



Universiteit
Leiden
The Netherlands

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

Stewart, M.E.

Citation

Stewart, M. E. (2021, June 10). *Freedom of overflight: a study of coastal State jurisdiction in international airspace*. Meijers-reeks. Retrieved from <https://hdl.handle.net/1887/3185505>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/3185505>

Note: To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/3185505> holds various files of this Leiden University dissertation.

Author: Stewart, M.E.

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

Issue date: 2021-06-10

2.1 INTRODUCTION

This chapter presents the international legal framework that forms the basis of the analysis in the following chapters of this research. It examines the development of the relevant laws and the interaction between international civil aviation law and the law of the sea, and of these two bodies of law within public international law more broadly insofar as it is relevant to overflight. In introducing and examining the application of the relevant law, this chapter also confirms the scope of the research, complementing Chapter 1 in this role.

The chapter will first outline the relationship between territory and sovereignty in international civil aviation law. In doing so, it will examine the development of the relationship between sovereignty and overflight rights, from the Convention Relating to the Regulation of Aerial Navigation (1919) (Paris Convention)⁶⁶ to the Chicago Convention (Section 2.2.2), as well as the delimitation of territory for the purpose of defining the scope of a State's sovereignty, both in terms of its vertical and horizontal limits (Sections 2.2.3 and 2.2.4).

Section 2.3 will then set out the legal framework governing the exchange of overflight rights between States in their national airspace. In international civil aviation law, the right of overflight is the right or privilege granted to a State for its aircraft to operate across the territory of the State making the grant, without landing, on a scheduled air service or non-scheduled flight.⁶⁷ The legal basis for overflight rights in national airspace differs depending on whether the flight is part of a scheduled service or is non-scheduled, whether the aircraft is manned or unmanned, and whether it is a State aircraft or a civil aircraft.

Article 6 of the Chicago Convention is the natural starting point in establishing the legal framework for the exchange of overflight rights in sovereign territory: it is pursuant to this provision that the exchange of these rights is made separately amongst States for scheduled international services. Most States exchange such rights through the International Air Services Transit Agreement (1944) (Transit Agreement),⁶⁸ which was adopted at the same time as the Chicago Convention and which regulates

⁶⁶ Convention relating to the Regulation of Aerial Navigation (Paris, 13 Oct. 1919) 11 L.N.T.S. 173, *entered into force* 31 May 1920 ('Paris Convention').

⁶⁷ Scheduled services and non-scheduled flights are discussed in Section 2.3.3.

⁶⁸ International Air Services Transit Agreement (Chicago, 7 Dec. 1944) 84 U.N.T.S. 389, *entered into force* 30 Jan. 1945 ('Transit Agreement').

the multilateral exchange of the right of overflight and of technical stop-overs. A great majority of flights falling under the Chicago Convention today are scheduled services conducted by manned aircraft and while non-scheduled flights have decreased in significance in recent decades,⁶⁹ unmanned aircraft, or pilotless aircraft as they are referred to in the Convention, are taking on an ever greater role in international civil aviation. This section of the chapter will address the distinction between scheduled services and non-scheduled flights, recognising the exchange of transit and traffic rights for non-scheduled flights under Article 5 of the Chicago Convention. It will then explain why, in accordance with Article 8, there is a necessity for the exchange of overflight rights to be made separately amongst States for pilotless aircraft, regardless of whether the flight is scheduled or non-scheduled.

As a terminological side note, Article 96(a) of the Chicago Convention defines ‘air services’ as ‘any *scheduled* service performed by aircraft for the public transport of passengers, mail or cargo’. For this reason, the term ‘services’ will be used throughout this study to encompass both scheduled and non-scheduled services while the term ‘air services’ will be restricted to scheduled services. Further to this, non-scheduled flights include both commercial and non-commercial flights. In this respect, the term ‘non-scheduled flight’ will be used to refer to non-scheduled flights generally, while the term ‘services’ will only be used in relation to non-scheduled flights when referring specifically to those that are commercial.

