

**New Directions in the Assessment of the Use of Weapons
against Civil Aircraft from an International Law Perspective
and in the Interpretation of Airspace Sovereignty**

Zoltán Papp

Theses of the Doctoral Dissertation

Supervisor: Prof. Dr. Péter Kovács, University Professor

Pázmány Péter Catholic University
Doctoral School of Law and Political Sciences

2019
Budapest

Contents

- I. Antecedents
- II. Brief Summary of the Research Objectives
- III. Adopted Research Methodology
- IV. New Findings of the Dissertation and Possibilities of Their Utilization
- V. List of Publications

Acknowledgements

I. Antecedents

The basic principle of national airspace sovereignty, also confirmed in the Convention on International Civil Aviation adopted in 1944 and still in force today (hereinafter: Chicago Convention), developed in its present form from the experiences of World War I. It was first codified in the form of a multilateral treaty in the Paris Convention of 1919 one hundred years ago. However, even today some aspects of airspace sovereignty are still the subject of debate, including the international law evaluation of the use of weapons by a state against civil aircraft or the evaluation of air defence identification zones (hereinafter: ADIZ). The dissertation examines these questions in order to clarify and resolve possible legal uncertainties. The two questions intended for analysis are closely related to each other and to airspace sovereignty.

II. Brief Summary of the Research Objectives

Despite the explosive growth and gradual globalisation of air traffic, the starting point of air law concerning the questions examined continues to be that a state has full and exclusive sovereignty over the airspace above its territory. At the same time, international airspace does not come under the sovereignty of any state.

Rules relating to the use of weapons by a state against civil aircraft are established by international air law and other associated fields of international law.

During peacetime, the rules relating to the use of weapons by a state against civil aircraft in national airspace are closely linked to the exercise of airspace sovereignty by the state. The prohibition of the use of weapons in international airspace and in the national airspace of other states does not affect the national airspace sovereignty of the state using the weapons; nevertheless, it raises the question as to what rules are applicable to the use of weapons against civil aircraft in such cases.

The law of armed conflict, including rules relating to the shooting down of civil aircraft, is not restricted to a state's territory (national airspace), but is usually applicable regardless of the scene of the armed conflict. However, with respect to

national airspace, even in such a case there may be some points of interconnection with airspace sovereignty.

In the light of the above, the dissertation examines the following questions:

1) With regard to rules relating to the use of weapons by a state against civil aircraft in peacetime

a) their development and content;

b) their connection with airspace sovereignty with respect to national airspace;

c) their application in international airspace and in the airspace of other states.

2) With regard to rules relating to the use of weapons by a state against civil aircraft during armed conflict

a) their development and content;

b) their connection with airspace sovereignty with respect to national airspace

3) Presentation of airspace sovereignty (jurisdiction) and national security considerations, including rules relating to the use of weapons, through an example from air law, namely, the case of the ADIZ established in international airspace.

The objective of the research is to identify the international rules relating to the use of weapons by a state against civil aircraft and their relationship with national airspace sovereignty.

III. Adopted Research Methodology

The research is based primarily on Hungarian and English, secondarily on French and German language academic literature, materials relating to conventions, documents of international organisations and international law blogs. No field work such as interviewing has been undertaken.

During the analysis of Article 3bis of the Chicago Convention on the prohibition of the use of weapons by a state, the official documents of the 25th (Extraordinary)

Session of the Assembly of the International Civil Aviation Organization (hereinafter: International Civil Aviation Organization or abbreviated to: ICAO) drafting and adopting Article 3bis was examined. The relevant documents are accessible on the official website of the ICAO. The positions formulated by ICAO contracting states either orally or in writing at the above conference with regard to the interpretation of Article 3bis are still of key importance even today.

