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Opinion

The Airspace Tribunal: towards a new human right to protect the freedom to exist without physical or psychological threat from above

Nick Grief, Shona Illingworth, Andrew Hoskins and Martin A. Conway*

Abstract

Over the last century, humans have radically transformed airspace: chemically, territorially, militarily and psychologically. Technological developments mean that this transformation is accelerating and growing in complexity. There is widening disparity in the global landscape of power, with civilians increasingly subject to expanding commercial and military exploitation of technology in airspace and outer space and to the consequences of environmental change. The associated threats are not adequately addressed by the contemporary legal framework. There is an urgent need for new thinking. One aspect of airspace requiring development is the human rights dimension. The Airspace Tribunal will consider the case for and against the recognition of a new human right to protect the freedom to exist without physical or psychological threat from above. Drawing on wide expertise and experience, it will engage the public in discussion and seek to challenge the narrow terms by which airspace is represented and defined in law.

Later this year, a people's tribunal will begin to consider the case for and against the recognition of a new human right to protect the freedom to exist without physical or psychological threat from above. The hypothesis that this new right demands recognition will be tested at the Airspace Tribunal, a series of international public hearings beginning in London with further hearings anticipated in locations around the world. The Tribunal will invite representations from experts across a broad range of disciplines, sectors and lived experience, such as human rights, contemporary warfare, new media ecologies, environmental change, neuropsychology, conflict and forced migration. These representations

will engage publics in dialogue and debate about the rapidly changing composition and nature of airspace, consider future pressures / impacts and interrogate and challenge the narrow terms by which airspace is currently defined and represented in law.

The current regime of airspace and why it needs re-imagining

Established legal frameworks for defining airspace rely on an older Cartesian model where airspace is viewed as open and empty and is mapped out in territorial zones: 'Airspace is a concept used to signify the spatial dimension where States exercise their jurisdiction or control for aviation and defence... Airspace refers to a domain, an area-based approach'.¹ However, this does not account for the complex and diverse ways in which the sky is utilized, impacted on or exploited, or for how it is valued, understood and experienced across different cultures. Furthermore, in the context of accelerating geopolitical, technological and environmental change, we need to radically reassess how we perceive airspace in the legal sense.

Under international law as recognised by Article 1 of the Chicago Convention on International Civil Aviation 1944,² every State has complete and exclusive sovereignty over the airspace above its territory. For a coastal State like the United Kingdom, this means sovereignty over the airspace above its land territory and territorial waters.³ Beyond the territorial sea are other maritime zones with specific legal regimes but the general principle is that the legal status of airspace reflects that of the subjacent land or sea.⁴ Over the high seas, which are open to all

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¹ UN General Assembly, Doc A/CN.4/667, International Law Commission, First Report on the protection of the atmosphere prepared by Mr Shinya Murase, Special Rapporteur, paras. 80 and 81 (footnotes omitted): <http://legal.un.org/docs/?symbol=A/CN.4/667>.

² 15 UNTS 295.

³ Ibid, Art. 2. See also Art 2 of the UN Convention on the Law of the Sea 1982 ('UNCLOS').

⁴ See e.g. Nicholas Grief, *Public International Law in the Airspace of the High Seas* (Dordrecht: Martinus Nijhoff, 1994).

States, the freedom of aviation prevails.⁵ However, it is generally recognised that in international airspace States can establish temporary restricted or danger areas for peaceful (i.e. non-aggressive) purposes⁶ subject to the requirement of reasonableness in terms of extent and time.⁷ Beyond airspace is outer space which, as declared by Article II of the Outer Space Treaty 1967,⁸ is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means. The boundary between airspace and outer space has not yet been defined but the resolution of that issue is less urgent than how we protect individuals' health and wellbeing in the space above our heads, regardless of the latter's legal status.

A key aspect of the legal framework of airspace in need of further development is the human rights dimension. The Universal Declaration of Human Rights 1948⁹ and regional instruments such as the European Convention on Human Rights¹⁰ marked the inception of modern international human rights law.¹¹ Since then, human rights have continued to evolve but gaps remain. One such gap relates to airspace. In short, there is a human right to the peaceful enjoyment of possessions¹² but there is not yet a human right to the peaceful enjoyment of airspace, protecting us from physical or psychological threat from above. It should be noted that what is being proposed is not an absolute right but a qualified one; i.e. a right the enjoyment of which can be restricted provided that the limitation is prescribed by law and necessary in a democratic society for the achievement of a legitimate aim such as national security, public safety or to protect the rights and freedoms of others.¹³ While it might be argued that what is advocated here is already covered by the right to life or the right to respect for

⁵ Art. 87(1)(b) of UNCLOS.

