification/Accession by Indonesia: - Effected with reservation as to acceptance National Jurisdiction regarding the ratification: Presidential Decree No. 5 of 2005
21.	Protocol on the Authentic Six-Language Text of the Convention on International Civil Aviation Montreal, 1/10/98	Date of Signature: - Date of Ratification or Accession: 01/10/1998 Effective Date: - Ratification/Accession by Indonesia: Effected with reservation as to acceptance National Jurisdiction regarding the ratification: Presidential Decree No. 6 of 2005
22	Convention for the Unification of Certain Rules for International Carriage by Air Montreal, 28/5/99	Date of Signature: - Date of Ratification or Accession: 20/03/2017 Effective Date: 19/05/2017 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 95 Year 2016
23.	Convention on International Interests in Mobile Equipment Cape Town, 16/11/01	Date of Signature: - Date of Ratification or Accession: 16/03/2007 Effective Date: 01/07/2007 Ratification/Accession by Indonesia: At that time of accession, Indonesia made declarations under Articles 39(1)(a), 39(1)(b), 40, 53, and 54(2) of the Convention National Jurisdiction regarding the ratification: Presidential Regulation No. 8 Year 2007
24.	Protocol to the Convention on International Interests in Mobile Equipment Cape Town, 16/11/01	Date of Signature: - Date of Ratification or Accession: 16/03/2007 Effective Date: 01/07/2007 Ratification/Accession by Indonesia: At that time of accession, Indonesia made declarations under Article XXX(1), (2), and (3) of the Protocol National Jurisdiction regarding the ratification : Presidential Regulation No. 8 Year 2007
25.	Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 50 (a)) Montreal, 6/10/16	Date of Signature: - Date of Ratification or Accession: 25/09/2019 Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 46 Year 2018

No	International Air Law Instrument	List of International Convention by ICAO ratified by Indonesia
26.	Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 56) Montreal, 6/10/16	Date of Signature: - Date of Ratification or Accession: 25/09/2019 Effective Date: - Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: Presidential Regulation No. 47 Year 2018
27.	Protocol of amendment (Final paragraph, Russian Text) Montreal, 30/9/77	Date of Signature: - Date of Ratification or Accession: 20/11/1990 Effective Date: 17/08/1999 Ratification/Accession by Indonesia: - National Jurisdiction regarding the ratification: -

However, not all international treaties required by ICAO have been ratified by Indonesia. Several treaties that have not been ratified by Indonesia include:

1. International Air Service Transit Agreement (Chicago, 7/12/44)
2. International Air Transport Agreement (Chicago, 7/12/44)
3. Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier Guadalajara, (18/9/61)
4. Protocol on the Authentic Trilingual Text of the Convention on International Civil Aviation (Buenos Aires, 24/9/68)
5. Article 3 bis (Montreal, 10/5/84)
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Montreal, 24/2/88)
7. Protocol of Amendment (Final Paragraph, Arabic Text (Montreal, 29/9/95)
8. Protocol of Amendment (Final Paragraph, China Text (Montreal, 1/10/98)
9. Convention on the International Recognition of Rights in Aircraft (Geneva, 19/6/48)
10. Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 7/10/52)
11. Protocol to Amend the Rome Convention of 1952 (Montreal, 23/9/78); Protocol to Amend the Warsaw Convention of 1929 (The Hague, 28/9/55)
12. Protocol to Amend the Warsaw Convention of 1929 as Amended by The Hague Protocol of 1955 (Guatemala City, 8/3/71)
13. Additional Protocol No. 1 (Montreal, 25/9/75)
14. Additional Protocol No. 2 (Montreal, 25/9/75)
15. Additional Protocol No. 3 (Montreal, 25/9/75)
16. Additional Protocol No. 4 (Montreal, 25/9/75)

17. Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Montreal, 4/4/14)
18. Convention on Compensation for Damage Caused by Aircraft to Third Parties (Montreal, 2/5/09)
19. Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft (Montreal, 2/5/09)
20. Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Beijing, 10/9/10; and Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aviation (Beijing, 10/9/10).

The treaty which serves as the main source of International Air Law is the Convention on International Civil Aviation 1944 (the Chicago Convention). The Chicago Convention of 1944 provides general principles such as: sovereignty, jurisdiction; flight over territory of contracting states such as scheduled and non-scheduled flights, cabotage, pilotless aircraft, prohibited areas, landing at custom airports, applicability of air regulations, rules on airspace, entry and clearance regulations, prevention of the spread of disease, airport tariffs and similar charges, search and rescue; flags of aircraft such as dual registration, domestic law governing registration, display of marks, report of registration; measures to facilitate air navigation such as customs and immigration procedures, customs duties, aircraft in distress, investigation of accidents, exemption from seizure on patent claims, air navigation facilities; conditions to be fulfilled with respect to aircraft such as aircraft radio equipment, certificate of airworthiness, license of personnel, recognition of certificate, journey logbook, cargo restriction; international standard and recommended practices such as adoption of international standards and procedures, departures from international standard and recommended practices (SARPs), endorsement of certificate, validity of endorsed certificate; the international civil aviation organization such as general assembly, council, air navigation commission; personnel; finance; other international arrangement etc. Indonesia ratified the Chicago Convention on 27 April 1950. From that point, Indonesia has been fully complying with the Chicago Convention of 1944.

The elements of ICAO regulations arise from several provisions: the first is the Chicago Convention 1944 as the main source of law; the second is an additional rule of Annexes that commonly consists of standards and recommended practices; the third is technical rules setting out of standards and recommendation, but it is encouraged by the Chicago Convention 1944 to apply Annex provisions; the fourth is a procedure of Air Navigation Service Operation of Aircraft that has similar provisions with Annex, but it cannot be put there because of some situations. ICAO also produces many international treaties that become the source of law in aviation for both private and public. It provides technical regulations to member countries, including Indonesia, in regulating aviation.