The analysis relating to so-called air incidents covers written applications and submissions filed with the International Court of Justice by the states: written applications initiating proceedings before the International Court of Justice, memoranda and written rebuttals to them, as well as objections have been the subject of the research. One of the objectives has been to identify the international law in force relating to the subject of the research, to reveal state practice and the *opinio iuris sive necessitatis*. The other objective has been to explore how states interpret and implement the international law in force. It has also been an objective to understand what constituted the remote antecedents of the adoption of Article 3bis of the Chicago Convention on the prohibition of the use of weapons. It is important to present the parties' applications too, since they enable us to examine the professional arguments that have been afforded less attention in research so far and to draw parallels with later air incidents (for example, similarities between the Iran Air 655 and the MH-17 air incidents).

It increases the complexity of the problem that the International Court of Justice was not able to establish its jurisdiction over the cases in question due to their peculiar nature, therefore it has never dealt with the legal evaluation of air incidents as to their substance; moreover, the number of states concerned in air incidents is limited.

The research was carried out over the past six years partly from home on the internet, partly in libraries, in particular, in the National Assembly Library, the Library of the Department of Public International Law at the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University and the library of HungaroControl Pte. Ltd. Co. The research activity was considerably assisted by the book and journal collection of the National Assembly Library and naturally also

by the HeinOnline international electronic database. Valuable help also came from the air law specialist library in Cologne.

IV. New Findings of the Dissertation and Possibilities of Their Utilisation

One had to wait until 1984 for the adoption, then until 1998 for the entry into force of conventional air law rules prohibiting the use of weapons against civil aircraft (Chicago Convention, Article 3bis). Article 3bis, created following the shooting down of flight KAL-007, prohibits the use of weapons by a state against civil aircraft in flight during peacetime. The strictness of the prohibition laid down in Article 3bis exceeded all earlier expectations.

ICAO Member States drafting Article 3bis basically drew upon the international law norms on the prohibition of the use of force between states (they could have approached the question from the aspect of the relationship between the state and the individual as well). Therefore, as regards the scope of exceptions to the use of weapons against civil aircraft, a reference to the United Nations Charter (the right of self-defence, Article 51) was included in the text of Article 3bis. This has had the consequence that even today the prohibition on the use of weapons against civil aircraft is very strict. All this is manifested in particular in the fact that Article 3bis affords protection to civil aircraft also in the event of violent acts committed using a civil aircraft where such acts do not amount to an armed attack (e.g. a civil aircraft hijacked by terrorists used as a weapon).

If we were to disregard the interpretation of the criteria “in flight” and “during peacetime”, there are only two exceptions to the prohibition of the use of weapons against civil aircraft, namely, the right to individual or collective self-defence provided for under Article 51 of the United Nations Charter, or the situation where the aircraft does not qualify as a civil, but a state aircraft. It is a common point in the two exceptions that both presuppose some sort of relationship between a civil aircraft and a state (naturally, apart from the fact that all aircraft participating in international air traffic are registered by some state that assumes the obligations prescribed by the Chicago Convention for a state of registration).

In the case of an armed attack, this relationship is the international law concept of attribution, while in the case of classification as a state aircraft the situation is not so straightforward, but probably it is the performance of a state task by a civil aircraft that may qualify the aircraft as a state aircraft. In any case, the distinction between civil aircraft and state aircraft constitutes a factor of legal uncertainty at present, which needs to be addressed in the future.

In view of the above, it may be concluded that a civil aircraft is entitled to comprehensive exemption from the use of weapons if its flight in a given situation is not related to a state either on the basis of the concept of attribution or on the basis of the rules relating to classification as a state aircraft. As such, the protection granted under Article 3bis extends to crimes committed using a civil aircraft (e.g. drug trafficking carried out with the use of a civil aircraft), as well as to violent acts not amounting to an armed attack (e.g. an attack against land targets committed using a civil aircraft hijacked by non-state actors).

