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The Legal Status of Military Aircraft in the High Seas*

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CONTENTS

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Ⅰ. Introduction

Article 1 of the Convention on International Civil Aviation of December 7, 1944 (hereinafter Chicago Convention)[1] stipulates "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." This recognition of principle of airspace sovereignty by contracting states extends not only to their mutual relations, but also to non-parties to the Convention; for Article 1 states that this sovereignty is exercised by "every" state.[2]

Article 2 of the Chicago Convention defines the territory of a State, specifying the horizontal limits of airspace sovereignty;

"For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

The parties to this Convention implicitly recognize the principle that the supremacy of a state does not apply to international waters and airspace of *res nullius* even though the Convention does not specify such a principle.[3]

Ocean covers 70.8% of the earth's surface including 60.7% of the Northern Hemisphere and 80.9% of the Southern Hemisphere. The gross area of the ocean is approximately 371,000,000 ㎢, which is 2.42 times larger than the gross of the earth's landmass. Thus, the intercontinental flights over the ocean by military or civil aircraft are a very important aspect of aviation law.

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1) 15 *United Nations Treaty Series*. p. 295; As of 2017, the Chicago Convention has 191 state parties.
2) Bin Cheng, *The Law of International Air Transport*, Stevens & Sons Limited, 1962, p. 120.
3) Bin Cheng, The Right to Fly, 42 *Grotius Society Transactions*, 1956, p. 99; Han Taek Kim, *International Air Law*, Whybooks, Korea, 2016 (written in Korean), p. 51.

According to the Article 86 of the United Nations Convention on the Law of the Sea (hereinafter UNCLOS)[4] in 1982, the high seas refer to all parts of the sea that are not included in exclusive economic zones (hereinafter EEZ), in the territorial sea or internal waters of a state, or in the archipelagic waters of an archipelagic state, so the range of the high seas is diminished. However, UNCLOS does provide that all States may enjoy the freedom of navigation and flight in the EEZs of other States.[5]

This article will deal with the legal status of military aircraft in the high seas. The main subjects of this article will focus on the legal status of the high as and the legal status of military aircraft in the high seas. As far as the latter is concerned, the legal status of military aircraft, the freedom of overflight, the right of hot pursuit, the right of visit and Air Defense Identification Zone (ADIZ) will be discussed. This article is based on "International Law on the Flight over the High Seas"[6] and "International Law on the Air Defense Identification Zones over the East China Sea", which I published in 2011 and 2014, respectively.[7]

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4) The United Nations Convention on the Law of the Sea, Dec. 10, 1982, A/CONF.62/122; The convention was opened for signature on 10 December 1982 and entered into force on 16 November 1994 upon deposition of the 60th instrument of ratification. As of 2017, the convention has been ratified by 168 parties, which includes 167 states (164 member states of the United Nations plus the UN Observer state Palestine, as well as the Cook Islands, Niue and the European Union).

5) UNCLOS Arts. 58, 86.

6) Han Taek Kim, International Law on the Flight over the High Seas (hereinafter Flight on the High Seas), 26 *The Korean Journal of Air & Space Law*, 2011 (written in Korean), pp. 3-30.

7) Han Taek Kim, International Law on the Air Defense Identification Zones over the East China Sea (hereinafter ADIZ) in Korean Branch International Law Association (ed.), 1 *Korean Yearbook of International Law* Ilchokak & Korean Branch ILA, 2014, pp. 141-159.

Ⅱ. The Legal Status of the High Seas

The high seas are open to all States, and no State may validly purport to subject any part of them to its sovereignty. This rule of customary international law is codified in the 1958 Convention on the High Seas (hereinafter Geneva Convention) and the 1982 UNCLOS.[8] For the high seas the most important rules are contained in Articles 87 and 89 of the UNCLOS.

In so far as invalidity of claims of sovereignty over the high seas is concerned Article 89 of the UNCLOS stipulates that no state may validly purport to subject any part of the high seas to its sovereignty. So the legal status of the high seas is *res extra commercium,*[9] not subject to national sovereignty and free for use by all nations.