Under the Chicago Convention of 1944, each State has complete and exclusive sovereignty over the airspace above its territory. Even though the characteristics of 'complete' and 'exclusive' are commonly agreed upon, they are not absolute. The legal consequences and the limitations in the implications of air sovereignty have been questioned by many legal experts. They have tried interpreting to the statement "ranging from the unlimited rights of a nation in the law of air sovereignty and the concept of free movement in air traffic".

The existence of ICAO's system that concerns technical issues such as the safety and security of aviation is the authority representation belongs to the states in the establishments of the flights. On the other hand, as one of the fields in International public law, air law is not necessarily free from the intervention, especially from international law management. With this, Frans G. Von der Drunk highlighted that the air law is one of the forms of law system specialization, a regime of *sui generis*, one of the forms of *sui generis* that is supposed to be disqualified as the *lex specialist*, Drunk applied the maxim of *lex specialist derogat lege generale* for the relationship between the international public law and the air law.[13]

John Cobb Cooper identified four basic principles that guide International Air Law: a) Territorial Sovereignty; b) National Airspace; c) Freedom of the Seas; and d) Nationality (flag) of the Aircraft.[14] Territorial Sovereignty is related to sovereignty if each country has the unilateral and absolute right to permit or refuse anything entering into the area that is acknowledged as its territory and the same right to control all movement in their territory. National airspace is related to the territorial of the sovereign nation that has three dimensions, including the territorial airspace above the national ground and water territory as well as the remote water areas of the nation. Further, the Freedom of the Sea is a principle that is related to the navigation on open waters and the flight above the open sea that is free for all nations. National Aircraft is a principle of nationality for the aircraft as the nationality principle for the ships developed on the maritime law (flag).[15] Niels van Anterpen in his book "Cross Border Provision of Air Navigation Service with Specific Reference to Europe" described the principles of international air law that cover 1) nation, the areas and the airspace, and 2) Sovereignty, jurisdiction and the delegation of the national authority.[16] These basic principles provide the basis the "specific right" that is derived from the character of "full" and "exclusive" of the national sovereignty in the airspace.

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13 Frans G. Von der Drunk in Gul Sarigul, "The Evolving Concept of Sovereignty in Air Law" (LL.M. Thesis, Faculty of Law Institute of Air and Space Law, 2004), 42, https://escholarship.mcgill.ca/concern/theses/2r36tz12f.

14 John Cobb Cooper, "Backgrounds of Internasional Public Air Law," in *Yearbook of Air and Space Law 1965*, ed. Rene H. Mankiewicz (Montreal: McGill University Press, 1967), 33.

15 *Ibid.*

16 Niels van Antwerpen, *Cross Border Provision of Air Navigation Services with Specific Reference to Europe* (The Netherland: Kluwer Law International, 2008), 123.

International Air Law recognizes two terms related to airspace, the "national airspace" and the "international airspace," although, normatively, that term was not mentioned in the Chicago Convention of 1944 or the UNCLOS of 1982. The use of the term "national airspace" and "international airspace" in the international air law is, principally, based on the necessities of each country in managing their national airspace as well as the cooperation among countries in using international airspace.

The advancement and development of technology in the globalization era, especially in the aviation field is in line with the development of various aspects of necessities. If, conventionally, aviation is dominated by the national necessities (in the field of defense and governmental economic), then in the current condition the aviation world is full of business necessities that are macro (commercial), even up to the necessities in the field of sport and hobbies (aero-sport and aero-modeling). The ease of access, time efficiency and good facility make air transport the primary choice. That is indeed not coming with zero risks. The euphoria phenomenon in the aviation world has had an impact to the world globally, including in Indonesia. The presence of the demand from various necessities in the aviation world needs to be accompanied by proper policies in airspace law.

III. INDONESIA'S AVIATION POLICY AND LEGISLATION

The Indonesian Civil Aviation Act of 2009 adopted almost all the provisions of the Chicago Convention of 1944 for the purpose to implement the SARPs provided by the International Civil Aviation Organization (ICAO). ICAO is the competent body for the most comprehensive package of regulations on international civil aviation. ICAO has a rule-making function that provides an outstanding example of worldwide international law-making. The following table shows international air law instruments promulgated by ICAO which have each been ratified by Indonesia.

The general framework of territorial sovereignty is enshrined in the the Indonesian Constitution. Article 33(3) of the 1945 State Constitution of the Republic of Indonesia states "*The land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people*". This article is a foundational provision of the sovereignty of the country where the natural resource of Indonesia is used for the great prosperity of the Indonesian people. In regulating the activities and sovereignty of the airspace, Indonesia regulates the national legislation, namely Law No. 83 of 1958 on Aviation which was later amended by Law No. 15 of 1992 on Aviation. Given the importance of updating the rules in line with the dynamic of aviation, Indonesia then created a new rule, namely Law No. 1 of 2009 on Civil Aviation. Provisions on Indonesia's sovereignty over its airspace are found in article 5 The Republic of Indonesia's Law No. 1 of 2009 on Aviation (Civil Aviation Act of 2009), which reads: "*The Republic of Indonesia has full and exclusive sovereignty over the air/space territory of the Republic of Indonesia.*"

SARPs implementation in Indonesia is further regulated under the Indonesian Aviation Law No. 1 of 2009 which entered into force on 12 January 2009. The aims and objectives of the act is to promote the development of Indonesian air transportation. It regulates at the international level nearly all aspect of the Chicago Convention 1944, from sovereignty in airspace, aircraft production, operation, and airworthiness of aircraft to aviation security and safety, aircraft procurement, aviation insurance, the independence of aircraft accident investigations, and the licensing of aviation professionals. Indonesian Aviation Law No. 1 of 2009 also regulates scheduled and non-scheduled air transportation, airline capital, the ownership of aircraft, aircraft leasing, fares, the liability of air carriers, air navigation facilities, airport authorities and services, and law enforcement related to air transportation. In addition, the Indonesian Aviation Law No. 1 of 2009 also has provisions aimed at supporting the development of national and international air transportation in Indonesia, including provisions regarding the creation of a publicly funded institute to further those goals. Some articles Indonesian Aviation Law No. 1 of 2009 instructed the Government of the Republic Indonesia to make regulate matters listed on the below table:

