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COMMENTARY

# The airspace tribunal and the proposed new human right to live without physical or psychological threat from above

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This double special issue of the Journal of Digital War is devoted to the Airspace Tribunal and the proposed new human right to live without physical or psychological threat from above. The case for and against this proposed new right has been examined in a series of international public hearings of the Airspace Tribunal, a people's tribunal which we established for that purpose in 2018. We set out the rationale in an Opinion piece in the European Human Rights Law Review (EHRLR) in June 2018[1] before holding the inaugural hearing of the Airspace Tribunal at Doughty Street Chambers, London, in September of that year. That was followed by a hearing at The Ethics Centre in Sydney in 2019, and then (due to COVID-19) by virtual hearings at The Power Plant, Toronto, in 2020 and at the European Center for Constitutional and Human Rights in Berlin in 2021, in partnership with those organisations.[2] The legal case for the proposed new human right is outlined in an Appendix to this introduction.[3]

A key catalyst for the recognition of this proposed new human right was HE Tony de Brum's opening statement to the International Court of Justice (ICJ) on Tuesday 8 March 2016 in the case between the Marshall Islands and Pakistan concerning nuclear disarmament obligations. Alluding to the snow which had fallen in The Hague the previous day, Mr de Brum told the Court how for the Marshallese people the sky had been irrevocably changed some sixty-two years earlier:

> 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.[4]

One of the things the Marshallese people lost that day, 1 March 1954, was the freedom to look up at the sky and not feel threatened.

The transformation of airspace and increasingly of outer space is now profoundly affecting the ability of peoples, communities and ecologies around the world not only to live and thrive, but even to survive. As we argued in our Opinion piece in the EHRLR:

> 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.[5]

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The established legal framework for defining airspace is based on an older Cartesian model where airspace is mapped out in territorial zones.[6] This does not account for the increasingly complex and diverse ways in which the sky is now used and exploited. Since we established the Airspace Tribunal in 2018, accumulating military threats from airspace and outer space have grown exponentially in scale, reach and complexity, compounded by the impacts of global warming, rising geopolitical tensions and the increased risk of conflicts globally.

It might be contended that what we are proposing is already covered by existing rights such as the right to life or the right to respect for private life, especially as 'private life' includes the protection of physical and psychological integrity.[7] But the Airspace Tribunal hearings have all confirmed that there are powerful reasons for stand-alone recognition of the right to live without physical or psychological threat from above.

We heard from witnesses that there is currently a lack of legal provision for psychological harm which is often long-lasting, traumatically-intrusive and trans-generational. Remedying this is increasingly urgent as developments in technology and warfare enable direct aerial threats against large populations to be maintained relentlessly and indefinitely. We heard how drones hovering over war zones and surveilled communities cause civilians there to suffer unrelenting 'anticipatory anxiety' as they are reminded of previous strikes or are terrorised by the fear of death or injury through targeting errors. This sustained anxiety results in significant long-term physiological and psychological harm. Children are especially vulnerable. Chillingly, traumatic experiences become encoded in memory and haunt the future, passing down through the generations.

Living with perpetual and debilitating anxiety about violence from above is terrifying and traumatic. It prevents communities from flourishing, inhibits self-determination and creates instability, with wider geopolitical and environmental repercussions. Meanwhile, constant competition for military advantage expands war and conflict more intensively towards the increased weaponisation of airspace and outer space, impacting all aspects of life. For growing numbers of people, nowhere is safe. In the Airspace Tribunal hearings, we heard from people exposed to attack from the air who have never known a time when the sky was not a source of threat and harm. Evidence was given about the development of autonomous weapons systems, the use of artificial intelligence and personal data for predictive targeting, the indiscriminate impact of wide area aerial bombardment in densely populated areas, the weaponisation of weather systems, state use of toxic aerial pesticides, threats of expanding nuclearism and the devastating effects of increasing air toxicity, environmental degradation and climate change.

We also heard how the impact of global warming, such as loss of biodiversity, resource scarcity and forced mass migration, will lead to wider use of aerial violence, with the likelihood that non-state actors will obtain weapons technologies with increasing range and lethal capacity, further exacerbating the risks of total war.

With such supporting evidence, much of which is contained in this special issue of the Journal of Digital War, our proposal will be submitted to the UN, the Council of Europe and other organisations. The dossier will also include the essay outlining the legal case for the proposed new human right,[8] the transcripts of the hearings and other material constituting the proposed right's drafting history. The full proposal will be made available on the Airspace Tribunal website.

The right we are proposing would be a qualified right. In other words, interference with its enjoyment would be allowed provided that the restriction was prescribed by law and no greater than necessary to achieve a legitimate aim, such as public safety or the prevention of harm or crime.

Furthermore, due to the interplay between International Human Rights Law and International Humanitarian Law, the body of international law designed to spare civilians from the effects of hostilities, the proposed right would enhance protection for civilians in war zones. For example, by removing any doubt that mental harm must be taken into account when applying the rule of proportionality prohibiting attacks which may be expected to cause excessive incidental injury to civilians.[9] Should civilians be harmed, the proposed new right would support greater accountability, and the possibility for those harmed to obtain a remedy.