As far as the freedom of overflight in the high seas by civil or military aircraft is concerned the Article 87 of the UNCLOS provides that the high seas are open to all states, whether coastal or land-locked. The freedom of the high seas is exercised under the conditions laid down by the UNCLOS and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States, freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, permitted under international law, freedom of fishing and freedom of scientific research.[10]

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8) R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 204.

9) *Res extra commercium* (lat. “a thing outside commerce”) is literally meaning something that cannot be the object of commercial trade, *e.g.* tombs under Roman Law; Gbenga Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space-Legal Criteria for Spatial Delimitation*, Routledge, 2012, p. 197.

10) Han Taek Kim, A Comparative Study between Space Law and Law of the Sea, 24 *The Korean Journal of Air & Space Law*, 2009, pp. 190-191.

Ⅲ. The Legal Status of Military Aircraft in the High Seas

All ships and aircraft, including warships and military aircraft, enjoy complete freedom of movement and operation on and over the high seas. For warships, this includes task force maneuvering, flight operations, military exercises, surveillance, intelligence gathering activities, and ordnance testing and firing. All nations also enjoy the right to lay submarine cables and pipelines on the bed of the high seas as well as on the continental shelf beyond the territorial sea, with coastal nation approval for the course of pipelines on the continental she1f. All of these activities must be conducted with due regard for the rights of other nations and the safe conduct and operation of other ships and aircraft.[11)]

1. The Legal Status of Military Aircraft

The Convention for the Regulation of Aerial Navigation of October 13, 1919 (hereinafter Paris Convention)[12)] recognized a distinction in public international law between “private aircraft” and “state aircraft” within the following articles, namely:

“Article 30 - The following shall be deemed to be State aircraft:
(a) Military Aircraft;
(b) Aircraft exclusively employed in a State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.
All State aircraft other than military, customs and police aircraft shall be

11) UNLOS arts. 79 & 87; A. R. Thomas & James C. Duncan (eds.), Chapter 2 International Status and Navigation of Warships and Military Aircraft, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 73 *International Law Studies*, US Naval War College, 1983 (http://stockton.usnwc.edu/ils/vol73/iss1/), p. 131.
12) 11 *League of Nations Treaty Series*, p. 173.

treated as private aircraft and as such shall be subject to all the provisions of the present Convention."

"Article 31 - Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.[13]"

According to Article 2 of the Paris Convention, each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of other contracting States, provided that the conditions laid down in the Convention are observed. Regulations made by a contracting State as to the admission over its territory of the aircraft of other contracting States shall be applied without distinction of nationality. It is important to note that a specific disposition pertaining to military aircraft was included within Article 32 of the Paris Convention, which reads

"No military aircraft of a contracting state shall fly over the territory of another contracting state nor land thereon without special authorization. In case of such authorization the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war. A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph."

The result of Article 32 of the Paris Convention is that military aircraft are exempt from the application by other states of legal enforcement measures applicable to civil aircraft, thus acknowledging the sovereign immunity of the military aircraft.[14] The crew of military aircraft receive immunity from jurisdiction of territorial

13) The term "aircraft" was not defined in the Convention itself but only in its Annex A as "all machines which can derive support in the atmosphere from the reaction of the air".
14) Bin Cheng, *The Law of International Air Transport, op. cit*., p. 75.

sovereignty only in so far as to acts performed during official duties.[15)]

The Chicago Convention is not only a source of normative air law, but also is the basic constitutional instrument of international public administrative law as the "grundnorm" (basic norm in English) for the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations. However, the Chicago Convention does not define the term "aircraft". Annex 7 defines aircraft as "any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface." The words "other than the reactions of the air against the earth's surface" were added in 1967 to exclude hovercraft from being legally considered as an air craft.[16)]