Section 2.4, still focusing on national airspace, will examine the grant of overflight rights in relation to the operation of State aircraft, which falls outside the scope of international civil aviation law. This part will begin by outlining the development of the distinction between civil aircraft and State aircraft, from the Paris Convention to the Chicago Convention, and then consider in more detail the definition under Article 3(b) of the Chicago Convention. Overflight rights over sovereign territory for State aircraft are generally negotiated bilaterally at a diplomatic level for individual flights.⁷⁰

69 Section 2.3.3.

70 See for example, US Department of State, ‘Diplomatic Aircraft Clearance Procedures for Foreign State Aircraft to Operate in United States National Airspace’, available at <www.state.gov/diplomatic-aircraft-clearance-procedures-for-foreign-state-aircraft-to-operate-in-united-states-national-airspace/> accessed 1 August 2020; Australian Government, Department of Foreign Affairs and Trade, ‘Diplomatic Clearances: Aircraft and Ships’, available at <dfat.gov.au/about-us/foreign-embassies/protocol/Pages/diplomatic-clearances-aircraft-and-ships> accessed 5 January 2019; Government of Canada, ‘Global Affairs Canada: State, Military or Scientific Overflight Authorization’, available at <www.international.gc.ca/protocol-protocole/policies-politiques/overflight_clearance-autorisation_survol.aspx?lang=eng> accessed 1 August 2020; Switzerland, Federal Office for Civil Aviation (FOCA), ‘Diplomatic Clearances’, available at <www.bazl.admin.ch/diplomaticclearances> accessed 1 August 2020. See Section 2.4.4 for further discussion on diplomatic clearances.

In international airspace there is no distinction made between State aircraft and civil aircraft for the purpose of freedom of overflight. The distinction is relevant though because, as will be seen throughout this research, coastal State actions in attempting to restrict freedom of overflight are predominantly focused on State aircraft and, more accurately, on military aircraft.

Section 2.6 will address a State's right to revoke or suspend overflight flights in its territory and to establish prohibited or restricted areas, as well as danger areas, which may be established in national and international airspace. It will also examine whether a State may, in certain circumstances, have an obligation to close its airspace. Finally, this section will consider the closure of national airspace through legal mechanisms outside international civil aviation law, including by way of a UN Security Council resolution and in the form of a countermeasure.

Section 2.7 sets out the foundation of freedom of overflight in international airspace, which is expressly provided under UNCLOS and which flows from the freedom of the high seas. With reference to Chapter 1, freedom of the high seas means that no State can claim sovereignty over any part of those seas and that all States have the right to enjoy them, including freedom of navigation and the related freedom of overflight.⁷¹ The seas are however, at the same time, 'an object of the law of nations', a state without which 'the consequence would be a condition of lawlessness and anarchy on the open sea'.⁷² Accordingly, whilst freedom of overflight means that no grant of overflight is required to operate in international airspace, it does not correspond to the operation of aircraft through international airspace without regulation. This part will establish the limited application of international civil aviation law to international airspace through Article 12 of the Chicago Convention and the related annexes. Annex 11, governing air traffic services (ATS), will be examined in further detail in Chapter 4 in relation to the rights of a coastal State in its FIR.⁷³ This section furthermore introduces the EEZ, the continental shelf and the contiguous zone, all zones recognised under UNCLOS which are located in international waters and therefore over which freedom of overflight exists. Each of these zones grants certain rights to the coastal State. These rights will be outlined in this part as a basis for the chapters to follow which will critically assess the interaction between the rights of the coastal State and the right to freedom of overflight.

71 Under UNCLOS, the term 'navigation' applies to vessels, while 'overflight' is used with respect to aircraft.

72 Robert Jennings and Arthur Watts, 'The Freedom of the High Seas' in Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume 1 Peace* (9th edn, OUP 2008) 726.

73 See Section 4.2.1.1 for the definition of ATS and the relationship between it and other aspects of airspace management.

Two additional maritime areas codified under UNCLOS with implications for overflight are archipelagic waters and international straits, with their corresponding archipelagic sea lanes passage and transit passage. These areas are anomalies in that national airspace exists over them, but the coastal State does not have the same rights in respect to overflight as it does in other national airspace. They are considered in the context of this research as maritime areas that, although constituting national airspace, involve rights regarding overflight that are in some ways akin to those in international airspace. In this context, archipelagic sea lanes passage and transit lane passage are introduced and analysed separately in Chapter 5.

At the conclusion of this chapter, the legal basis of the right of overflight in both national airspace and international airspace will be clear. In relation to the latter, the interaction between international civil aviation law and the law of the sea, as they apply to the maritime areas beyond the territorial seas, will be evident. Coastal States rely on their rights and responsibilities in these maritime areas to justify – legitimately or illegitimately, as will be examined in subsequent chapters – the exercise of jurisdiction over aircraft in international airspace within them. Thus, it is the second part of the chapter addressing international airspace that will be referred back to frequently throughout the research in examining the legitimacy of coastal State actions in restricting and prohibiting overflight.