There are also important implications for outer space. In the context of the military use of satellites, the growing risk of weapons deployment in space and territorial claims from commercial exploitation such as space mining driving further conflict, with potentially catastrophic consequences for life on earth, it has been argued that the proposed new right would strengthen the principle that outer space shall be used only for peaceful purposes and for the benefit of all humankind. It does not matter that airspace and outer space are subject to different legal regimes. Human rights may be violated by harmful activity in outer space, high up in airspace, or immediately over our heads.

This proposed new right could be recognised by the courts through a creative extension of existing rights. In the interest of certainty and legitimacy, however, it would be better to adopt a specific right through the normal political processes but with the active involvement of people across the world. As a people's tribunal, the Airspace Tribunal has challenged the state-centric way in which international law is usually created. It has done that by bringing together a wide range of knowledge, perspectives and, crucially, lived experience from around the world,

assisted by our expert Counsel to the Tribunal,[10] to shape this proposed new human right to live without physical or psychological threat from above.

We stand by the statement in the Universal Declaration of Human Rights' preamble that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[11] Furthermore, we recognise the fundamental importance of human rights in protecting not just individuals but also, by extension, peoples and communities (including future generations), environments and ecologies.

We know that for this proposed new human right to be adopted, it will need to be championed by States. But there have been other civil society initiatives that have led to important developments in international law. For example, the World Court Project on Nuclear Weapons and International Law, which ultimately led to the ICJ's advisory opinion on the legality of the threat or use of nuclear weapons;[12] ICAN's role in the creation of the Treaty on the Prohibition of Nuclear Weapons;[13] the Mine Ban Treaty, which "was brought about by civil society responding to a man-made catastrophe and forcing their governments to the table";[14] and the right not to be subjected to enforced disappearance, specifically recognised in a UN treaty in 2006,[15] which emerged as a result of several decades of lived experience.

In shaping this proposed new human right to live without physical or psychological threat from above, we are engaging the dynamic concept of human rights as a living instrument to be interpreted in the light of present day conditions.[16] This is necessary in order to address the rapidly compounding and increasingly complex threats from airspace and outer space. As Professor Conor Gearty KC (Hon) has argued:

> in this language of human rights, we find the necessary bridge between aspiration (what we ought to be) and action (how to get there).[17]

We have heard from human rights lawyers at the European Center for Constitutional and Human Rights (ECCHR) that the proposed new human right would fill a gap in the legal protection for civilians on the ground by, for example, making stricter demands concerning the information required before a strike can be authorised; and by increasing accountability for physical or mental harm suffered by civilians in the event of a strike.[18]

For their part, human rights lawyers at José Alvear Restrepo Lawyers Collective (CAJAR) in Colombia have told us that in the context of internal conflict where interpretations of International Humanitarian Law do not prioritise the protection of civilians on the ground, the proposed new human right may "serve as a rule that prevents the use of air strikes and pursues their punishment if they do occur, rather than as a criterion for determining where and when they are permissible".[19]

The purpose of the Airspace Tribunal, as a people's tribunal, has been to develop the human rights dimension of airspace and outer space by giving people, particularly those most affected, greater agency in the international legal order. Art and creative cultural practice have also had a critical role to play in this process. *Topologies of Air*,[20] a three-screen video and multi-channel sound installation, and the growing body of artwork created throughout the process of developing this proposed new human right, have sought to make visible the accelerating threats from above; and, through exhibitions and public programmes, to engage activism and widen public debate about their consequences and the alternative futures that could be imagined.

Our relationships with the sky run deep across cultures, spaces and time. The sky can teach us about the cosmos and how the universe functions. It teaches us perspective.[21] But relationships with the sky are all too easily fractured. It is our hope that recognition of the human right we are proposing will help to restore and preserve this vital and life-affirming association.

We would like to thank the many people who have given evidence to the Airspace Tribunal, our Counsel to the Tribunal, Kirsty Brimelow KC and Professor Andrew Byrnes, and the organisations, partners, galleries and museums that hosted and facilitated the hearings, exhibitions, public programmes and the Defence and Legal Roundtables. We also thank our collaborators, Andrew Hoskins, Renata Salecl and Anthony Downey, the co-editors of this double special issue of the Journal of Digital War.

## Notes

1. Nick Grief, Shona Illingworth, Andrew Hoskins and Martin A. Conway. The Airspace Tribunal: Towards A New Human Right to Protect the Freedom to Exist Without a Physical or Psychological Threat From Above. EHRLR, 2018, Issue 3, pp. 201–207.
2. The Airspace Tribunal: https://airspacetribunal.org/. Accessed on 14-11-23. Our partners and supporters have included Doughty Street Chambers, London, The Wapping Project, the University of Kent, the Big Anxiety Festival, The Ethics Centre, UNSW, The Power Plant, the Master of Visual Studies program at the Daniels Faculty, University of Toronto, the Freeman Air and Space Institute, the Centre for Peace, Hiroshima University (CPHU) and the European Center for Constitutional and Human Rights (ECCHR).
3. Nick Grief, The Airspace Tribunal: Developing the Human Rights Dimension of Airspace and Outer Space. Originally published in Shona Illingworth—

Topologies of Air, Anthony Downey, ed. London: Sternberg Press and The Power Plant, 2022, pp. 233–238. Reproduced here with kind permission of Sternberg Press and The Power Plant.