⁶ Art. 88 of UNCLOS provides: 'The high seas shall be reserved for peaceful purposes.' Given the reference to 'the Purposes and Principles of the United Nations' (UNCLOS, preamble, 7th recital) and in the light of State practice, it is clear that in this context 'peaceful' means non-aggressive rather than non-military.

⁷ Grief, above, pp. 58-61.

⁸ 610 UNTS 205.

⁹ UN General Assembly resolution 217 A, 10 December 1948.

¹⁰ ETS No 5.

¹¹ Vaughan Lowe, *International Law* (Oxford: OUP, 2007), pp. 11-12.

¹² Art. 1 of Protocol 1 to the ECHR.

¹³ Rosalind English and Philip Havers QC (eds.), *An Introduction to Human Rights & the Common Law* (Oxford: Hart Publishing, 2000), pp. 19-26.

private life,¹⁴ there are compelling reasons for specifically recognising this proposed new human right.

There is precedent for human rights which were once subsumed within broader rights or freedoms becoming specifically identified and explicitly protected as thinking evolves, such as freedom of the arts and sciences.¹⁵ So too with the freedom to look up and not feel threatened, which is fundamental to health and life. During armed conflict, moreover, this new human right would provide a clearer reference point for the operation of international humanitarian law and help to determine the latter's content. If the freedom to look up and not feel threatened were specifically recognised in international human rights law, this might enhance protection under the law of armed conflict, the *lex specialis* which regulates the conduct of hostilities,¹⁶ and help to make that law more effective.

Over the last century, humans have radically transformed airspace's composition: chemically, territorially, militarily and psychologically. With current and anticipated technological developments, this transformation is accelerating and gaining in complexity. This represents a rapidly growing disparity in the global landscape of power, where civilians - including unprecedented numbers of displaced people - are increasingly subject to expanding commercial and military exploitation of technology in airspace and outer space and to the consequences of environmental change. The associated threats are not adequately accounted for by the legal framework defined by the contemporary international law of airspace.

This disparity has grown significantly since the early 20th century, which saw a radical shift in the terms of conflict with the first full-scale deployment of airborne chemical warfare at the Second Battle of Ypres on 22 April 1915.¹⁷ Thirty years later, Hiroshima and Nagasaki were destroyed by atomic bombs. From 1946 to 1958, while administered by

¹⁴ Arts. 2 and 8 of the ECHR.

¹⁵ Art. 13 of the Charter of Fundamental Rights of the European Union.

¹⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, para. 25.

¹⁷ Peter Sloterdijk, *Terror from the Air* (Los Angeles, CA: Semiotext(e), 2009). On p.14, Sloterdijk describes this attack as a radical shift towards 'targeting no longer the body, but the enemy's environment'.

the United States under UN trusteeship, the Marshall Islands was the location of repeated nuclear weapons testing by the US. During that period, 67 nuclear weapons were detonated there and the devastating impact of those nuclear substances and wastes continues to this day.¹⁸ What the Marshallese people lost included the freedom to look up and not feel threatened. In his poignant opening statement to the International Court of Justice in *Marshall Islands v Pakistan* on 8 March 2016,¹⁹ the Marshall Islands' Co-Agent and ex-Foreign Minister, Tony de Brum, recalled how, as a 9 year old boy, he had seen children playing in the radioactive dust that fell from the skies:

'Yesterday was a beautiful morning here in The Hague that featured a picture-perfect snowfall. As a tropical State, the Marshall Islands has experienced "snow" on one memorable and devastating occasion, the 1954 Bravo test of a thermonuclear bomb that was one thousand times the strength of the Hiroshima bomb. When that explosion occurred, there were many people, including children, who were a far distance from the bomb, on our atolls which, according to leading scientists and assurances, were predicted to be entirely safe. In reality, within five hours of the explosion, it began to rain radioactive fallout on Rongelap. Within hours, the atoll was covered with a fine, white, powdered-like substance. No one knew it was radioactive fallout. The children thought it was snow. And the children played in the snow. And the children ate the snow. So one can understand that snow, while beautiful, has a tragic and dark history in the Marshall Islands.'

¹⁸ Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Calin Georgescu; Addendum, Mission to the Marshall Islands (27-30 March 2012) and the United States of America (24-27 April 2012): 3 September 2012, Doc. A/HRC/21/48/Add.1, paras 1-19.