Table 2

List of International Government Regulations mandated by Indonesian Aviation Law No. 1 of 2009

No	Article	Subject Matters	Government
1	9	Violation of sovereign territory, a stipulation of prohibited areas, restricted areas, execution of action against the aircraft(s) and crew(s), and the system and procedure of enforcing action by state aircraft(s)	Government Regulation No. 4 of 2018
2	12(2)	Supervision, agency, policy formulation function, and the function for granting consideration in the field of aviation and outer space	-
3	70	State aircraft	-
4	191	Multimodal transportation	Government Regulation No.8 of 2011
5	216	Construction of airport	-
6	244(3) (a)	The amount of airport services tariff at airports not yet commercially operated for an airport operated by an airport operation unit	-
7	260(4)	Noise and contamination level, and monitoring and management the of environment	-

No	Article	Subject Matters	Government
8	356	Search and rescue in aircraft accident	-
9	369	Aircraft accident investigations and follow-up investigation	-
	374	Empowerment of aviation industry and technology development	-

Indonesian Aviation Law No. 1 of 2009 commands the transformation of at least ten government regulations, however, to date there are only two government regulations have been promulgated. The various regulations that have been applicable in Indonesia are inseparable from several international regulations and several agreements on aviation that have been ratified by Indonesia. As an ICAO member country, Indonesia has ratified and is bound by several conventions and protocols which have been transformed into domestic law. As evidence of Indonesia's concern and seriousness in creating security and safety of civil aviation, Indonesia has also made several technical regulations regarding civil aviation. The regulations made by the Ministry of Transportation, as the authority in regulating and striving for of security and safety on civil aviation in Indonesia. These regulations are established concerning international provisions, such as Annex and SARPs. Some examples of these rules include:

1. Regulation of the Minister of Transportation Number 51 of 2020 concerning National Aviation Security;
2. Decree of the Director-General of Civil Aviation Number KP 149 of 2020 concerning Supervision of Information Technology-Based Air Transportation for Aviation Inspectors in the Air Transportation Sector;
3. Decree of the Director-General of Civil Aviation No. KP 166 of 2020 concerning Stipulation of Technical and Operational Standards Part 69-01 (Manual of Standard Part 69-01) Licenses, Ratings, Training and Skills of Aviation Traffic Guidance Personnel;
4. Decree of the Director-General of Civil Aviation Number KP 46 of 2020 concerning the Establishment of Safety Performance Indicators (SPI) and Acceptable Level of Safety Performance (ALoSP) in Airworthiness and Aircraft Operations for Airline Operators Operator Certificates (AOC) 121 and 135;
5. Regulation of the Director-General Civil Aviation Number KP 47 of 2020 concerning Operational Technical Guidelines for Civil Aviation Safety Regulations Part 120-CSEA 001 (Advisory Circular Part 120-CSEA 001) concerning Guidelines for Aircraft Operators on Training Programs on the Use of Terrain Awareness and Warning System (TAWS)
6. Regulation of the Director-General of Civil Aviation No KP 62 of 2020 concerning Operational Technical Guidelines for Civil Aviation Safety Regulations Part 19-06 (Advisory Circular Part 19-06) Implementation of a Safety Management System for Aviation Navigation Service Providers

IV. INDONESIA'S THEORETICAL AND PRACTICAL APPROACHES TO THE DEVELOPMENT OF INTERNATIONAL AIR LAW

In the national air law regulations, the language of the Law No 1 of 2009 on Aviation provides a narrative that aviation as the part of the national transportation system is established to assist the economic growth, territorial development, strengthening international relationships, and enhancing the nation's sovereignty. That requirement proves that airspace management is specifically aimed at improving the prosperity of Indonesian society. On the other side, importance is placed on protecting the nation's sovereignty in managing the whole national airspace, especially the authority over the airspace for flight navigation.

Generally, there are two primary necessities in airspace management in Indonesia, security, and economic impact:[17]

1. Security Concerns

Ruwantisa Abeyratne opines that the aim of incorporating security aspect into the opening of the Chicago Convention was to guide the development of international civil aviation in the future has the objective to help in keeping the closeness and the communal understanding between the nations in the world should eliminate potential security threats in developing the international civil aviation.[18] General Security of the Chicago Conference symbolize the importance of keeping the peace. The term has been interpreted in the broadest meaning possible by the ICAO Assembly on various sessions to discuss social issues like discrimination, race, as well as the threat in the conduct of civil or commercial aviation.

Article 1 of the Chicago Convention of 1944 gave the highest role and authority to states in utilizing the airspace especially for air transport based on the principle of the sovereignty. One for the form of the nation is regulated in the Article 6 of Chicago Convention of 1944, which mentioned that every nation that will conduct scheduled international flight through or to other contracting state must have a special permit from the nation that will be on the flight path or the destination.[19] This article strictly mentions that the civil flight that serves the scheduled international air transportation can only operate if the flights obtain permit to take off, land and travel through sovereign airspace.[20] Furthermore, Brian F. Havel specifically

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17 Adi Kusumaningrum dan Wisnu Virgiaswara Putra, *Hukum Udara: Kepentingan Indonesia di Ruang Udara Nasional* (Malang: UB Press, 2019), 17.

18 Ruwantisa Abeyratne, *Air Navigation Law* (New York: Springer, 2012).

19 Art. 6: *"no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or authorization of that State, and in accordance with the terms of such permission or authorization"*. This article is the manifestation of "exclusive" characteristic from national sovereignty on airspace as mentioned in Article 1 Chicago Convention 1944.

