Some Questions of International Law Relating to Airspace Sovereignty

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Theses of the Doctoral Dissertation

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Acknowledgements
I. Antecedents

Global air traffic is calculated to produce 2.7 trillion USD worth of value annually, 3.5% of the world’s gross domestic product (GDP). Therefore, the impact of air traffic on the international economy and numerous other areas of life cannot be overestimated. Nevertheless, one must not forget about the harmful effects of air traffic either (e.g. environmental pollution).

Despite the explosive growth and gradual globalisation of air traffic, the starting point of air law, rooted in customary and conventional international law, continues to be - in the areas examined in the dissertation - that (1) a state has exclusive sovereignty over the airspace above its territory. At the same time, (2) states are not allowed to expand their sovereignty over international airspace that is outside of the state’s territory, for example, over the high seas. In my dissertation I examine the above two starting points relating to airspace more closely in those real-life international situations, which, for varying reasons, have become the focus of attention.

II. Brief Summary of the Research Objectives

This dissertation aims to explore some questions of international law relating to the concept of airspace sovereignty as known in international law. I examine in detail:

(1) the situation concerning conventional air law rules as applied to airspace above territories with unsettled legal status under international law,

(2) the evaluation, from the perspective of international law, of the Air Defense Identification Zone (ADIZ) established in international airspace,

(3) international air law rules regulating armed force used in peacetime by a state against civil aircraft in flight and

(4) the rules relating to the use of armed force by a state against civil aircraft in the course of an armed conflict.
(1) After presenting the ideas developed in international air law on sovereignty and international jurisdiction, I examine how international air traffic is regulated in relation to territories with unsettled legal status under international law. This issue, connected with the recognition of a state, may have significance, because the conclusions of the particular court case before the domestic UK court relating to Cyprus may be applicable to other territories with unsettled legal status, such as the Donetsk territories in the Ukraine occupied by separatists, or South Ossetia.

(2) Further on, I examine the controversial topic of Air Defense Identification Zones (ADIZ), the lawfulness of which regularly becomes the focus of attention; in particular, the ADIZ established on the East China Sea has evoked sharp international reactions. Apart from a few examples, ADIZs are usually set up and maintained in peacetime, therefore my dissertation focuses on the regulations applicable under normal conditions. An ADIZ essentially is a form of regulation relating to airspace above the high seas, but the term is not regulated by any international body, which raises relevant questions in the context of jurisdiction exercised over the airspace in question. Legal academic literature is to this day divided in its evaluation of the lawfulness of ADIZs. Scholars from states maintaining an ADIZ, such as the United States and China, usually attempt to demonstrate the lawfulness of ADIZs in their studies.

(3) In a longer chapter, I examine in what form and with what content international air law regulates cases where a state intends to use armed force against civil aircraft flying in its national airspace. The historical overview shows us the bumpy road leading to the adoption of Article 3bis of the Chicago Convention, before which, during the Cold War era, the shooting down of a civil aircraft registered in another state was purely a domestic matter in the interpretation of some states. From, here the development of the regulation has covered a long distance right up to the point that, in modern times, civil aircraft used for an appropriate purpose during peacetime basically enjoy absolute protection against attack. In some cases, even civil aircraft not used for an appropriate purpose are afforded protection. Naturally, this does not mean that there would be no problems raised by the
interpretation of Article 3bis of the Chicago Convention, for example, in the case of civil aircraft used as a weapon, or concerning the classification of civil aircraft used for non-civilian purposes.

(4) Finally, the relevant rules of the law of armed conflicts relating to force used against civil aircraft are presented and analysed.

III. Research Methodology

The dissertation basically focuses on the concepts and arguments of English and Hungarian academic literature, but it also contains references to academic articles and textbooks written in French or German. The air law contained in the dissertation is based on the lifework of Professors Bin Cheng and Michael Milde, both renowned experts in the field of international air law for decades. I carried out my research over the past six years partly on the internet, partly in libraries, in particular, in the National Assembly Library and the library of HungaroControl Zrt. My 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. I also received valuable help from the air law specialist library of Cologne.