¹⁹ <http://www.icj-cij.org/files/case-related/159/159-20160308-ORA-01-00-BI.pdf>. This was one of three cases in which the Marshall Islands contended that nuclear-armed India, Pakistan and the UK are in breach of obligations concerning good faith disarmament negotiations. On 5 October 2016 the Court controversially decided that it could not proceed to the merits.

There has been a rapidly increasing trajectory of large-scale human vulnerability to the weaponisation of airspace, pervasive transformation of its composition and use, and significant environmental impacts. The scale and dimension of these impacts also require new thinking. For example, Svetlana Alexievich has identified the Chernobyl disaster as ‘a catastrophe of time’:²⁰

*The image of the adversary had changed. We’d acquired a new enemy. Or rather enemies. Now we could be killed by cut grass, a caught fish or game bird. By an apple. The world around us, once pliant and friendly, now instilled fear. Elderly evacuees, who had not yet understood they were leaving forever, looked up at the sky: ‘The sun is shining. There’s no smoke or gas, nobody is shooting. It doesn’t look like war, but we have to flee like refugees.’ A world strange yet familiar.*²¹

In 2013, the International Law Commission decided to include ‘The Protection of the Atmosphere’ in its programme of work and appointed a Special Rapporteur with a view to producing a set of draft articles on the topic.²² In his first report, the Special Rapporteur distinguishes between airspace and the atmosphere: ‘Airspace refers to a domain, an area-based approach; the atmosphere, in contrast, is a natural resource that flows through national boundaries.... Thus, the atmosphere is a fluid, single and non-partitionable unit, whereas airspace is a static - and separable - spatial domain.’²³ Nevertheless, recognising that States may want reassurance that their ‘complete and exclusive sovereignty’ over the airspace above their territory will not be compromised, he proposes the inclusion of a saving clause to the effect that nothing in the draft guidelines shall affect the legal status of airspace provided in other conventions.²⁴

²⁰ Svetlana Alexievich, *Chernobyl Prayer* (London: Penguin Modern Classics, 2016, new translation by Anna Gunin and Arch Tait), p. 24.

²¹ *Ibid*, p. 28.

²² Doc A/CN.4/667 (above, note 1), para. 4,

²³ *Ibid*, para. 81 (footnotes omitted).

²⁴ *Ibid*, para. 83.

The relationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including human rights law, is also addressed. Draft guideline 9 ('Interrelationship among relevant rules') provides that States should 'to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner';²⁵ and that 'special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation'. It adds: 'Such groups may include, inter alia, indigenous people, people of the least developed countries and people of small-island and low-lying States affected by sea-level rise.'²⁶ So there are interesting connections between the ILC's ongoing work on the protection of the atmosphere and the Airspace Tribunal initiative to develop and recognise a new human right to protect the freedom to exist without physical or psychological threat from above. Even though the Special Rapporteur is emphasising the domain or area-based approach to airspace and safeguarding the sovereignty principle reaffirmed by the Chicago Convention, it will be important for the proposed new human right and the new rules of international law on the protection of the atmosphere to be developed 'in a harmonious manner' and with particular regard to especially vulnerable individuals and groups.

Another of the ILC's current topics, 'The protection of the environment in relation to armed conflicts',²⁷ recognises that during the 20th Century, 'technological development placed the environment at a greater risk of being permanently destroyed through destruction caused by nuclear weapons or other weapons of mass destruction, but also through destruction caused by conventional means and methods of warfare'.²⁸ Such developments and the associated risks continue unabated. In February 2018 the Pentagon announced that '[e]xpanding flexible US nuclear options now, to include low-yield options, is important for the

²⁵ Ibid, para 2.

²⁶ Ibid, para 3.

²⁷ http://legal.un.org/ilc/summaries/8_7.shtml.

²⁸ Doc A/66/10, Annex E, para. 4.

preservation of credible deterrence against regional aggression'.²⁹ Soon afterwards came Russia's announcement that it had developed new nuclear delivery systems capable of evading US defences.³⁰ At the same time, the space above us is the location of increasingly complex weapons systems trials, advances in geotracking, surveillance and satellite warfare. At this critical juncture, expertise from across a range of disciplines is required to respond to these developments and ensure adequate representation for those whose rights are affected. In advocating the development and recognition of this new human right, the Airspace Tribunal will facilitate new dialogues, stimulate new critical thinking and propose new approaches to deal with the current and future pressures on airspace. It will also examine the efficacy of current forms of representation within the legal framework, seeking to ensure agency and voice across a wider constituency of experience and expertise.

