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Protection of aviation security through the establishment of prohibited airspace

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Summary

The study focuses on how to establish prohibited airspace over conflict zones. This study endeavors to answer the following research questions:

- 1) *What are the conditions, including legal requirements, for establishing a prohibited airspace?*
- 2) *Who has jurisdiction to establish prohibited airspace?*
- 3) *How can the status quo be changed with respect to prohibited airspace to enhance aviation security?*

The establishment of prohibited airspace concerns on the one hand, the principle of air sovereignty, agreed by governments as recognized in Article 1 Chicago Convention, and on the other hand, the object of agreeing on this principle to “develop international civil aviation in a safe and orderly manner”. Threads running through the chapters are the themes of sovereignty, jurisdiction and territory.

After explaining the methodology in Chapter 1, this study explores the positive law with respect to prohibited airspace, including the Chicago Convention and ICAO regulations. Chapter 2 clarifies the reasons and conditions necessary for establishing prohibited airspace to answer the first research question. On the basis of Articles 1 and 2 of the Chicago Convention, the treaty’s Article 9 confirms a Contracting State’s right to establish a prohibited or restricted airspace over its sovereign territory; and at the same time, Article 9 sets out qualifications for this right, such as the requirement of non-distinction. The benchmark for measuring (non-)distinction is set upon the nationality of an aircraft, rather than the nationality of an airline. Therefore, a Contracting State’s prohibition of one particular airline’s transit rights might not necessarily create distinction as to the nationality of the aircraft, taking note of flexible arrangements under Article 83bis of the Chicago Convention.

The interpretation of the situations and requirements in Article 9 has to take into account that the Chicago Convention is a law designed for peacetime: its Article 89 allows Contracting States to resume the freedom of action in times of war and national emergencies in order to take self-preserving measures. Therefore, the non-distinction requirement does not apply to prohibited airspace established in wartime and during national emergencies.

Chapter 3 addresses the technical and operational aspects of prohibited airspace. This chapter explains the importance of information necessary for

decision-making concerning prohibited airspace, and examines the effectiveness of existing ICAO regulations regarding flight information services in a flight information region (FIR). Article 28 (b) of the Chicago Convention predicts new operational practices and rules to be adopted by ICAO from time to time. According to ICAO regulations, a Contracting State may provide ATS over another State's territory, over the high seas and in airspace of undetermined sovereignty. That is to say, in addition to territorial sovereignty, the jurisdiction of an appropriate ATS authority may also derive from bilateral agreements, or multilateral arrangements under the auspices of ICAO; this is the "ATS jurisdiction" as referred by this study, covering the situations of delegated airspace, airspace over the high seas and airspace of undetermined sovereignty.

Chapter 4 continues the discussion on ATS jurisdiction and concluded that the responsibility thereby accepted by the appropriate ATS authority encompasses the competences and obligations: 1) to assess risks of air routes; and 2) to take contingency measures, including airspace restrictions. Applying the theory of instant custom, the Attachment C to Annex 11 has crystalized customary international law on contingency measures, in light of the strong *opinio juris generalis* demonstrated in ICAO proceedings, as well as judgments of courts and decisions of aviation authorities. An appropriate ATS authority is both competent and obliged to make contingency plans which announce that portions of airspace are "not available/safe/secured".

Chapter 5 covers the establishment of prohibited areas in the situations of national emergency and war. It discusses the relationship between prohibited airspace, war zone, and conflict zone. Due to development of modern humanitarian law, this chapter argues that States should have the obligation to establish a prohibited airspace over conflict zones as a precautionary measure to protect civilians. In the case of an International Armed Conflict (IAC), a Contracting State does not need to notify the ICAO Council; Article 89 is triggered automatically by the resort to armed forces. Once Article 89 is triggered, the States affected are entitled to the freedom of action, including the freedom to impose airspace restrictions; restrictions as such are not subject to the non-distinction requirement in Article 9. In other words: *can* establish prohibited airspace. Meanwhile, during armed conflicts, all States should respect the customary humanitarian rule to take precautionary measures; this means an obligation to impose airspace restrictions. In other words: *should* establish prohibited airspace. The competence, that is "can" do, and the obligation, that is "should" do, are the two dimensions of the concept of responsibility. Again, this chapter elaborated on the two dimensions of States' responsibility with respect to prohibited airspace over conflict zones.

The final chapter, Chapter 6, proposes a legal regime for prohibited airspace covering three different situations: sovereignty and ATS jurisdiction exercised by the same State, by different States and by no State. Aspiring for changes, the author proposes that air law should strengthen the language on the obligation of States to establish prohibited airspace over a conflict zone, encompass-

ing combat zones and zones with heightened alert situations posing risks to civil aircraft in-transit. This means a shift in the paradigm of legal technicalities away from the idea of *lex specialis* or *lex posterior*, and towards considering *lex ferenda*. The obligation to take precautionary measures under International Humanitarian Law (IHL) should be applied *mutatis mutandis* to conflict zones as defined by ICAO.