20 Bin Cheng, *The Law of International Air Transport* (London: The London Institute of the World Affairs, 1962), 314-326; I.H.Ph. Diederiks Verschoor, *An Introduction to Air Law*, Six revised edition (The Hague – London – Boston: Kluwer Law International, 1991), 23-24. Furthermore, in Article 7 Chicago Convention, it was determined that every member may refuse to give permission to the aircraft belonged to another member of the Convention which conducts a scheduled flight

mentioned that article 6 here is the perfect logic from the term of 'limiting' see the Article 1 of the Chicago Convention of 1944, which is inspired by security considerations. This article emphasizes that there is no scheduled international flight that is operated above or to a nation, unless it is with the permission or the civil aviation authority of the nation, according to the requirement of permission and authorization.[21] Based on this article, based on the *de jure* status, the airspace of each nation is 'closed' for foreign-flagged aircraft until the concerned nation 'opens' it on a *de facto* basis. Then, Articles 1 and 6 of the Chicago Convention of 1944 provides the legal basis for the trade of the freedom of the air.[22] Both articles gave birth to two main principles of the trade of the freedom of the air, namely 'sovereignty' and 'special permission or other authorization' from the destination country in operating the scheduled international service. The two main principles place the freedom of the air and the bilateral treaty as the heart of the Chicago Convention 1944, as mentioned by Brian F. Havel.[23] The security concerns create the following three separate concepts in the international air law:

a. The concept of Air Sovereignty

   Article 2 of the Chicago Convention of 1944 regulates that the sovereignty of the airspace both over land territorial waters, which are under the sovereignty, protection, and mandate of a nation. The principle of full and exclusive sovereignty upon the airspace allows the airspace to be fully closed to foreign aircraft, the military, or the civil ones unless one already gained permission from the country before on the bilateral treaty or the multilateral ones.

   The geography of Indonesia has been acknowledged internationally as an Archipelagic State that caused the airspace, principally, not to be fully closed. Article 53 of the United Nations Convention on the Law of the Sea (UNCLOS) of 1983 regulates that the Archipelagic States can determine the sea channel and the flight route above it that is suitable to use for the foreign ships and the aircraft that will continuously, directly, and steadily pass through or above the archipelagic water and the adjacent zones. For the international straights regimes, Indonesia has promulgated its mandatory route to be followed by foreign ships and aircraft passing by, known as "Alur Laut Kepulauan Indonesia" (ALKI) where aircraft acts have the crossing rights on the ALKI (normally used for international navigation)

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to collect passengers, letters, and cargo that charges a fee to be brought from one place to another place in one nation's territory. This principle is called Sabotage.

21 Brian F. Havel noted that in comparison to the international regime on outer space, this is totally different. Article 1 the Outer Space Treaty 1967 determined "outer space, including the moon and other space objects, should be free from exploration and to be used by all nations....". Brian F. Havel, *Beyond Open Skies: A New Regime for International Aviation* (The Netherlands: Kluwer International law, 2009), 101.

22 Hussein Kassim and Handley Stevens, *Air Transport and The European Union: Europeanization and its Limit* (London: Palgrave Macmillan UK, 2010), 25.

23 Havel, *Beyond Open Skies*, 103.

above the seawater. At the IMO (*International Maritime Organization*) Assembly in 1996, Indonesia was asked by other maritime nations to determine the East-West ALKI that passage through the Java Sea – the Flores Sea – the Banda Sea up to the Arafura Sea. To date, the issue keeps developing. The Indonesian government needs to deal with it since by determining the new ALKI, the consequence would be on the right of passage for foreign aircraft in Indonesian airspace that would surely affect the strength of Indonesian air defense.

b. The concept of the Air Defense Zone (ADIZ)

Under a nation's defense system, especially in the airspace, a state may determine its ADIZ). Principally, an ADIZ is formed as the initial zone in preventing foreign aircraft as a potentially harmful threat. The aircraft entering ADIZ are required to provide information necessary before entering Indonesian airspace.

c. The Delineation of Airspace

Another urgency in security of national airspace management is determining the airspace in Indonesian national air territory. Article 9 in Chicago Convention 1944 regulates the determination of prohibited areas by states according to military concerns and general national security, as well as the non-discrimination principle within their national airspace.

2. Civil and Economic Aspects

The Chicago Convention of 1944 provides a juridical foundation on the international civil aviation activities. As mentioned in the preamble thereto, international aviation activities should be conducted and developed in a safe and orderly manner. International air transportation services could be developed based on equal opportunities and operated well and economically. Based on this convention, the nations have exchanged their "*freedom of the airs*" either through bilateral or multilateral agreements.[24] Along with the enhancement of liberalization, a multilateral agreement has become generally accepted in the exchange of "*freedom of the air*" ever since the 1980s. Ruwantissa Abeyratne mentions that this phenomenon is an undeniable fact.[25] Since *the ICAO's 4th Worldwide Air Transport Conference*, air

[24] In the early development of international air law, nations tended to use bilateral negotiation to build and regulate international flight and commercial flight services within and outside the territory. Bilateral agreements between two countries provide mutual and exclusive rights and responsibilities for both parties. *The International Air Services Agreement Transit* (IASTA) and *International Air Transport Agreement* (IATA) have failed to reach consensus on the legal requirements that regulate economic policy on International Civil Aviation during the negotiations in Chicago Convention 1944. Jason R. Robin, "Regionalism in International Civil Aviation: A Reevaluation of The Economic Regulation of International Air Transport in The Context of Economic Integration," in Singapore *Yearbook of Interdomestic law and Contributors* (Singapore, 2010), 118.