The Chicago Convention neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the Paris Convention. The Chicago Convention codified other practices pertaining to state aircraft navigation in international airspace, such as the rule of "due regard." Nonetheless, unlike the Paris Convention, the Chicago Convention applies only to civil aviation and civil aircraft, as evidenced by Article 3. The effect of the Chicago Convention on military aircraft is minimal. Consequently, the status of military aircraft was not redefined with the Chicago Convention and remains, as stated in the Paris Convention, as a norm of customary international law.[17)]

Military aircraft are "state aircraft" within the meaning of the Chicago Convention, and, like warships, enjoy sovereign immunity from foreign search and inspection. According to Article 3(b) of the Chicago Convention, "state aircraft" include aircraft used in "military," "customs" and "police" service. Subject to the right of transit passage, archipelagic sea lanes passage, and entry in distress, state aircraft may not enter national airspace.[18)] As far as the sorts of the military aircraft are concerned there are army aircraft, navy aircraft, air

15) Michel Bourbonniere and Louis Haeck, Military Aircraft and International Law: Chicago Opus 3, 66 *Journal of Air Law and Commerce* (hereinafter *JALC*), 2001, p. 891.
16) *Ibid*., p. 894.
17) *Ibid*., p. 892.
18) Thomas & Duncan (eds.), *op. cit*., p. 114.

force aircraft, marine corps aircraft, coast guard aircraft, attack aircraft, fighter aircraft, bombers, transport aircraft, helicopters, drones, tanker aircraft.[19]

2. The Freedom of Overflight

Article 87 (1) of the UNCLOS provides that any state may enjoy at least six freedoms on the high seas as follows.

It comprises, inter alia, both for coastal and land-locked States:
(a) freedom of navigation
(b) freedom of overflight
(c) freedom to lay submarine cables and pipelines, subject to Part VI;
(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
(e) freedom of fishing, subject to the conditions laid down in section 2;
(f) freedom of scientific research, subject to Parts VI and XIII.

Along with the freedom of navigation and others, the principal and most important freedom is that of overflight.[20] It is the least disputed freedom and may be enjoyed anywhere above the high seas. It is important to stress that the UNCLOS does not include EEZ in its definition of the 'high seas,'[21] but it does provide that any states may enjoy the freedoms of navigation and overflight in EEZs of other states. For purposes of these freedoms, the legal regime of the 'high seas' applies to all parts of the sea not included in the territorial sea or in the internal waters of a State.[22]

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19) Military Aircraft, Military.com (http://www.military.com/equipment/military-aircraft).
20) Myres S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, Yale University Press, 1962, p. 782.
21) UNCLOS, Art. 86.
22) UNCLOS Arts. 58, 86.

As far as the freedom of flight by military aircraft in the high seas is concerned the two cases will be introduced as follows. On July 1, 1960, the Soviet MiG-19 shot down a U.S. Air Force reconnaissance airplane RB-47, which was on a proposed mission from the United Kingdom near the northern borders of Norway and the Soviet Union and over the Barents Sea. Four out of the six men aboard were killed, while two were captured and held prisoners for espionage. However, U.S. claimed the RB-47 was never closer to the Soviet Union than about 30 miles and never penetrated Soviet territorial waters or air space. In the RB-47 incident, unlike the U.S. reconnaissance airplane U-2 incident on May 1, 1960[23], the dispute between the U.S. and Soviet Union was primarily about the facts. The Soviet Union alleged that the RB-47 was shot down over Soviet territorial waters off the northern coast of U.S.S.R after it had deliberately intruded into Soviet airspace and disobeyed an order to land. Finally the two crew members were released from Soviet captivity on January 25th, 1961.[24] Professor Bin Cheng classified two cases differently. U-2 incident would be called penetrative reconnaissance whereas the RB-47 peripheral reconnaissance if U.S. allegations for it were right.[25]

On April 1, 2001, a U.S. Navy EP-3 reconnaissance airplane and a Chinese fighter jet F-8 collided over the South China Sea, causing the EP-3 to make an emergency landing on China's Hainan island and the F-8 fighter aircraft to crash into the sea causing the death of a Chinese pilot. The precise location of the U.S. plane was in dispute, with U.S. officials saying that the plane was in international airspace (about 70 miles away from the Hainan island) when the collision

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23) The U-2 airplane was shot down by Soviet rocket while flying over the Soviet Union territory at an altitude of approximately 60,000 to 63,000 feet on May 1, 1960, and the pilot parachuted safely and was captured and convicted of espionage and sentenced to three years of imprisonment plus seven years of hard labor but was released two years later on February 10, 1962.