Contexts and scenarios demonstrating the need for new thinking

The following contexts and scenarios demonstrate the need for radical new thinking in this area:

1. Each year, vast areas of airspace over the north of Scotland and extending out over the North Atlantic are occupied by NATO member states for military exercises (e.g. Operation Joint Warrior)³¹ and by commercial organisations for weapons testing (e.g. Operation Unmanned Warrior).³² While the expansion and use of these 'Danger Areas' have far-reaching consequences, public consultation has only addressed their economic and environmental impacts and then only in very narrow terms.³³ The

²⁹ US Department of Defense, *Nuclear Posture Review* (February 2018), Executive Summary, p. XII: <https://media.defense.gov/2018/Feb/02/2001872886/-1/-1/1/2018-NUCLEAR-POSTURE-REVIEW-FINAL-REPORT.PDF>.

³⁰ "Russia's Putin unveils 'invincible' nuclear weapons", *BBC News*, 1 March 2018, <http://www.bbc.co.uk/news/world-europe-43239331>.

³¹ <http://www.gov.scot/Resource/0052/00525162.pdf>.

³² <https://www.royalnavy.mod.uk/news-and-latest-activity/operations/uk-home-waters/unmanned-warrior>.

³³ Demonstrated by Sneddon Economics, *MOD Missile Test Range Uists, Economic Impact Assessment*, 19 August 2009, report commissioned by Highlands & Islands Enterprise (HIE) on behalf of the Hebrides Range Task Force, and by the CAA Decision Letter: <https://www.caa.co.uk/WorkArea/DownloadAsset.aspx?id=4294972710>.

scope of such consultation needs to be commensurate with the complexities and reach of the impacts.

2. The psychological impact of aerial bombardment and of the fear of attack from above, whilst acknowledged, is not yet adequately understood. The advent of such bombardment a century ago 'created hopelessly unequal new power relationships between warrior high above and victim below... The dread of random death from above became a psychological weapon in itself... Each technological breakthrough intruded war's terror deeper into the anxieties and fantasies of civilians'.³⁴ With the significant shift to the weaponisation of airspace and outer space, and the rapid development of technology allowing the maintenance of airborne threats indefinitely, the impact on civilian populations of sustained threat of attack from the air (e.g. through drone warfare, chemical weapons and anti-satellite weapons systems) and its longer term psychological and physical consequences require greater understanding and recognition in the legal context, including new approaches to the gathering and presentation of evidence.

This is especially crucial for the growing numbers of civilians who are displaced and disenfranchised through war, conflict or environmental disaster. In a 12-month period between 2015 and 2016, over 1.2 million people applied for asylum in the European Union alone. This was the largest movement of people in Europe since the Second World War.³⁵ The majority had been displaced by war and conflict in which large civilian populations had been subject to attack from the air. As Alison Abbott has observed, although the crisis has attracted global attention and sparked political tension, 'What hasn't been widely discussed is the enormous burden of mental-health disorders in migrants and refugees'.³⁶ Citing work published by the American Psychiatric Association, Emily Holmes makes a related point: 'Even once in a safe country, refugees are often plagued by vivid mental images of

³⁴ From "The Unconscious Life of Bombs", *BBC Radio 4*, 11 December 2017, presented by Daniel Pick (Birkbeck).

³⁵ Alison Abbott, "The Troubled Mind of Migrants", (2016) 538 *Nature* 158.

³⁶ *Ibid.*

traumatic events – called ‘intrusive memories’ – that repeatedly spring to mind unbidden.’³⁷

Of particular importance, and currently unknown, is whether there are any special psychological features of suffering attack from the air. Perhaps the frequency of generalised anxiety disorder (GAD) and post-traumatic stress disorder (PTSD) is more common following such attacks compared to other types of attack? Currently, we simply do not know. The rapid expansion of the weaponisation of airspace could lead to distinctive psychological conditions requiring new therapeutic interventions. Recognition of this proposed new human right could help to stimulate new knowledge in this field. A better understanding of the psychological impacts is also critical to more effective representation within the legal context.