During my research I endeavoured to the greatest extent possible to rely on state practices and the positions expounded by states, therefore I studied cases of air law incidents before the International Court of Justice and the material from states parties’ international aviation meetings in great detail. In particular, I present in detail what was said at the 25th Extraordinary Session of the ICAO Assembly that drew up Article 3bis of the Chicago Convention. In addition, I also placed great emphasis on presenting and analysing national and international case law.
IV. New Findings of the Dissertation and Possibilities for their Utilisation

(1) How can air law be applied to a territory with unsettled legal status under international law? What happens in the situation where a state has effectively lost its control over a territory while, for example, under the multilateral air law conventions, that state continues to be the internationally recognised contracting party in respect of the territory in question. I address these questions in the context of the Republic of Cyprus, the Turkish Republic of North Cyprus and the Chicago Convention.

In my opinion, enforcement of the exercise of effective power by right of occupation is restricted by the Chicago Convention, the implementation of which is the responsibility of the contracting states parties having rights and obligations in relation to each other. The exercise of rights arising from an international agreement such as the Chicago Convention on international aviation, by a contracting state that has lost effective control of a territory, cannot be suspended automatically, that is, without the consent of the contracting state concerned. Such a situation leads to a stalemate, given the fact that the contracting state deprived of effective authority can prevent the entity exercising effective authority/control from exercising the rights enshrined in international conventions on aviation (e.g. decisions concerning the location of airports and routes).

(2) It may be stated that neither the Republic of Cyprus nor North Cyprus possesses exclusive rights relating to the airspace in question. The condition for resolving the situation (in this particular case, the condition for the operation of scheduled and non-scheduled flights between North Cyprus and the United Kingdom,) is that Cyprus and North Cyprus must cooperate with each other. Of course, due to the known circumstances, it is debatable if there could be a realistic chance of this, especially given the fact that cooperation might be interpreted as implied state recognition. It is similarly important that the given ICAO contracting state should grant at least its tacit approval to the pursuit of international air traffic activities with regard to the KFOR sector set up in the airspace over Kosovo and the airspace over Taiwan.
(3) From the aspect of international law, I classify ADIZ as extraterritorial jurisdiction, with regard to the fact that it entails binding rules (often enshrined in law) adopted by the ADIZ states, which lay down obligations for legal entities flying in international airspace. An ADIZ provides binding rules for the operators and pilots of aircraft flying in national and international airspace based on the national security interests of the state maintaining the ADIZ. All this must be distinguished from ICAO (International Civil Aviation Organization) rules serving the purposes of aviation safety. With regard to their content, there are a lot of similarities between the ADIZ and the binding ICAO aviation rules (rules of the air) adopted in the interests of ensuring aviation safety in international aviation. These rules of the air are set forth in Annex 2 to the Chicago Convention.

(4) During my analysis of international air law and the law of the sea, I found no international source of law that would grant an express authorisation to establish and maintain an ADIZ. With regard to potential prohibitive rules, Article 12 of the Chicago Convention is relevant; this provides that rules applicable to airspace over the high seas are to be adopted by the ICAO Council. In order to form a judgement on the existence of a prohibition, it is necessary to construe Article 12 above. If the ICAO is regarded as possessing exclusive legislative powers then laying down ADIZ rules at the national level regarding airspace above the high seas is not permitted. If this international legislative authority is not regarded as being exclusive then it is acceptable for states to adopt, with respect to international airspace, supplementary rules that do not conflict with aviation rules.

(5) I can see a possible legal basis for the lawfulness of the ADIZ in international customary law, therefore I suggest the rules of international customary law built on international state practices relating to each ADIZ be collected and established. At present, what is primarily missing is the opinio iuris, since a certain uniform state practice has already developed over the past decades. It may be expected that, having regard to the views held by states, such a survey would lead to the result that ADIZ rules applied in relation to aircraft intending to fly into the state of the ADIZ may be
considered to derive from international customary law. The question arises as to whether customary law extends to both civil and state aircraft or only to civil aircraft.

(6) In the past decades, with regard to the rules of armed force used in peacetime by a state against a civil aircraft in flight, one has been able to witness the gradual relegation of airspace sovereignty to the background and the gaining ground of international legal rules (as opposed to the ADIZ, which means the expansion of jurisdiction).