24) See Oliver J. Lissitzyn, Some Legal Implications of the U-2 and RB-47 Incidents, 56 *American Journal of International Law* (hereinafter *AJIL*), 1962, pp. 135-142.

25) Bin Cheng, *Studies in International Space Law*, Clarendon Press·Oxford, 1997, pp. 103-119.

occurred, and Chinese officials saying that the aircraft was over Chinese airspace. The Chinese Government detained the 24 U.S. members of the crew for 11 days. On April 11, 2001, all members of crew were released and returned to their base at Whidbey Island via Honolulu, Hawaii.[26]

3. The Right of Hot Pursuit

Article 111 of the UNCLOS provides the right of hot pursuit in details. According to this article, the right of hot pursuit may be exercised by a ship or aircraft which is clearly indicated and identified as a warship, military aircraft or for the purpose of other government service and the relevant authority has been granted. Thus the right of hot pursuit may apply in the case of pursuit by a military aircraft.[27] The main contents of Article 111 of the UNCLOS regarding the right of hot pursuit is that the pursuit of a foreign ship may be carried out by the relevant authority of a coastal state if there is sufficient reason to believe that the ship has violated the laws and relevant regulations of the coastal state. This pursuit should begin while the whole or a part of the foreign ship is located in internal waters, archipelagic waters, territorial waters or contiguous zones of the state, and it may continue outside the territorial waters or contiguous zones of the state only if it has not been interrupted. The right of hot pursuit comes to an end when the pursued ship enters into the territorial waters of its own country or a third country. Article 111, Paragraph 2 of the UNCLOS provides certain regulations for the right of hot pursuit exercised in the EEZ.

Since hot pursuit is an exception to the principle of the freedom of the high seas, it must be exercised with the utmost care and strict regulation of the aircraft

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26) As for the legal analysis of the EP-3 case See Margaret K. Lewis, An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident, 77 *New York University Law Review*, 2002, pp. 1404-1441,

27) *See* N. M Poulantzas, *The Right of Hot Pursuit in International Law*, Martinus Nijhoff Publishers, 1969, pp. 302, 347 with regard to the right of hot pursuit of ships and aircraft.

entitled to exercise pursuit is essential.[28] The *I'm Alone* case[29] is a good example of what is prohibited in the exercise of hot pursuit. In that case, the Arbitral Commission condemned the destruction of a Canadian vessel that was intercepted following the exercise of the right of hot pursuit by an American Coast Guard vessel. Evidently, this destruction was an abusive means of exercising the right of hot pursuit, not supported by any principle of law. Indeed, the pursuit, although justified by a necessity to ensure the effective exercise of jurisdiction by the coastal State, should not have gone beyond the capture of the vessel.[30] In the *Red Crusader Case*[31] a Commission of Entry found that Denmark had exceeded the legitimate use of armed force by firing solid gun-shot without warning and endangering life without proven necessity.[32]

As far as the right of aerial hot pursuit in the airspace of high seas is concerned, it must be said that this is a right recognized in neither the Geneva Convention nor the UNCLOS. This right might already exist or ought to be customary international law because there is no specific treaty expressly prohibiting hot pursuit.[33] One example of aerial hot pursuit by a military aircraft involved two Soviet army jets entering into the Kuril Islands on February 1952, which were intercepted by US Thunderjets in the airspace of Hokkaido Island in Japan. However, the US Thunderjets gave up the right of hot pursuit against these Soviet army jets to avoid violating the Soviet airspace.[34]