3. A review of the human rights dimension of airspace is further necessitated by the transformations in proximity and distance in contemporary warfare. As new technologies facilitate a ‘militarized regime of hypervisibility’,³⁸ enabling an increasingly remote means of locating and killing enemies, the co-presence of journalists and others charged with documenting the threats and effects of warfare is increasingly compromised. Reflecting on his work as a landscape photographer recording the aftermath of conflict, Simon Norfolk has highlighted the challenge of using more traditional methods to document contemporary forms of war: ‘How do you photograph a drone flying over Yemen at 40,000 feet and firing a missile into a car in the middle of nowhere? You can’t photograph it. How do you photograph satellite warfare or submarine systems, or cyberwarfare? That’s how the war of the future is being fought, that is where the money is being spent... I don’t know how to photograph any of that stuff’.³⁹ Against this background, developing forensic practices across interdisciplinary teams of

³⁷ Emily A. Holmes et al., “‘I Can’t Concentrate’: A Feasibility Study with Young Refugees in Sweden on Developing Science-Driven Interventions for Intrusive Memories Related to Trauma”, (2017) 45 *Behavioural and Cognitive Psychotherapy* 97.

³⁸ Derek Gregory, “From a View to a Kill: Drones and Late Modern War”, (2011) 28 (7-8) *Theory, Culture & Society* 193.

³⁹ Simon Norfolk in conversation with Andrew Hoskins, Open Eye Gallery, Liverpool, 3 May 2012.

expertise, such as those exemplified by Forensic Architecture,⁴⁰ to gather, analyse and present evidence in the complex domain of contemporary and future conflict will become increasingly necessary, as will the legal framework to consider this.

4. A human right to protect the freedom to exist without physical or psychological threat from above also needs to accommodate the risk posed to individuals by their inadvertent exposure as targets. For instance, geolocation features pervasive in smartphones and increased search engine power in sifting and mapping geotagged photographs reveal a person's 'patterns of life'. A recent example was the release in November 2017 of Strava's data visualisation map of uses of the company's fitness tracking app used on a variety of devices (smartphones and fitness trackers). More than one billion activities uploaded to Strava were suddenly made available on its global heatmap comprising more than three trillion individual data points. Early in 2018 it became apparent that the jogging routes of foreign military personnel and the internal layouts of their bases in Afghanistan and Syria had been revealed, in a new risk to their operational security.⁴¹

The Airspace Tribunal process

Conceived by Grief and Illingworth, the Airspace Tribunal will draw together a wide range of expertise and lived experience to argue the case for and against the recognition of this new human right. The hearings will consider the changing environmental, cultural, social, psychological, political, military and historical definition, perception and composition of airspace. Its members ('judges') will be an invited cross-section of the general public who will be involved as participants in this initiative, challenging the traditional state-centric view of how

⁴⁰ <http://www.forensic-architecture.org>. Forensic Architecture is an independent research agency led by Eyal Weizman and based at Goldsmiths, University of London.

⁴¹ Alex Hern, "Fitness tracking app Strava gives away location of secret US army bases". *The Guardian*. 28 January 2018: <https://www.theguardian.com/world/2018/jan/28/fitness-tracking-app-gives-away-location-of-secret-us-army-bases>.

international law is created.⁴² At the inaugural hearing in London there will be short representations from 10 key speakers / experts.

The process will be led by Counsel to the Tribunal, who will question each of the experts after they have delivered their statements and then invite and facilitate comments and questions from the floor – both from invited participants and from the wider audience. The hearings will be recorded and transcribed in order to document the drafting history of this proposed new human right. The Tribunal is part of and will inform the development of *Topologies of Air*, a major new body of art work by Illingworth, commissioned by The Wapping Project,⁴³ that will be exhibited at The Power Plant, Toronto in 2020 and provide further opportunity for public debate.

Conclusion – and an invitation to contribute

In sum, an intensifying dialectic of fear between ground and space, of pervasive mass human vulnerability of being tracked, surveilled and targeted from above, requires similarly radical rights in response. This is why we are proposing not only a new and urgent debate on a scale commensurate with these emergent risks, but a unique forum – the Airspace Tribunal – whose documented proceedings will help to constitute the drafting history of this new human right and signal a critical cultural change in scholarly intervention, through interdisciplinary public dialogue and debate. We invite and welcome contributions to this project in the form of comments, criticism, suggestions and / or expressions of interest in attending the London session of the Airspace Tribunal.⁴⁴

⁴² Barbara Woodward (ed.), *Global Civil Society in International Lawmaking and Global Governance* (Leiden: Brill | Nijhoff, Queen Mary Studies in International Law, 2010), pp. 105-106.

⁴³ <http://thewappingproject.org/>. The Wapping Project is a platform for the continuous development of ideas, thoughts and people. The London hearing of the Airspace Tribunal is supported by The Wapping Project and by the University of Kent's Public Engagement with Research Fund.

⁴⁴ Further information about the Tribunal and its developing work can be found here: www.airspacetribeunal.org.