Article 3bis of the Chicago Convention prohibits in an absolute manner the use of weapons in peacetime against civil aircraft used for an appropriate purpose. According to Article 3bis, the sole exception to the prohibition of the use of weapons is the inherent right of individual or collective self-defence granted under Article 51 of the United Nations Charter to a state in the event of an armed attack against it. Such a situation may arise where a civil aircraft is being used by another state for the purposes of an armed attack and therefore the aircraft in question is deemed a military aircraft.

The protection under Article 3bis also applies where natural persons are using the civil aircraft for a purpose inconsistent with the Chicago Convention (e.g. drug-trafficking, arms trade).

(7) However, Article 3bis does not provide protection in situations where, based on the purpose of its use - by the state - an aircraft of originally civil character is deemed a state aircraft (e.g. military aircraft). In such cases, however, one has to proceed carefully and within narrow confines when reclassifying aircraft as state aircraft, since such reclassification puts an end to the protection afforded to civil aircraft. Thus, for instance, espionage or arms transportation for state purposes during peacetime by civil aircraft carrying innocent passengers cannot lead – for reasons of the protection of passengers – to the civil aircraft qualifying as a military aircraft.

(8) Article 3bis is considered a norm of customary law; therefore, it is applicable even if the effect of the Chicago Convention is suspended due to war or the existence of a state of emergency. An analysis of the preparatory work preceding Article 3bis reveals that not all states involved in the preparatory work may have wanted the prohibition on
using weapons to have such a wide scope. International air law is “fortunate” in the sense that the other branch of international law, international human rights law - similarly to air law - also protects the lives of innocent passengers in a wide scope and in an absolute manner. Thus, the rules relating to the prohibition of the use of weapons against civil aircraft in flight may be deduced not only from air law, but also from human rights law in general, although there is a slight difference between the interpretations applied by the two branches of law.

(9) Based on my findings, in practice one may observe the pushing into the background of Article 3bis in favour of international human rights regulations, the latter supplementing and in some cases overriding the prohibition of the use of weapons contained in Article 3bis, and providing legal remedy to natural persons. Human rights laws are especially relevant in situations where the Chicago Convention is not applicable (e.g. the rules relating to force used against aircraft registered in the given country and used for internal traffic or in the case of aircraft classified as non-civil aircraft).

It is worth mentioning that, despite the air law and human rights law prohibition, a group of states (NATO renegade operational plan) is prepared from the aspect of their operational and legal authorisation to use armed force, if required, against a civil aircraft being used as a weapon.

(10) The HPCR Manual on the law applicable to air warfare – which restates international customary law – reaffirms that, during armed conflict, weapons may be used against an aircraft regarded as a military target only as a last resort and only if the use of armed force also complies with the basic principles of humanitarian law, including, in particular, the principle of proportionality.

(11) This statement raises several questions:

- To what extent does the use of weapons that surely cause the death of innocent passengers meet the requirement of distinction? These passengers, unlike the civilian employees of an armaments factory, for example, do not in any way contribute to the functioning of the war machine.
- Is it possible to define the precise circumstance that renders a civil aircraft a military target (e.g. what reconnaissance activity should it pursue; or what type and quantity of military equipment should it carry?)
- With respect to proportionality, what expected military advantage may counterbalance the deaths of hundreds of innocent civilian passengers?
- Can any attack be launched against a civilian population being used as a human shield?
- Can the prohibition on the use of weapons – having the force of international customary law - laid down in the Chicago Convention be applied during armed conflicts?

It is not easy to provide reassuring answers to the above questions, since deciding some of them requires careful consideration on the part of those making the decision about, for instance, classification as a military target.

(12) From the aspect of possibly utilising the new findings, it is relevant that the dissertation proceeds from real-life international situations that are of serious concern to states and international public opinion, be it the relationship between territories with unsettled status under international law and conventional international (air) law, or the lawfulness of Air Defence Identification Zones (ADIZ), or the international law rules relating to the use of armed force by a state against civil aircraft. The dissertation clearly addresses these international questions and, thereby, supplies points of reference for developing the Hungarian political or legal position.

The contents of the dissertation may also provide assistance with the appropriate formulation of national laws, as well as their interpretation, if required. The answers supplied by the conclusions may serve to promote clarity; they highlight and explain interconnections and, in some cases, discuss questions and give the answers that are needed to make a step forward and give further consideration to the issues under discussion.
V. List of Publications


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