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28) Nicholas Grief, *Public International Law in the Airspace of the High Seas*, Martinus Nijhoff Publishers, 1994, p. 105.
29) I'm Alone case (Canada v. U.S.) 29 *AJIL*, 1935, p. 326.
30) Anne Bardin, Coastal State's Jurisdiction over Foreign Vessels, 14 *Pace International Law Review*, 2002, p. 53.
31) 35 *International Law Reports*, 1967, p. 485.
32) Grief, *op. cit*., p. 105.
33) Gbenga Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space-Legal Criteria for Spatial Delimitation*, Routledge, 2012, p. 114.
34) 9 *Keesing's Contemporary Archives*, 1952-54, p. 12827; Han Taek Kim, ADIZ, *op. cit*., pp. 146-147.

4. The Right of Visit

Article 110 of the UNCLOS provides the right of visit. Paragraph 1 stipulates that a warship which encounters on the high seas a foreign ship is not justified in boarding it unless there is reasonable ground for suspecting one of following;

(a) the ship is engaged in piracy;
(b) the ship is engaged in the slave trade;
(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
(d) the ship is without nationality; or
(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Paragraph 2 provides that in the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration. Paragraph 3 stipulates that if the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.[35] These provisions apply *mutatis mutandis* to military aircraft (Paragraph 4). Also, these provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service (Paragraph 5).

The view that there is a right of aerial hot pursuit in customary international law is not supported by state practice or *opinio juris*. As the number of the aerial hot pursuit above the high seas are few, it cannot be said that there is a “general

35) Han Taek Kim, ADIZ, *op. cit*., pp. 147-148.

practice accepted as law" evincing a rule of customary international law permitting the hot pursuit of a foreign aircraft beyond national airspace. An act to approach and intercept a foreign aircraft carried out for the right of self-defence may be carried out very restrictedly, and especially it should be carried out for private aircraft in the last resort and in the way to avoid danger to lives on board the aircraft.[36)]

A Korean Air flight (Boeing 747, Flight No. 007) was off course while coming to Seoul from New York and Anchorage on September 1, 1983 and flew the airspace of the Kamchatka Peninsula and the Sakhalin Island, was shot down by a Soviet army jet and a total of 269 lives on board were killed. An ICAO general meeting held in 1984 newly adopted 'Article 3 bis' to the Chicago Convention in 1944, providing that when any civil aircraft invades the territorial airspace of a state without permission, the relevant aircraft shall be forced to land on a designated airport without using military force. Main contents of Article 3 bis provide that every State must refrain from the use of weapons against civil aircraft in flight. In case of interception, the lives of those aboard and the safety of the aircraft must not be endangered. If there are reasonable grounds to conclude the aircraft is being used for purposes inconsistent with the Convention, the State may instruct it to end such violations, resorting to any appropriate means consistent with international law and the Convention.[37)]

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36) Grief, *op. cit.*, pp. 107, 160-161.

37) Protocol Relating to an Amendment to the Convention on the International Civil Aviation, May 10, 1984, 23 *International Legal Materials*, pp. 705-707. Article 3 *bis* reads as follows;

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this

However the amendment was not ratified by a sufficient number of ICAO members to take effect until fourteen years later on October 1, 1998, with two subsequent resolutions[38] of ICAO having been adopted urging its ratification by member states. The Article 3 bis did not establish new principle but rather reflects the way in which the rule evolved a principle of customary international law to refrain from the use of force against civil aircraft in interception cases.[39]

5. Air Defense Identification Zone (ADIZ)

'Air Defense Identification Zone' (ADIZ) is an air sector established on the airspace over high seas or EEZ outside of the territorial airspace for the defense of territorial airspace, and it is established and declared unilaterally by the air force of a state for the national security. This is the zone which a state has

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purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.

38) *See* ICAO, *Assembly Resolutions in Force* (as of 5 October 2(01), at 1-6 to -9, ICAO Doc. 9790 (1st ed. 2002); Brian E. Foont, Shooting Down Civilian Aircraft: Is There An International Law ?, 72 *JALC*, 2007, p. 710.