2.2 DEFINING 'SOVEREIGNTY' AND 'TERRITORY'

2.2.1 Sovereignty and territory under general public international law

The concept of territory is central to international civil aviation law as it provides the delimitation for the exercise of State sovereignty over airspace. As in public international law more broadly, the concepts of sovereignty and territory are integrally linked. A territorial unit forming a State necessarily involves the exercise of sovereignty by that State over the territory, a key principle of public international law as recognised in Article 2(1) of the Charter of the United Nations (UN Charter).⁷⁴ On the other hand, territory that does not constitute a State or part of a State is not subject to the sovereignty of any State.⁷⁵

⁷⁴ Charter of the United Nations (San Francisco, 26 Jun. 1945) 1 U.N.T.S. 16, *entered into force* 24 Oct. 1945 ('UN Charter').

⁷⁵ Although a State may have sovereign rights or jurisdiction in the territory (see Section 2.7).

In the words of Crawford, '[t]he term 'sovereignty' has a long and troubled history, and a variety of meanings',⁷⁶ but it is generally understood as 'the right to exercise therein, to the exclusion of any other State, the function of a State'.⁷⁷ The concept of sovereignty has its basis in the political philosophy of, influentially but among others, Bodin, Hobbes, Locke and Rousseau.⁷⁸ The Peace of Westphalia (1648) is also frequently cited in relation to the emergence of sovereignty as we understand it today,⁷⁹ although the role of this event in forming the modern concept of sovereignty is increasingly downplayed.⁸⁰

A defined territory is one of the four necessary elements of a State, as provided in the Montevideo Convention of 1933, along with a permanent population, government, and the capacity to enter into relations with other States.⁸¹ As described above, territory that forms a State is under the sovereignty of that State, where sovereignty 'is not... a criterion of statehood... [it] is an attribute of States, not a precondition'.⁸² Under international

76 James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 32.

77 *Island of Palmas (US v. Netherlands)* (1928) II R.I.A.A. 829, 838.

78 JL Brierly, *The Law of Nations* (6th edn, OUP 1963) 7-16; Luke Glanville, *Sovereignty and Responsibility to Protest: A New History* (The University of Chicago Press 2014) 61-68; for Bodin and Hobbes specifically see, William A Dunning, 'Jean Bodin on Sovereignty' (1896) The Academy of Political Science 82.

79 See, for example, Brierly (n 78) 5-6: 'The Peace of Westphalia, which brought to an end in 1648 the great Thirty Years War of Religion, marked the acceptance of the new political order in Europe. This new order of things gave the death-blow to the lingering notion that Christendom, in spite of all its quarrels, was in some sense still a unity, and there was a danger that the relations between states would be not only uncontrolled in fact, as they had often been before, but henceforth uninspired even by any unifying ideal. The modern state, in contrast with the medieval, seemed likely to become the final goal of unity...'.

80 Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55(2) International Organization 251, 252 and 281; Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Martinus Nijhoff 2004) 70.

81 Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo, 26 Dec. 1933) 165 L.N.T.S. 19, *entered into force* 26 Dec. 1934, Article 1(b), together with Articles 1(a), (c) and (d) ('Montevideo Convention'). The Montevideo Convention is a restatement of customary international law and therefore applies to the international community as a whole rather than just to its signatory States. However, '[d]espite its wide acceptance in the practice of states (far beyond its sixteen parties), it [the Montevideo Convention] has come under scholarly criticism, especially the fourth element ('capacity to enter into relations with other states'). Many scholars do not include that condition among the elements of statehood, considering such capacity to be a consequence, not a condition, of statehood, or holding that the essence of that capacity is independence' (Aristoteles Constantinides, 'Statehood and Recognition' in André Nollkaemper, August Reinisch, Ralph Janik, Florentina Simlinger (eds), *International Law in Domestic Courts: A Casebook* (OUP 2018) 32).

82 Crawford, *The Creation of States* (n 76) 32.

law, territory generally falls within one of three categories: territory that is under the sovereignty of a State or territory that does not belong to a State, being either *terra nullius* or *res communis*.⁸³ *Res communis*, as territory that is incapable of being placed under sovereignty,⁸⁴ is often understood

83 The classification of certain territory under these categories has been, and in many cases continues to be, ambiguous under the law, not just because territory is disputed, as to which see this note below, but also because the application of the legal concepts themselves are unclear. This is the case, for example, regarding the application of *res communis* to the high seas, as will be discussed later in this section. Regarding *terra nullius* see, for example, the case of *Mabo v Queensland (No 1)* [1988] HCA 69, (1988) 166 CLR 186, in which the High Court of Australia overturned the classification of the Murray Islands having been *terra nullius* at the time of colonisation, over 100 years later. It ruled that the Merriam people held, and continue to hold, native title over the territory.