In air law, it is the so-called mixed situations (for example, where a civil aircraft is carrying soldiers or war equipment, or it is spying for a state) that are subject to a rather complex evaluation with regard to the application of the prohibition of the use of weapons. In such cases, however, the civil aircraft shall be qualified as a civil aircraft, which means that the prohibition enshrined in Article 3bis remains applicable.

Due to the rather strict prohibition on the use of weapons contained in Article 3bis, from the very beginnings there have been or, hypothetically, there could be attempts at formulating interpretations based on air law or other areas of international law that would permit the use of armed force against a civil aircraft. Such interpretations include:

- reference to Article 89 of the Chicago Convention, pursuant to which the Chicago Convention cannot be applied in the event of war or a state of national emergency;
- reference to the use of the flight for a purpose inconsistent with the Chicago Convention (Chicago Convention, Article 4);
- interpreting the state's self-defence situation as extending to violent acts committed by non-state actors;

- reference to a necessity, or maybe to distress; and
- reference to the classification of a civil aircraft as a state aircraft.

The above interpretations cannot result in (new) exceptions to the prohibition of the use of weapons contained in Article 3bis.

With regard to force applied against a civil aircraft, besides the air law interpretation, a human rights law interpretation has also been gaining ground. Human rights law considerations were raised already during the elaboration of Article 3bis (including the Corfu Channel case), but at that time they were relegated to the background. An important stage was the Cuban air incident of 1996, where the case was also examined by an international human rights judicial forum. It was mainly human rights law interpretations that were predominant concerning the terrorist attacks of 11 September 2001.

International human rights law reaffirms the prohibition of the use of weapons contained in Article 3bis of the Chicago Convention but, concerning the evaluation of attacks committed with civil aircraft – hijacked by terrorists – against land targets, the two bodies of laws may provide different interpretations due to their different nature. The human rights law approach is relevant especially in such situations where Article 3bis is not applicable (e.g. in the case of domestic flights). Human rights laws render a new kind of rights enforcement mechanism, compared to Article 3bis, possible, since the violation of Article 3bis may give rise to international responsibility, which may only be invoked in interstate disputes before the International Court of Justice. As is well-known, the International Court of Justice has never delivered a judgment on the merits of a case relating to the shooting down of an aircraft due to the lack of jurisdiction. Nevertheless, there are not many cases relating to the shooting down of aircraft either before national courts or international human rights courts (probably human rights considerations would prevail even in the case of the MH-17 air incident if it was possible to establish the identity of the perpetrating state with all certainty).

Despite the interpretation of international law as presented above, based on the available information it seems that NATO member states, including Hungary, are prepared, both operationally and by authorisation based on legislation, to deploy weapons in case of necessity against civil aircraft hijacked by terrorists.

On the whole, it may be concluded that airspace sovereignty relating to national airspace has been significantly restricted by Article 3bis of the Chicago Convention, prohibiting the use of weapons by a state against civil aircraft, and by the human rights law rules of international law. The prohibition contained in Article 3bis is applicable to civil aircraft flying not only in national airspace, but also in international airspace and the airspace of third countries but, as a matter of course, it does not affect airspace sovereignty applying to national airspace.

The rules of humanitarian law applicable during international armed conflicts (*jus in bello*) do not exclude the possibility of shooting down civil aircraft, which results from the fact that humanitarian law operates with a legal approach and legal notions that are different from those applied by air law and human rights law. It is the principle of military necessity, the concept of military target and the special interpretation of proportionality that may render the use of weapons against an aircraft carrying civilian passengers possible. In this respect difficult questions arise, for example the following:

- To what extent does shooting down an aircraft used for military purposes, but at the same time carrying innocent passengers meet the requirement of distinction, as in this case the innocent passengers will surely die? It is not to be forgotten either that the passengers of the aircraft, unlike the civilian employees of a weapons factory, for example, do not in any way actively contribute by their acts to the functioning of the war machine.
- When does a civil aircraft lose its protection afforded to it under international air law (e.g. what type and quantity of military equipment should it carry, or what reconnaissance activity should it pursue)?
- With regard to the principle of proportionality, what expected military advantage may justify sacrificing the lives of several hundred innocent civilian passengers?