[25] Ruwantissa Abeyratne, "Liberalization of Trade Air Transport Services," *The Journal of World Investment & Trade 4, no. 4* (2003): 639. More than 600 (six hundred) bilateral agreements have been amended during January 1995 until December 2001. Around 70 (seventy) percent of the agreements and amendments are regulating liberalization. Before the ICAO's 4th Worldwide Air Transport Conference, there were only two regional regulations, those were European Union (EU)

transportation liberalization has experienced huge developments, especially in terms of market access, particularly at the regional and sub-regional levels.[26] With this level of cooperation, the group of nations has created a multilateral regime to cooperate and liberalize of air transportation among the member nations.

Liberalization that takes place in air transportation is usually referred to *open sky policies*. Verschoor explains the definition of *open sky policy* as follows:[27]

> The term Open Skies indicates a shift from the traditional exchange of traffic rights toward a system under which regulation of competition forms the core elements. As freedom is inherent to such a system, it would seem more appropriate to list what should not be allowed under such a regime instead of the present situation of a non-exhaustive list of what is allowed.

Verschoor shows the elements of change in the exchange of air traffic rights, from the traditional system into the competitive regulated system of flight. *Open sky policies* is a concept of international policy that aims at conducting liberalization of the requirements concerning international air transportation, specifically in commercial flights such as by opening free trade agreements specifically for the airline industry.[28] *Open sky* here also refers to providing flexibility or vast opportunities for airline companies to carry out traffic rights through bilateral or multilateral agreements.[29] In short, the concept of *open sky policies* means that everything is authorized, except for those carriers that have been strictly prohibited. Therefore, Endang Saefullah Wiradipradja states that an *open sky* means, in the context of air transportation, a "fully accessible sky" because it sounds like a nation no longer has complete sovereignty over the airspace above its territory.[30]

The shift in the management dimension is also bound to happen in the area of ASEAN (*The Association of Southeast Asian Nations*).[31] In its development,

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and Andean Pact. Since 1995, eight regulations were promulgated and distributed all worldwide (two in America, one in Asia-Pacific, one in Middle East and four in Africa). From all those agreements, seven of them provide instant or gradual liberation directed to a full access to the market. Some other potential regulation is also running (in Europe, North Atlantic, South Pacific, and Caribbean).

26 *Ibid.,* 642.

27 I.H.Ph. Diederiks Verschoor, *An Introduction to Air Law, ninth revised edition* (The Netherland: Walters Kluwer, 2012), 66.

28 Endang Saefullah Wiradipradja, "Penggunaan Ruang Udara Indonesia bagi Penerbangan Internasional Berjadwal dan Masalah Open Skies Policy" in *Peran Hukum Dalam Pembangunan di Indonesia: Kenyataan, Harapan dan Tantangan, eds. Idris et. al.* (Bandung: Remaja Rosdakarya, 2013), 231.

29 *Ibid.*

30 "*Open sky*" policies for *hard right* air transportation service were started by the United States of America in 1975 by projecting ADA or *Airline Deregulation Act* in 1978. The process of air transportation deregulation also happened in Europe by adopting Directive 83/416/EEC year 1983 to liberate several air services among the regions within the Europe Union community. See Assad Kotaite in Pablo Mendez de Leon in Mieke Komar Kantaatmadja, *Berbagai Masalah Hukum Udara dan Angkasa* (Bandung: Remadja Karya, 1985), 8. Also see I B R Supancana, *Kedaulatan Negara Atas Wilayah Negara (Persperktif Hukum Nasional dan Internasional)*, This explanation is delivered in Air Law and Humanitarian Law Assembly for the Officers of Indonesian Air force, conducted by the Department of Law Indonesian Air force Jakarta, 2 June 2016.

31 ASEAN is a geo-political and economic organization for the nations in the South-East Asia region. This organization consists of 10 nations, such as Brunei Darussalam, Indonesia, Cambodia, Laos, Malaysia, Myanmar, Philippine, Singa-

ASAM has agreed upon three regional cooperation agreements, such as *ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services (ASEAN MAFLAFS)* in Manila on 20 May 2009; *ASEAN Multilateral Agreement on Air Services (ASEAN MAAS)* in Manila on 20 May 2009; *ASEAN Multilateral Agreement on the Full Liberalization of Passenger Air Service (ASEAN MAFLPAS)* in Brunei on 12 November 2010. Indonesia has validated the three agreements along with the appurtenant protocols, ASEAN MAAS is validated by the Presidential Regulation of the Republic of Indonesia No. 74 of 2011, ASEAN MAFLAFS by the Presidential Regulation No. 74 of 2015, and the last, Indonesia also legalize ASEAN MAFLPAS in by the Presidential Regulation a No. 12 of 2016.[32]

Open sky agreements as implemented by the US, EU, and ASEAN are models of open sky agreements. The integration of such air transportation is identified as the combination of national importance from the several nations in the civil aviation sector into a unity of greater society's importance.[33] Specifically, the development in the interconnected global and regional economies in the form of re-evaluation on the position of air transportation economy in a nations' economic systems. This issue has encouraged the nations to no longer consider air transportation as an isolated activity.[34] The indicator of the improved social welfare through the management of airspace, especially for aviation activities is seen from the economic income from the national aviation business sector (*economic benefit*). The more demand for aviation transportation means the more human resources needed to support flight operations. Besides, good aviation business management will surely improve social welfare in general, and not only limited to flight services only. The most recent policy, that is the enactment of the regulation of the Ministry of Transportation Number PM 20 the Year 2019 about Maximum Fare Limit for Economic Class Services in Commercial Airline for Domestic Flight, is expected to

pore, Thailand, and Vietnam. In the High-Level Conference 13th in Singapore, ASEAN reached a new history by signing ASEAN Charter. ASEAN Charter becomes the constitutional foundation in reaching the goal and implementation of mutual principles to achieve ASEAN community development in 2015.