39) Michael Milde, Interception of Civil Aircraft vs. Misuse of Civil Aviation, 11 *AASL*, 1986, pp. 125-128; *See* Bin Cheng, The destruction of KAL flight KE007 and Article 3 bis of the Chicago Convention in J.W.E. Storm van's Gravesande and Veen Vonk A van der (eds.), *Air Worthy*, Kluwer Law & Taxation Publishers, 1985, pp. 47-74.

declared to the international community in advance that a foreign aircraft may be requested to retreat or brought down if it becomes a threat to national security.[40)]

The U.S. declared an ADIZ unilaterally on December 1950 in order to defend the coastline from the enemy's air strikes when tensions built up between the U.S. and Soviet Union and the high speed jet fighters were developed by both countries due to the outbreak of the Korean War in June 1950.[41)] If an aircraft flying through an ADIZ has failed to make a report, it will be intercepted by a U.S. fighter plane, but if the aircraft that enters into ADIZ but just passes through ADIZ and flies to other region without entering into the U.S. territory has no obligation to notify the detailed information of the aircraft. With regard to this, there is an opinion that this system is accepted as the customary international law or part of customary law of the regional community, but it is not interpreted as the expansion of territorial airspace. Likewise, ADIZ is not the territorial airspace but the zone where the flight of foreign aircraft is controlled for the defense of airspace, and if any foreign aircraft regardless of military aircraft or private aircraft intends to enter into this zone, an approval should be obtained from the relevant country at least 24 hours in advance.[42)]

On November 23, 2013, China declared ADIZ (CADIZ) unilaterally claiming

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40) Han Taek Kim, ADIZ, *op. cit.*, p. 143.

41) Peter Dutton, *Caelum Liberam*; Air Defense Identification Zones Outside Sovereign Air Space, 103 *AJIL*, 2009, p. 698.

42) The U.S. has established ADIZ including the 310-nautical miles off the Atlantic coast, 310-nautical mile off the Pacific Coast, 120-nautical miles off the Gulf of Mexico, 335-nautical mile off Hawaii, and 225-nautical miles off of Guam. Canada also has established 240-nautical miles off the Atlantic Ocean, 180-nautical miles off the Pacific Coast and off the Arctic region, and Korea has secured 140-nautical miles, and Japan has secured 200-nautical miles to the east and 300-nautical miles to the west. Also, the Philippines has established 225-nautical miles, India has established 150-nautical miles for Bombay ADIZ, Myanmar (previously Burma) has established 130-nautical miles, Iceland has established 25-nautical miles, Sweden has established 15-nautical miles off the Baltic, Vietnam has established 150-nautical miles, and Oman has established 55-nautical miles for Dhofar ADIZ. Other countries that has established ADIZs include England, Germany, Italy, Greece, Norway, Finland, Taiwan, Australia, the Philippines, Libya, Turkey, Cuba, Pakistan, Panama and China; Han Taek Kim, ADIZ, *op. cit*., pp 143-145.

that CADIZ was established for detecting, identifying flying objects approaching the mainland China in advance and taking proper measures.[43] The China's declaration of CADIZ was condemned by the surrounding countries including Japan, Korea, the Philippines and Taiwan as well as EU and the U.S. The Korean government also declared new Korean Air Defense Identification Zones (KADIZ) on December 8, 2013 in response which came into effect on December 15, 2013. New KADIZ was expanded by matching the southern boundary line with the Incheon Flight Information Region (FIR) allocated to Korea by ICAO.[44]

As for ADIZ there are no articles dealing with it in the Chicago Convention. An ADIZ can be established over EEZ or the high seas outside the territorial airspace for defense based on the self defense under the international law, but there are no international standards to recognize or prohibit the establishment of ADIZs. In other words, there are no provisions in international law that specify the legal authority for a state to declare an ADIZ unilaterally[45]

Ⅳ. Conclusions

The Chicago Convention neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the Paris Convention. So the status of military aircraft was not redefined with the Chicago Convention and remains, as stated in the Paris Convention, as a norm

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43) This zone includes the surrounding sky of Senkaku Islands (Diaoyudao in Chinese) of Japan and the Iodo base of Korea.