4. https://www.icj-cij.org/sites/default/files/case-related/159/159-20160308-ORA-01-00-BI.pdf, p. 9, para. 2. Accessed on 14-11-23.
5. EHRLR, 2018, Issue 3, p. 201.
6. In October 1919, the Convention Relating to the Regulation of Aerial Navigation was concluded in Paris. For the first time, a treaty proclaimed that every state has complete and exclusive sovereignty over the airspace above its territory. Twenty-five years later, that principle was confirmed and restated in a new treaty. The Chicago Convention on International Civil Aviation 1944 is still in force and has virtually universal adherence. See Nick Grief, The Airspace Tribunal: Developing the Human Rights Dimension of Airspace and Outer Space. 2022. In Shona Illingworth—Topologies of Air, Anthony Downey, ed. London: Sternberg Press and The Power Plant, pp. 233–238.
7. See e.g. European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights', Updated on 31 August 2022: https://www.echr.coe.int/documents/d/echr/guide_art_8_eng. Accessed on 14-11-23.
8. See note 3. The essay is attached here as an Appendix and will be made available on the Airspace Tribunal website.
9. A Chatham House research paper published in December 2018 concluded that while there is no reason in principle to exclude mental harm from that proportionality assessment, the majority of state practice considered did not take mental harm into account. See Emanuela-Chiara Gillard, 'Proportionality in the Conduct of Hostilities: The Incidental Harm Side of the Assessment', Royal Institute of International Affairs (2018), para 115: https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incidental-harm-gillard-final.pdf. Accessed on 14-11-23.
10. Kirsty Brimelow KC was Counsel to the Tribunal at the hearings in London, Toronto and Berlin. Professor Andrew Byrnes fulfilled that role at the hearing in Sydney.
11. Universal Declaration of Human Rights, Preamble, first recital.
12. https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf. Accessed on 14-11-23.
13. The International Campaign to Abolish Nuclear Weapons (ICAN), https://www.icanw.org/the_treaty. Accessed on 14-11-23.
14. Steve Wright, 'The landmine ban: 20 years on', SGR Newsletter No 45; online publication 4 April 2017: https://www.sgr.org.uk/resources/landmine-ban-20-years. Accessed on 14-11-23.
15. UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, available at: https://www.refworld.org/docid/47fdfaeb0.html. Accessed on 11-12-2023.
16. The first explicit reference to the European Convention on Human Rights as "a living instrument which […] must be interpreted in the light of present-day conditions" was in the European Court's judgment in *Tyrer v. United Kingdom*, April 25, 1978, Series A, no. 26, para. 31. See European Court of Human Rights, Judicial Seminar 2020, "The Convention as a Living Instrument at 70," Background Document, 3, https://www.echr.coe.int/Documents/Seminar_background_paper_2020_ENG.pdf. Accessed on 14-11-23.
17. Conor Gearty. Imagining Human Rights For The Future: The Power of Possibility, in Shona Illingworth: Topologies of Air, Sternberg Press and The Power Plant: London and Toronto, 2022, p. 242.
18. Andreas Schüller, Programme Director, International Crimes and Accountability, ECCHR, Berlin, Airspace Tribunal hearing, 9 June 2021.
19. Sebastián Escobar Uribe, human rights defender and lawyer with the José Alvear Restrepo Lawyers' Collective (CAJAR) in Colombia. ECCHR, Berlin, Airspace Tribunal hearing, 11 June 2021.
20. Shona Illingworth, *Topologies of Air*, 2021, three-screen video and multi-channel sound installation, duration 45 min shown on a loop. Commissioned by The Wapping Project. See also Shona Illingworth—Topologies of Air, Downey, Anthony. ed. London: Sternberg Press and The Power Plant, 2022; and Caterina Albano, Topologies of Air: Shona Illingworth's Art Practice and the Ethics of Air. *Journal of Digital War*, 2022.
21. Kirsten Banks, 'Aboriginal astronomy can teach us about the link between sky and land', The Guardian, 21 May 2018, https://www.theguardian.com/commentisfree/2018/may/21/aboriginal-astronomy-can-teach-us-about-the-link-between-sky-and-land. Accessed on 14-11-23.

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**Nick Grief** With over 40 years of experience as a legal academic in three universities, Nick Grief is now Emeritus Professor of Law at the University of Kent where he completed his undergraduate and doctoral studies. Throughout his career, he specialised in public international law, international human rights law and EU law, with particular reference to airspace, outer space and nuclear weapons. Nick also practised at the Bar for 25 years, mainly as an Associate Tenant at Doughty Street Chambers where he is now an Honorary Associate Tenant. He was a member of the legal team which represented the Marshall Islands before the International Court of Justice in cases against India, Pakistan and the UK concerning the obligation to negotiate in good faith towards nuclear disarmament. He is co-founder with Shona Illingworth of the Airspace Tribunal.