32 Other than ASEAN regional agreements, Indonesia also has agreed to sub-regional agreements of BIMP-EAGA and IMT-GT. The sub-regional agreement of BIMP-EAGA is a cooperation among Brunei Darussalam, Indonesia, Malaysia, and Philippine. The four nations have promised to give 3rd & 4th flight rights with unlimited capacity. And the 5th freedom of flight right among Indonesia, Brunei Darussalam, Philippine with *multi designated airlines*. While the sub-regional agreements of ITG/IMT-GT is a cooperation among Indonesia, Malaysia, and Thailand. The three nations have promised to give 3rd & 4th flight rights with unlimited capacity. And the 5th freedom of flight right among Indonesia, Brunei Darussalam, Philippine that is implemented based on case per case method. ASEAN also conducts an agreement with dialog partners, such as ASEAN – China, ASEAN – Korea, ASEA – Japan, ASEAN – EU, ASEAN – *India Air Transport Agreement* (still in discussion). At the level of *Asia Pacific Economic Cooperation* (APEC), the liberalization of air transportation includes *airline ownership and control, airline designations, tariffs, air freight, airlines cooperative arrangements, charter services, market access, doing business*. Based on this scheme, Indonesia has liberated the international flight market. For the sake of transparency principle in APEC *Individual Action Plan* (AIP) mechanism, Indonesia presents national regulation regarding market access and national treatment. Adi Kusumaningrum, *Kedaulatan Negara di Ruang Udara dan Perkembangan Angkutan Udara Internasional* (Malang: UB Press, 2018), 103.

33 Robin, "Regionalism in International Civil Aviation", 114

34 *Ibid.,* 122.

elevate the economic benefits in general somehow even decrease the demands on the national aviation sector.

V. THE CHALLENGES OF AIR LAW PRACTICE IN INDONESIA

Currently, Indonesian air law still faces many challenges in terms of conceptual and practical issues. Other than the problems concerning the enactment of Indonesian Air Defense Identification Zone (ADIZ), Realignment Flight Information Region (FIR), civil and military cooperation, and the reinforcement of air territory sovereignty, the author also tries to deliver the new issues occurring in the recent days, those are the jurisdiction and sovereign rights in the airspace, that is the extreme ideas which shall be put into consideration among the experts on air law in Indonesia. This study shall be commence considering the many challenges in the air territory of Indonesia.

The general description of Law of the Republic of Indonesia No. 26 of 2007 concerning Spatial Planning mentioned that the planning and the management of airspace especially for aviation that requires the integrated authority system, whether the aviation aspect of commercial or national security aviation (the air force) because both are interconnected. The utilization of the airspace for aviation must be developed while paying attention to the of the authority of airspace, aerial defense zones and the determining of the airspace. Meanwhile, the Aviation Constitution can only regulate the operational aspects of civil aviation, and the other planning and management of airspace are not yet regulated further in the constitution.

The planning and management of the space, including the airspace, has the goal of creating a national airspace that is safe, comfortable, productive, and sustainable based on the "Wawasan Nusantara" and the national defense. According to the requirement of Article 6 (3) the Law No. 26 of 2007 about Spatial Planning, the national space area including the jurisdiction and the national sovereignty that covers overland, territorial waters, and airspace, including the underground as a unity. Then, under Article 6 (5) it is stated that the management of water space and airspace is regulated with a specific constitution. Nonetheless, until recently, there is no specific constitutional provisions that regulates the management of airspace. Regarding the jurisdiction over airspace, Article 10 (b) of the Law No. 34 of 2004 about the National Military of Indonesia, stated that the national jurisdiction of the airspace is the following:

The duty of the Indonesian Air Force:

"Uphold the law and maintaining the security in the national jurisdiction over the airspace according to the ratified national and international legal requirement"

However, this act does not explain further what is meaning of "national jurisdiction over the airspace" is. also, Article 9 (2) The Governmental Regulation No. 4 of 2018 about The Safety of Airspace also mentioned the national jurisdiction of the airspace as the following:

"Air defense identification zone / ADIZ as mentioned on point (1) is on:

a. Airspace in the Air Area; and

b. Airspace in Air Jurisdiction Area"

Article 1 (1) of the regulation states that "the sovereign airspace above the land and water area of Indonesia". Meanwhile, the jurisdiction of the airspace is defined in the Article 1 point (2) that stated, "the Jurisdiction over Airspace is the area outside the nation that consists of the Exclusive Economic Zone, Continental Shelf and the Additional Zone where the nation has the particular sovereign right and authority according to the requirement of the constitution and international law." However, the concept of the sovereign right and authority is not defined further.

This jurisdictional region is also defined by the Law No. 43 of 2008 about the National Area in Article 1 (3), "the area outside the National Area that consists of the Exclusive Economic Zone, the Continental Shelf, and the Additional Zone where the nations have the sovereign right and particular authority as regulated in the international constitution and law." This also emphasizes the sovereign rights under Article 7, by mentioning that Indonesia has the sovereign rights and other rights in the Jurisdiction according to the requirements of the constitutional regulation and the international law.