Furthermore, not all territory falls within one of these categories. Consider, for example, airspace over occupied or contested territory, such as that over Northern Cyprus (Mark Franklin and Sarah Porter, 'Sovereignty over Airspace and the Chicago Convention: Northern Cyprus' (2010) 35(1) A&SL 63; Alexis Heraclides, *Greek-Turkish Conflict in the Aegean* (Palgrave MacMillan Limited 2010) 193-98; Nicholas Grief, 'The Legal Principles Governing the Control of National Airspace and Flight Information Regions and their Application to the Eastern Mediterranean' (European Rim Policy and Investment Council, 2009)); and, the Autonomous Republic of Crimea (ICAO WP/245, *ATM Aspects within Simferopol and Dnipropetrovsk FIRs*, Presented by Ukraine at the 13th Air Navigation Conference, Montreal (28 September 2018)); Consider also, the airspace over Antarctica. Antarctica is partly *terra nullius* but over its other territory, seven States – Argentina, Australia, Chile, France, New Zealand, Norway and the UK - have made territorial claims. There is a 'thin legal basis to fly over Antarctica' provided by the Antarctic Treaty (Peter Haanappel, 'Aerial Sovereignty: From Paris 1919, Through Chicago 1944, to Today' in Pablo Mendes de Leon and Niall Buijsing (eds), *Behind and Beyond the Chicago Convention* (Wolters Kluwer 2019) 28, referring to Article 7(4) of the Antarctic Treaty (Washington, 1 Dec. 1959) 402 U.N.T.S. 71, entered into force 23 June 1961: 'Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers'); Finally, the UN Charter recognises non-self-governing territories as 'territories whose people have not yet attained a full measure of self-government' (Article 37). There are seventeen of these States recognised by the UN today (United Nations, 'Non-Self-Governing Territories', available at <www.un.org/dppa/decolonization/en/nsgt> accessed 18 June 2019) including, for instance, Western Sahara: Morocco claims sovereignty over the territory, which no other State recognises. The ICJ has ruled that Morocco's claim is not valid and that the people of the territory are entitled to form an independent State (*Western Sahara*, Advisory Opinion, I.C.J. Rep. 1975 (Oct. 16), p. 12, p. 68 para. 162). A referendum determining the will of the people on this question is yet to be held and, in the meantime, Western Sahara is classified as a non-self-governing territory with the liberation front for the people of Western Sahara, Polisario, as the legitimate international legal representative of its population.

84 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 237-38.

to apply the high seas and outer space,⁸⁵ while the only remaining example of *terra nullius* – as ‘a territory belonging to no-one’⁸⁶ – is Marie Byrd Land, unclaimed territory lying in the west of Antarctica between territory claimed by New Zealand and Chile.⁸⁷ Whilst the high seas are referred to as *res communis*, this is not without objection. As discussed by O’Connell, Grotius identified that the terms *res nullius*, *res communis* and *res publica* were all used to refer to the seas,⁸⁸ with each having since been subject to criticism, as well confusion over the precise implications of their application to the high seas.⁸⁹

