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Freedom of overflight: a study of coastal State jurisdiction in international airspace

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Cover Page



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Summary

The central research question of this study is: What jurisdiction does a coastal State have over the operation of the aircraft registered in other States in international airspace adjacent to its coast? It explores the concept of freedom of overflight and considers the legality of coastal State jurisdiction in international airspace in respect to overflight of the aircraft of other States in instances where there is no explicit basis for the jurisdiction.

The first chapter of the study sets out the context and scope of the research as well as the structure and methodology used. The second chapter introduces the international legal framework that is relevant to the study. It does so in two parts. Firstly, it considers the concept of overflight and its facilitation for civil aircraft under international civil aviation law as well as, more broadly, for State aircraft by way of diplomatic arrangements. Secondly, it sets out the maritime areas under the law of the sea that are relevant to this research and the key rights associated with them, as well as the application of the Chicago Convention and its annexes to international airspace. The central legal analysis of this study sits in chapters three and four which consider coastal State jurisdiction in the airspace over maritime constructions, in respect to the provision of air traffic services (ATS) in international airspace and in relation to air defence identification zones (ADIZ). Chapter five briefly addresses coastal State jurisdiction in the airspace over international straits and archipelagic sea lanes which, while not international airspace, involve rights for aircraft with similarities to freedom of overflight.

The overarching conclusions and observations of this study are as follows.

Fragmentation in the law – between the law of the sea and international civil aviation law – when it comes to governance of international airspace presents a problem for the development of the law in that States are left to interpret it without further guidance. This is particularly so in the context of the topic of this study where the interests of coastal States collectively, in extending their jurisdiction into international airspace, are in direct opposition to users of the airspace, that is, State and civil aircraft exercising their freedom of overflight. The risk to freedom of overflight is even greater when justifications for the extension of jurisdiction are based on such broad concepts as ‘national security’.

Freedom of overflight is still narrowly defined in that the exercise of jurisdiction by coastal States in international airspace is presently restricted to the facilitation of the exercise of the freedom of overflight and achieving a balance between the freedom of overflight and other maritime freedoms. Coastal States have prescriptive jurisdiction in international airspace within

their FIRs in order to fulfil their responsibility for carrying out the provision of ATS in the area, pursuant to Annex 11 of the Chicago Convention. In the high seas and in a State's exclusive economic zone (EEZ), a State may establish a danger area to notify aircraft of potential safety risks resulting from use of the maritime area but a State is not permitted to restrict or prohibit aircraft from international airspace by way of establishing a danger area and the area must be of defined dimensions and for a specified time, as opposed to being indefinite or undefined. Having said this, this study sees the possible development of customary international law in two areas as providing a significant shift in the concept of freedom of overflight if they were to crystallise. The first is the right of a coastal State to regulate military activities in its EEZ and the second is the right of a State to establish an ADIZ.

Environmental restrictions that limit or prohibit the establishment of maritime constructions may serve to protect freedom of overflight by obviating the reason for further management of overflight in international airspace in respect to the would-be constructions. This is more so a consideration for the future, particularly considering the construction of airports in a coastal State's EEZ, for example, where a danger area as a traditional airspace management mechanism to help ensure airspace safety in the case of increased risk, would not be sufficient.

Coastal State jurisdiction is not just a legal issue, but it is also heavily political. National security and the pursuit of maritime power are motives for both coastal States and States operating their aircraft in international airspace. The involvement of State aircraft in these matters, which is frequently the case, means that they fall largely outside the normative powers of ICAO. Even where international civil aviation law is concerned though, ICAO tends to be reluctant to issue unequivocal statements on the law where there are strong political undercurrents. Where the legal questions involve interpretation of UNCLOS, a decision by ITLOS would be the ultimate procedure. The reach of this mechanism is restricted though as a result of key maritime players not being State parties to UNCLOS.

The above conclusions and observations exist alongside the more specific conclusions relating to the matters that form the central analysis of the study in chapters three and four.

Chapter three establishes that the right to impose a safety zone around a maritime construction under Article 60 of the United Nations Convention on the Law of the Sea (UNCLOS) is restricted to the sea and does not provide the coastal State with the right to exercise jurisdiction in the airspace over the construction. This is based on a literal interpretation of Article 60, specifically Articles 60(4)(5) and (6), and is supported by subsequent practice of States as well as the drafting history of the article. Articles 60(1) and (2) UNCLOS make it clear that a State has jurisdiction over the maritime operations themselves that are conducted to and from its maritime constructions and thus, if a coastal State were to construct an airport in its EEZ or on its continental shelf it would have jurisdiction over that airport.

On the basis of safety zones not extending to the airspace above a maritime construction, the State would not have jurisdiction over the airspace as a result of the construction of the airport though. Management of the air traffic is governed in accordance with the international airspace in the flight information region (FIR) in general.

Chapter four demonstrates first, in respect to the provision of ATS in international airspace, that the provision of the services is not subject to an implied principle of non-discrimination but that the State responsible for the FIR has such narrowly defined jurisdiction in the airspace that any discrimination must be justifiable in accordance with safety and efficiency considerations. Secondly, this chapter considers the legality of ADIZ, concluding that even if a State has the right to establish an ADIZ (prescriptive jurisdiction), it does not have the right to act (enforcement jurisdiction) in international airspace in the zone in response to an aircraft that does not comply with its ADIZ requirements beyond the rights it has under international law in the absence of the ADIZ. In determining whether a coastal State has the right to establish an ADIZ, the study, on the one hand, considers whether there is a permissive rule under international law to serve as a legal basis for the right to establish ADIZs or, in the case that a permissive rule is not necessary, whether the establishment of such a zone is prohibited by international law. It finds that there is no permissive rule at present and that ADIZs are not consistent with freedom of overflight.