The San Remo Manual on International Law applicable to Armed Conflicts at Sea (1994) and the HPCR Manual on International Law Applicable to Air And Missile Warfare (2009), restating relevant international humanitarian law, define a broad range of activities which may render a civil aircraft a military objective. It is recommended in this regard that the air law interpretation of situations referred to

as mixed situations (for example, when a civil aircraft is carrying soldiers or war equipment, or is carrying out espionage) should also be applied by humanitarian law and, in this connection, exclusively aircraft carrying civilian passengers actually carrying out an attack should be considered as military targets.

On the basis of the above, it could be concluded that an aircraft carrying civilian passengers enjoys substantially greater protection against the use of weapons by a state during peacetime than during an armed conflict. The rules of humanitarian law applicable to national airspace restrict national airspace sovereignty and afford greater protection to the lives of civilian passengers than the rules adopted in 1923 relating to air warfare, but for this the credit must primarily be given not to air law, but to humanitarian law.

The air defence identification zone (ADIZ) is an example of the state's unilateral expansion of national airspace sovereignty, more specifically, of extending its jurisdiction to international airspace. The ADIZ does not serve the purpose of aviation safety, but that of national security.

International law does not contain any express permissive provision that would grant authorisation to establish and maintain an ADIZ. It is a question of interpretation whether there are any prohibitive rules in international law, such as, for example, Article 12 of the Chicago Convention, which provides that aviation rules applicable to airspace over the high seas are to be adopted by the ICAO Council. The other potential prohibitive rule may be deduced from the special status of international airspace in international law, pursuant to which the freedom to overfly the high seas may not be restricted or affected in any way. Geographically overlapping ADIZs (e.g. in the South China Sea) pose serious aviation safety risks, because aircraft flying in such ADIZs are in principle required to follow instructions given by the air traffic control services of several ADIZ states simultaneously.

Interpretations aimed at justifying the international law arguments for the ADIZ, such as establishing ADIZ as a preliminary condition for the entry into the state of the ADIZ, or reference to the fact that international law does not prohibit establishing an ADIZ were not convincing. International examples similar to the ADIZ under analysis revealed that extraterritorial state action requires either a legal

basis to be established under international law or the voluntary participation of the foreign states concerned.

Besides airspace sovereignty (jurisdiction), ADIZ also relates to international rules concerning the use of weapons by a state against civil (or possibly state) aircraft, since the ADIZ has also been designed to serve national security interests and, thereby, self-defence purposes. Naturally, unilaterally adopted ADIZ rules cannot override norms of international law relating to the use of armed force. Not even the controversial international law concept of anticipatory self-defence may provide a legal basis for a state to prescribe - with reference to preparation for a possible later attack – binding legal provisions as to international airspace.

The legality of the ADIZ under international law may be justified pursuant to international customary law if it is proven that the requirements of relevant state practice and *opinio juris* are met with regard to the ADIZ. A certain kind of uniform state practice seem to emerge, especially in relation to the ADIZ established by the United States. The existence of *opinio juris*, in other words, an assessment of the question as to whether states consider ADIZ rules as legally binding would require an ICAO-level study. As a matter of course, codification in international law would also contribute to establishing legal certainty. Such a codification could establish mutually acceptable minimum rules relating to civil aircraft flying into the state of the ADIZ. Determining the sanctions for the violation of rules relating to the ADIZ would probably constitute a great challenge during codification.

As regards the possibility of utilisation of the new findings, it is relevant that this dissertation proceeds from real-life international situations that are of serious concern to the states and international public opinion, be it the legality of an air defence identification zone (ADIZ), or international law rules relating to the use of armed force by a state against civil aircraft. The dissertation endeavours to provide clear answers to these international issues and, thereby, to supply points of reference for developing the Hungarian political and/or legal position.