Article 1 of the Chicago Convention 1944 states that "the contracting states recognize that every state has complete and exclusive sovereignty over the airspace above its territory." Further, Article 2 of the Convention is explained further that "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State." Articles 1 and 2 of this Convention emphasize that Chicago Convention 1944 bifurcates the airspace into the national and international airspace. The details are presented in the following figure:

Figure 1

Maritime and Airspace Zone[35]

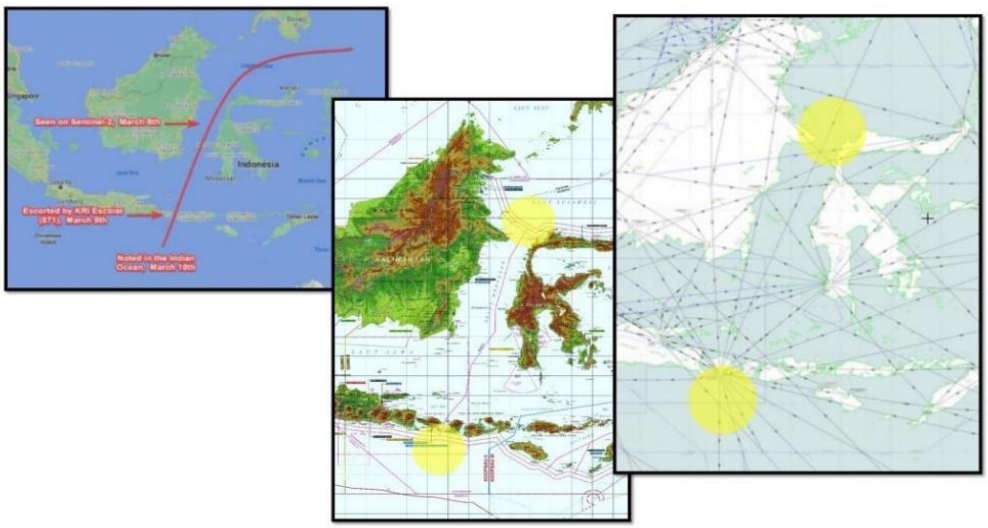
This scheme is different from the Chicago Convention of 1944 in that the United Nations Convention Law of the Sea (UNCLOS) 1982 divides the maritime zone of coastal states into the following divisions: 12 nautical miles measured from the baseline delineates the territorial waters; 24 nautical miles from the baselines is the contiguous zone; then 200 nautical miles from the baselines is the Exclusive Economic Zone (EEZ); while the deep ocean floor below the EEZ within 200 nautical miles and can be expanded to at most 350 nautical miles wide from the baselines is the continental shelf. This maritime zone, Article 56(1)(a) of UNCLOS of 1982 emphasizes the maritime area that includes the sovereign right is the Contiguous Zone, EEZ, and the Continental Shelf. Meanwhile, sovereign rights are the authority of a nation upon a particular area, which inside the practice must obey the legal rules that are adopted by the international society. Sovereign rights in general, are the right to utilize the natural resources in a particular area. International Air Law that divides the airspace into national and international airspace and can be interpreted that there is no concept of sovereign rights under the jurisdiction area of the airspace. The question is how that with the three positive legal requirements of Indonesia, Article 6 (3) of the Law No. 26 of 2007 about Spatial Planning, Article 10 (b) of the Law No. 34 of 2004 on the Indonesian Armed Forces, Article 9 point (2) of the Governmental Regulation No. 4 of 2018 regarding the Security of Air Territory, each of which indicates the presence of jurisdictional airspace.

35 Jay Batongbacal and Aileen S.P. Baviera, *The West Philippine Sea: The Territorial and Maritime Jurisdiction Disputes from a Filipino Perspective,* (Manila: The Asian Center and Institute for Maritime Affairs and Law of the Sea University of the Philippines, 2013), 41.

The set of legal obligations has faced challenges from international incidents. On the 10th of March 2021, the Nuclear-powered aircraft carriers of the US Navy USS Theodore Roosevelt (CVN-71) crossed the Sea Channel of Indonesian Archipelago (ALKI) II, entered the sea area of Sulawesi Sea, and continued through the Makassar Strait, the Flores Sea, and Lombok Strait. Based on the Innocent Passage rights, there was no legal violation when crossing the territorial area. However, when it went to the strayed of the territory, the aircraft carriers launched the F-18 Hornet fighter jets which then were flying and performing maneuvers with no prior-notice, meanwhile on Indonesian airspace under Ujung Pandang's Flight Information Region. The figures show the position and the location of the maneuver of the F-18 Hornets:

Figure 2.

Position and the Location of Maneuver of F-18 Hornet of the Nuclear-Powered Aircraft Carriers of US Navy USS Theodore Roosevelt (CVN-71)

