

FREEDOM OF THE SKIES: A TOOTHLESS DISTANT RELATIVE OF FREEDOM OF THE SEAS

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Freedom of the Seas is one of the central principles of American foreign policy. It is the right of all peoples to travel unmolested in international waters in both war and peace. In what should be a parallel concept, Freedom of the Skies, the international community has adopted a more complex and primarily commercial framework that lacks both clarity and any means of enforcement in the face of unprovoked surface-to-air missile attacks on civil aircraft. If it is to mean anything, the United States must now recast Freedom of the Skies in simple, direct terms and enforce air security in the same manner as it executes its strategic role on the high seas.

Freedom of the seas has been an important means by which the United States has influenced international affairs, and maintaining navigational freedom is one of the principal missions of the United States Navy. It is one of the most important contributions of the United States to stabilizing international trade and deterring regional aggression. In May, 1941, President Franklin D. Roosevelt asserted:

"All freedom—meaning freedom to live and not freedom to conquer and subjugate other peoples—depends on the freedom of the seas—for our own shipping, for the commerce of our sister Republics, for the right of all nations to use the highways of world trade, and for our own safety.... As President of a united, determined people, I say solemnly: we reassert the ancient American doctrine of the freedom of the seas."

Beginning in 1979, the United States asserted a freedom of navigation policy in response to unilateral extensions of territorial waters claims by several littoral nations. That policy incorporates a three-pronged strategy of diplomatic protest, operational assertion, and bilateral or multilateral negotiation to insure that such claims cannot threaten open passage. The force structure and deployment patterns of the Navy are also designed to counter threats from both nations and non-nation-state actors, and in recent years, has countered both Iranian ambitions to restrict the Strait of Hormuz, al Qaeda-affiliate threats to the Strait of Malacca, and piracy in the coastal waters off the Horn of Africa.

Freedom of the Skies, in stark contrast to that of the Seas, is comprised of a web of complex conventions and bilateral agreements, first proposed in the Convention of International Civil Aviation (1944). The International Air Services Transit Agreement (IASTA) established the freedom to fly across the territory of another state without landing and the freedom to land in a state for non-traffic purposes, e.g., refueling without boarding or disembarking passengers, and by 2007, 129 countries had become signatories.

The rights of the IASTA have been supplemented by later agreements, and in particular, by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971,

<https://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>) which makes destruction of an aircraft in service a criminal act. The Convention criminalizes the following behavior:

1. performing 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;
2. destroying an aircraft in service or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
3. placing or causing 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;
4. destroying or damaging air navigation facilities or interfering with their operation, if any such act is likely to endanger the safety of aircraft in flight;
5. communicating information which the perpetrator knows to be false, thereby endangering the safety of aircraft in flight;
6. attempting any of the offenses mentioned; and
7. being an accomplice of a person who commits or attempts to commit any of the offenses mentioned.

This treaty has 188 signatories, including, in particular, both Russia and Ukraine (both having signed as the USSR and Ukrainian SSR). The Convention sets out the principle of *aut dedere aut judicare*—that a party to the treaty must either (1) prosecute a person who commits an offense or (2) send the individual to another state that requests his or her extradition for prosecution of the same crime.

THE EVOLVING THREAT ENVIRONMENT

The first successful man-portable air defense systems (MANPADS) attack against a civilian aircraft occurred September 3, 1978, when fighters of the Zimbabwe People's Revolution Army shot down Air Rhodesia Flight 825. The 1994 missile downing of a plane carrying the leaders of Rwanda and Burundi precipitated a war that killed more than 800,000 Rwandans. More recently, in 2002, al-Qaeda affiliated terrorists in Mombassa, Kenya, fired two shoulder-launched missiles at an Arkia Israel Airlines plane. Both shots missed, but the act marked the first attack on a civilian airliner outside a conflict zone. Following these attacks and other threats, governments responded by changing approach and departure routes, increasing the size of security perimeters, and in some instances, installing detectors and countermeasures aboard civilian aircraft (<http://edition.cnn.com/2004/WORLD/meast/05/24/air.defense/>).