44) New KAIZ included the southern airspace of Marado Island and Hongdo Island as well as the airspace of Ieodo base which was 170㎞ away from the Jeju Island to the south; Han Taek Kim, A Study on International Law about the Air Defense Identification Zones over the East China Sea, 44 *Kangwon Law Review*, 2015 (written in Korean), pp. 88-89.

45) Grief, *op. cit*., p. 153; Dais A. Welch, What's an ADIZ ?, Why the United States, Japan, and China Get It Wrong, *Foreign Affairs*, December 9, 2011; Han Taek Kim, ADIZ, *op. cit.,* p. 152.

of customary international law. The analyses on the legal status of the military aircraft in the high seas are summarized as follows;

1. According to the Article 95 of UNCLOS warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State. We can suppose that the military aircraft over the high seas have also complete immunity from the jurisdiction of any State other than the flag State.

2. According to the Article 111 (5) of UNCLOS the right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. We can conclude that the right of hot pursuit may be exercised by military aircraft. However the view that there is a right of aerial hot pursuit in customary international law is not supported by state practice or *opinio juris*. As the number of aerial hot pursuit above the high seas are few, it cannot be said that there is a "general practice accepted as law" evincing a rule of customary international law permitting the hot pursuit of a foreign aircraft beyond national airspace.

3. According to the Article 110 of UNCLOS a warship which encounters on the high seas a foreign ship, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy, (b) the ship is engaged in the slave trade, (c) the ship is engaged in an authorized broadcasting and the flag State of the warship has jurisdiction under article 109, (d) the ship is without nationality, or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. These provisions apply *mutatis mutandis* to military aircraft.

4. As for Air Defence Identification Zone (ADIZ) there are no articles dealing with them in Chicago Convention. ADIZs established on EEZ or high seas outside the territorial airspace for defense of airspace are declared unilaterally based on the self defense under the international law, so there are no international standards to recognize or prohibit the establishment of ADIZs. In other words, there are no provisions in the international law that specify the legal authority for a state to declare an ADIZ unilaterally. However ADIZ is not interpreted as the expansion of territorial airspace.

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초 록

이 논문은 공해상 군용기(또는 군용항공기)의 법적 지위에 관한 것으로 군용기의 법적 지위, 상공비행의 자유, 추적권, 임검권, 방공식별구역(ADIZ) 등을 다루었다. 1982년 UN해양법협약 제86조에 의하면 공해는 영해와 내수는 물론이고 접속수역, 배타적 경제수역이 아닌 수역을 의미하므로 기존의 공해였던 부분이 상당히 연안국관할권 하에 놓이게 되었다. 이와 같은 공해의 상공비행과 관련된 군용기의 법적 지위에 관한 사항으로 다음과 같은 결론을 얻을 수 있다.

첫째, 1944년 시카고 협약은 군용기의 법적 지위를 명시하고 있지 않은데 제3조(a)에서 본 협약이 민간항공기에만 적용되고 국가항공기에는 적용되지 않는다고 명시하고, 제3조 (b)에서 군용기, 세관용 항공기, 경찰용 항공기 등이 국가기관에 소속된 국가항공기로 간주된다고만 명시되어 있다. 따라서 현재 군용기의 법적 지위는 1919년 파리협약 제32조에 명시되었던 면책특권과 국제관습법에 의존하는 수밖에 없다. 한편 UN해양법협약 제95조는 공해상 군함의 면제권에 관하여 공해에 있는 군함은 기국외의 어떠한 국가의 관할권으로부터도 완전히 면제된다고 규정하고 있는데, 군용기의 경우도 군함에 준하는 면책권을 향유한다고 해석할 수 있다.