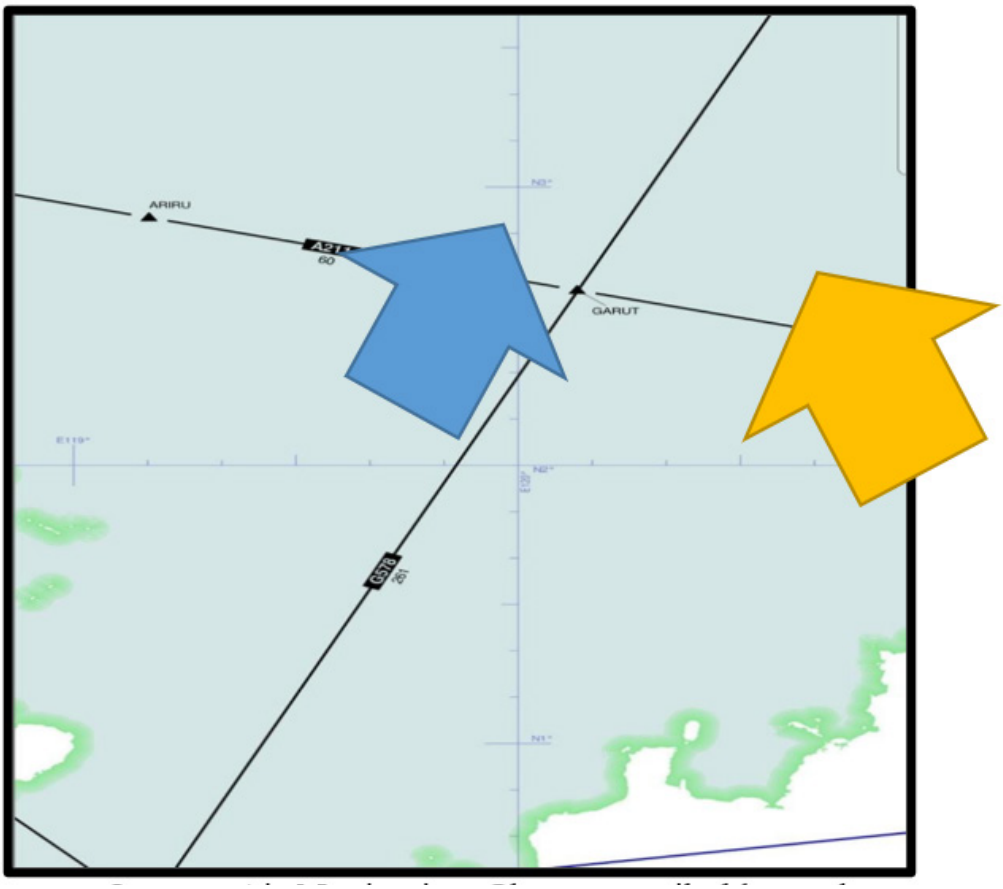


Source: Air Navigation Chart compiled by author.

At the same time, there were also Smart Aviation Civil Aircraft (No. reg PK-SNK) for the Ternate-Malinau route that were flying using airways A211s. It was identified based on the report from the crew of PK-SNK aircraft that there were F-18 Hornets that were shadowing the PK-SNK in GARUT checkpoint. The problem was, there were airways in the aircraft maneuver location and could have disturbed the aircraft that was flying in the airways. This maneuver could have been classified as a threat to the safety of national flights. The detail presented in the figure below:

Figure 3

Airways of the Smart Aviation Civil Aircraft (Noreg PK-SNK) and the Position of F-18 Hornet Aircraft

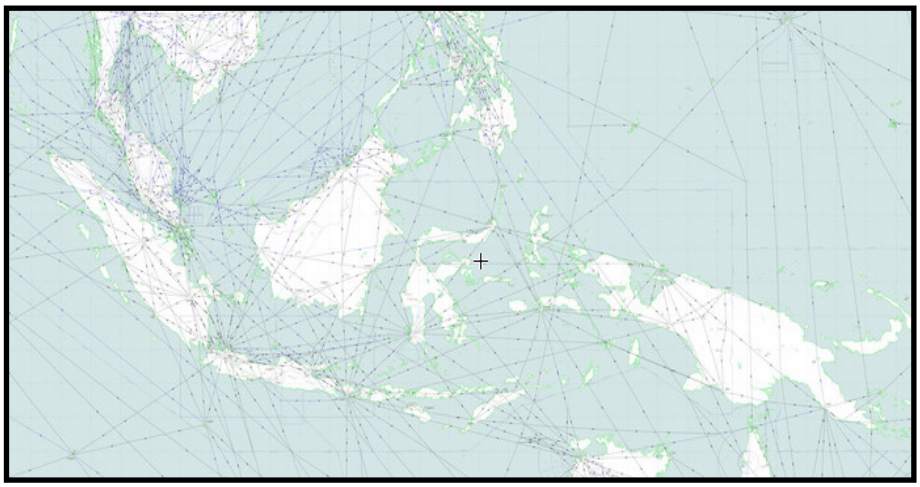


Source: Air Navigation Chart compiled by author.

Airways are a national resource, including the Airways located outside the national territory which are still managed by Indonesia (FIR Indonesia). These resources surely must be secured by the managing nation against any flights or actions that violate other related requirements. This is also following the mandate in Article 10 (b) Law No. 34 of 2004 about Indonesian National Armed Forces "enforce the law and protect the security in the national juridical air space according to the statutory national and international law". As the illustration of the resources in the air, in the form of airways, is shown in the following figure:

Figure 4

Airways managed by Indonesia



Source: Air Navigation Chart compiled by author.

Shortly after the incident of the Nuclear-powered aircraft carrier US Navy USS Theodore Roosevelt (CVN-71) as discussed above, on 6 April 2021, F-18 Super Hornet US Navy aircraft once again performed low altitude maneuvers and passed above Floating, Production, Storage and Off-loading vessel (FPSO) Natuna that was operated by Indonesian oil company. The oil platform was located within the EEZ territory of Indonesia, about 169 miles to the west of Natuna Archipelago. Natuna oil platform is a vital national object which the security shall be well-maintained. This national vital object plays an essential role in the life of the society, either based on the economic, political, social, cultural, defense, and security aspects. Thus, there needs to be some regulation on the security of national vital objects, especially in the airspace which is outside the national sovereign territory. The Presidential Decree No. 63 of 2004 about the Security of National Vital Objects does not fully cover the security management of the national vital object, particularly in protecting it from any threats coming from outside the territory, according to Government Regulation No. 4 of 2018 regarding the Security of Air Territory.

In the future, a study on the gap between *das sollen* and *das sein* in international air law needs to be conducted. Conceptually, the term of jurisdiction and sovereign rights in the airspace is peculiar. Practically in the field, however, there are a lot of national interests in the international airspace. There are, at least, there main importance, those are resources in the airspace, economic value of the air space management, and threats coming from the international sphere.

VI. CONCLUSION

Air Law (Aero-nautical Law, Lucht Recht; Luft-Recht, Droit d'Arien') and aviation law is often used alternatively. Several experts limit the definition of air law as a set of rules regulating on the use of air space along with all the aviation utility for the civilians and other nations in the world. In other words, Air Law includes any law, regulation, or customs on aviation, along with the rights and responsibilities, which are constructed based on treaties, customs, and laws applied in and among the nations. Among all the developments, challenges, and problems faced in the establishment of air law, it does not only concern in aviation issues. Therefore, it is the author's view that the air law and aviation law have different scopes. Air law does not only include the regulations on aviation, but also the concepts of air space which involves the usage and utilization of air space for economic, defense and security, socio-cultural, and environmental affairs. To assume that air law and aviation law to be similar will only lead to narrowing the scope and attention to air law itself.

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