The US government estimates that approximately 500,000-750,000 MANPADS remain in stockpiles around the world, although it is difficult to estimate the number of operable systems (<http://www.smallarmssurvey.org/weapons-and-markets/products/manpads.html>). It is known that non-state actors have captured such weapons, or have acquired them from suppliers, as groups including Hamas, Hezbollah, al Qaeda in the Magrheb, Boko Haram in Nigeria, and several Syrian insurgent factions have advertised their stockpiles.

A typical MANPAD has a range of 6km and a detection range of 10km, so an aircraft operating at altitudes of greater than 6,100m (21,000ft) are generally safe. Of course, all aircraft must take off and land, and it is during these terminal operations that flights are most vulnerable. Because MANPADS are small and easily concealed, the threat of an attack is greatest in crowded areas typical of urban airports.

Military surface-to-air missile systems are generally larger, more complex, and more visible than MANPADS and have not generally been considered a serious threat to civil aviation safety, despite a few high-profile incidents in the past. In the cases of the Soviet downing of Korean Air Lines Flight 007 in September 1983 and the US destruction of

Iran Air Flight 655 in July 1988, both of these incidents involved arguable mistakes by active military personnel in what they and their commanders believed was a threat environment.

After KAL007, the Soviet government expressed regret over the loss of life, but offered no apology and did not respond to demands for compensation. By contrast, the US, after some delay, settled a case brought by Iran at the International Court of Justice stating, "...the United States recognized the aerial incident of 3 July 1988 as a terrible human tragedy and expressed deep regret over the loss of lives caused by the incident..." but denying liability and agreeing to pay on an *ex gratia* basis \$61.8 million, amounting to \$213,103.45 per passenger, in compensation to the families of the Iranian victims.

The events surrounding the shoot down of Malaysian Air Flight 17 are well known: a Buk (SA-11) anti-aircraft missile battery, stationed in eastern Ukraine, and either operated or advised by Russian military personnel took down a Boeing 777 cruising at 33,000ft (10,000m) on a well-known commercial air route. The missile system is an old Soviet type, but that does not matter to civilian aircraft, since it is able to track and target aircraft flying up to 25,000m (80,000ft) high, far beyond the capability of every commercial airliner. The dead number 298. Given the political situation on the ground, there is virtually no chance that Ukraine will ever be able to comply with its obligations under the Montreal Convention, and it is far from likely that Russia will, either. The other casualty here is Freedom of the Skies, which seemingly has no one to defend it.

There are, of course, tremendous differences between defending sea lanes in international and coastal waters, and defending air corridors over nations and disputed regions in turmoil. The types of cover that can be given to civilian airliners is far less effective than that offered by the US Navy to civilian ships. It is unthinkable that the US Air Force would begin to patrol commercial air routes, using its weapons to preemptively strike at target-acquisition radar systems along the way. Even the battery that took down Flight 17 has vanished back across the Russian border, taking with it any record that implicates its operators and their political bosses.

A greater danger than the MANPADS that can destroy planes during their most vulnerable ascents and descents must now become a factor in airline operations. Full surface-to-air threats mean that all operations are at risk. Free passage cannot be assumed in this environment, and political risk must now be a factor in flight planning. As may be seen from the July 22 FAA order to restrict US airlines' operations at Tel Aviv's Ben Gurion Airport, even threats in the vicinity of an airport will cause schedule disruption.

Since 1944, the air transport industry has been a key factor in making the world a smaller and more integrated place. Globalization and growth have been facilitated by what the international community has assumed was safe and efficient air travel. Just in time inventory systems, from assembly lines that start in the Far East and end in Detroit, to overnight delivery of your made-to-order iPhone all depend on these assumptions. In many regions, however, assumptions of safety are no longer valid. How the US, in particular, responds to such threats, will determine the continued viability of international civil aviation. It is true that US voters have tired of playing the role of global policeman, but it may be just that role that is needed to ensure the future of international air transport.