The dissertation may also provide assistance to the drafting of national laws, as well as their interpretation, if required. The answers supplied by the conclusions may serve to promote (legal) clarity, to highlight the international context and, in some

cases, discuss and answer questions necessary for making a step forward and giving further consideration to the issues under discussion.

V. List of Publications

Papp Z.: Az Európai Ombudsman jogállása az Európai Unió intézményrendszerében. *ELTE Jogi Továbbképző Intézet Szakdolgozat, Budapest.* 2008. [The legal status of the European Ombudsman in the institutional system of the European Union]

Németh J., Papp Z.: Az EU Stabilitási Eszköz Programja és a szakértői támogatás hazai vonatkozásai. *Európai Tükör*, 15/3, 2010.pp. 83-93,own contribution: pp. 83-88 [The EU's Stability Facility Programme and domestic aspects of expert support]

Papp Z.: A Montreali Egyezmény és az Európai Unió légiközlekedési felelősségi tárgyú rendeletei viszonyrendszerének néhány aktuális kérdése. *Iustum Aequum Salutare* 9/2, 2013. pp. 281-299. [Some topical questions relating to the relationship between the Montreal Convention and European Union regulations on liability in aviation]

Papp Z.: A légtér-szuverenitás néhány nemzetközi jogi kérdése Ciprus vonatkozásában az Egyesült Királyság bírósági esetjoga fényében. *Miskolci Jogi Szemle*, 8/2, 2013. pp. 117-136. [Some questions of international law relating to airspace sovereignty with regard to Cyprus in the light of United Kingdom case law]

Papp Z.: Az Európai Bíróság ítélete az Európai Unió légi közlekedésre vonatkozó kibocsátáskereskedelmi rendszeréről. Az EU (területi) joghatósága, az uniós másodlagos jogi aktusok területen kívüli hatálya. *JeMa (Jogesetek Magyarázata)*, 2. szám, 2014. pp. 101-110. [Judgment of the European Court of Justice on the European Union's emissions trading system relating to aviation. The EU's (territorial) jurisdiction and the extraterritorial scope of application of EU secondary law.]

Papp Z.: Air Defense Identification Zone (ADIZ) in the light of Public International Law. *Journal of International and European Law (Pécs)* II. 2015. pp. 28-54.

Papp Z.: States' interpretation of the rules of international law regarding the use of force against civil aircraft in cases before the International Court of Justice. *Pázmány Law Working Papers*, No. 13. 2016. pp. 1-16.

Arnold I., Papp Z., Arnold K.: The difficult present and uncertain future of the Single European Sky Network Manager: The challenges we are facing and why they matter. *Air & Space Law*, 42/2, 2017. pp. 185–213 Own contribution: 30%.

Under review for publication

Papp Z.: Az MH-17 légi járat lelövésének nemzetközi jogi megítélése a nemzetközi polgári repülésről szóló Chicagói Egyezmény tükrében. Debreceni Jogi Műhely. [The downing of flight MH-17 over Ukraine: analysis from the perspective of the Chicago Convention on international civil aviation]

Acknowledgements

I would like to express my special gratitude to my supervisor Professor *Péter Kovács*, judge of the International Criminal Court in The Hague, for his support of my research and his irreplaceable professional guidance.

I owe my sincere thanks to Professor *Gábor Sulyok*, senior research fellow of the Hungarian Academy of Sciences, for his valuable professional advice and explanations.

I would like to express my particular thanks to Associate Professor *Réka Varga*, lecturer of the Department of International Law at Pázmány University, for her thoughts on humanitarian law, as well as to *Máté Gergely*, expert of the ICAO Headquarters based in Montreal, for his valuable comments on international air traffic issues, last but not least to ATM expert *Iván Arnold* for his remarks concerning international air law.