둘째, UN해양법협약 제111조는 추적권에 관하여 규정하고 있는데 이러한 추적권은 군함이나 군용기 또는 기타 정부역무에 종사함이 명백히 표시되고 식별되며 이에 대한 권한이 부여된 선박이나 항공기에 의해서만 행사되어질 수 있음을 명시하고 있으므로 선박 뿐 아니라 군용기에 의해서도 추적권이 행사될 수 있음을 규정하고 있다. 그러나 외국항공기에 대한 연안국의 공해상공의 추적권(right of aerial hot pursuit)이 국가관행이나 법적 확신(*opinio juris*)에 의해서 국제관습법 상 존재하는지는 확실하지 않다. 공해상공의 추적권 사례가 매우 적으므로 영공 이원의 외국항공기에 대한 이 권리가 국제관습법을 증명하는 '법으로 인정된 일반관행(general practice accepted as law)으로 존재한다고 할 수는 없다.

셋째, UN해양법협약 제110조는 임검권(right of approach)에 관하여 설명하고 있는데, 외국선박을 공해에서 만난 군함은 일정 혐의를 가지고 있다는 합리적 근거가 있는 한 그 선박을 임검하는 것은 정당화되는데, 이 규정은 정부 업무에

사용 중인 것으로 명백히 표시되어 식별이 가능하며 정당하게 권한이 부여된 모든 선박이나 항공기에도 적용된다. 따라서 이러한 규정은 군용기에도 준용된다고 할 수 있다.

넷째, 방공식별구역(ADIZ)은 자국 영공을 방위하기 위해 영공 외곽 배타적 경제수역(EEZ) 또는 공해 상공에 설정하는 공중 구역으로 국제법상 '자위권'(또는 정당방위, self defense)에 근거하여 일방적으로 선포되므로, 엄밀히 말하면 ADIZ를 설치할 규범도, 이를 금지할 수 있는 규범도 없고, 이를 규제하는 국제기구도 없다고 할 수 있다. 그러나 ADIZ가 영공의 확장으로 해석되지는 않는다.

주제어 : 군용기, 상공비행의 자유, 국제공역(*res extra commercium*), 추적권, 임검권, 방공식별구역(ADIZ), 비행정보구역(FIR)

Abstract

The Legal Status of Military Aircraft in the High Seas

Kim, Han Taek

The main subject of this article focused on the legal status of the military aircraft in the high seas. For this the legal status of the military aircraft, the freedom of overflight, the right of hot pursuit, the right of visit and Air Defense Identification Zone (ADIZ) were dealt. The 1944 Chicago Convention neither explicitly nor implicitly negated the customary norms affecting the legal status of military aircraft as initially codified within the 1919 Paris Convention. So the status of military aircraft was not redefined with the Chicago Convention and remains, as stated in the 1919 Paris Convention, as a norm of customary international law. The analyses on the legal status of the military aircraft in the high seas are found as follows;

According to the Article 95 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State. We can suppose that the military aircraft in the high seas have also complete immunity from the jurisdiction of any State other than the flag State. According to the Article 111 (5) of the UNCLOS the right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. We can conclude that the right of hot pursuit may be exercised by military aircraft. According to the Article 110 of the UNCLOS a warship which encounters on the high seas a foreign ship, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy, (b) the ship is engaged in the slave trade, (c) the ship is engaged in an unauthorized broadcasting and the flag

State of the warship has jurisdiction under article 109, (d) the ship is without nationality, or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship. These provisions apply *mutatis mutandis* to military aircraft. As for Air Defence Identification Zone (ADIZ) it is established and declared unilaterally by the air force of a state for the national security. However, there are no articles dealing with it in the 1944 Chicago Convention and there are no international standards to recognize or prohibit the establishment of ADIZs. ADIZ is not interpreted as the expansion of territorial airspace.

Key Words : military aircraft, freedom of overflight, *res extra commercium*, right of hot pursuit, right of visit, ADIZ, FIR.