-
- 85 For the high seas, see: UNCLOS, Article 89; Crawford, *Brownlie’s Principles* (n 84) 237; Malcolm Shaw, *International Law* (6th edn, CUP 2008) 492; For outer space, see: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (London, Moscow, Washington, 27 Jan. 1967) 610 U.N.T.S. 8843, *entered into force* 10 Oct. 1967, Article 2 ('Outer Space Treaty'); Stephan Hobe, Bernhard Schmidt-Tedd, Kai-Uwe Schrogel and Gérardine Meishan Goh (eds), *Cologne Commentary on Space Law: Vol I* (Carl Heymanns Verlag 2009) 27. The law of the sea and outer space law also recognise the concept of the ‘common heritage of mankind’ applying to the sea bed (UNCLOS, Article 136) and the Moon (Agreement governing the Activities of States on the Moon and Other Celestial Bodies (New York, 5 Dec. 1979) 1363 U.N.T.S. 3, *entered into force* 11 Jul. 1985, Article 11 ('Moon Agreement')); The principle of the common heritage of mankind is not clearly defined under international law, although it is understood to consist of four elements: prohibition on sovereign claims, use for peaceful purposes, sharing in management, and distribution of benefits (Edward Guntrip, ‘The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?’ (2003) 4(2) *Melb J Int’l L* 376, 393; Cheryl Chan, Fatima Noor Khan and Sajida Awan, ‘Bigger Issues in a Smaller World’ in Blake Hudson, Jonathan Rosenbloom and Dan Cole (eds), *Routledge Handbook of the Study of the Commons* (Routledge 2019) 403).
- 86 *Western Sahara*, Advisory Opinion, I.C.J. Rep. 1975 (Oct. 16), p. 12, p. 39 para. 79; See also, *Legal Status of Eastern Greenland*, Judgment (1933) P.C.I.J. Series A/B, No. 53, p. 63.
- 87 Robin Churchill, ‘The Piracy Provisions of the UN Convention on the Law of the Sea – Fit for Purpose?’ in Panos Kourakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) 20, the author at the same time recognising that the validity of the claims to sovereignty over the other territory of Antarctica is debated (see above n 83).
- 88 Grotius wrote, ‘[a]s the seas is commonly described in (Roman) law as *res nullius*, as common property, or as public property according to the law of nations...’ (Hugo Grotius, *Mare Liberum* (Lodewijk Elzevir 1609) 13). Regarding the concept of *res publica*, or public property, ‘[i]t is unclear to what extent the concept of the high seas as public domain coincides with its characterization as *res nullius* or *res communis* or with neither’ (DP O’Connell, *The International Law of the Sea – Vol II* (OUP 1982) 794).
- 89 O’Connell (n 88) 792–94.

2.2.2 Sovereignty as the foundation of international civil aviation law

2.2.2.1 Sovereignty over national airspace under the Chicago Convention

The principle of sovereignty sits at the heart of international civil aviation law and ‘airspace sovereignty over national territory... is well recognised by States as part of international customary law’.⁹⁰ The airspace and more specifically the territorial classification of airspace, determines the physical extent of the exercise of a State’s sovereignty. Reflecting their paramount position as the basis of international civil aviation law, the Chicago Convention deals with sovereignty and territory in Articles 1 and 2, respectively. Article 1 is declaratory of the above-mentioned customary law, recognising that ‘...every State has complete and exclusive sovereignty over the airspace above its territory’. In order to define the physical space over which a State has sovereignty as referred to in Article 1, it is necessary to establish both the horizontal and vertical limits; that is, what ‘territory’ encompasses and then to what altitude above the territory the ‘airspace’ extends. The first of these will be termed ‘horizontal territory’ while the second will be termed ‘vertical territory’. The horizontal and vertical limits of a State’s airspace will be addressed in Sections 2.2.3 and 2.2.4, respectively.

Article 2 is the starting point for establishing what is meant by ‘territory’ in Article 1:

‘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’ (emphasis added).

Whilst the phrase ‘suzerainty, protection or mandate’ represented the relationships between certain States and other entities at the time of the drafting of the Chicago Convention, it is now ‘a vestige of colonial times’ which ‘has

90 Bin Cheng, *The Law of International Air Transport* (Stevens & Sons Ltd 1962) 120; Eugène Pépin, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session* (A/CONF.13/4) – Extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents), United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958, 65.

no legal relevance at present' and will therefore not be further considered as part of this research.⁹¹

Although the concept of sovereignty is not static or even capable of a universally-accepted definition at a single point in time, such debate is outside the scope of this research and the areas 'under the sovereignty of a State' is taken to be that consisting of a State accepted as such, consistent with the criteria in Article 1 of the Montevideo Convention.

As identified in Section 1.1 and as will be revisited at various stages throughout this study, the law of the sea has developed so that the maritime areas under the sovereignty of maritime States has increased over time. The interpretation of 'territory' under Articles 1 and 2 of the Chicago Convention has shifted as a result. This method of interpretation involves 'systemic integration',⁹² or 'the process... whereby international obligations are interpreted by reference to their normative environment ('system')'.⁹³ Systemic integration is recognised under Article 30(3)(c) of the Vienna Convention on the Law of Treaties which states that, as part of the general rule of interpretation, 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account. It is presented as a remedial measure against the fragmentation of international law.⁹⁴ In relation to the changes to the concept of territory that have resulted from developments in the law of the sea, many of these have been recognised

91 Michael Milde, *International Air Law and ICAO* (3rd edn, Eleven International Publishing 2016) 37. The term 'mandate' is used in the UN today with a number of different meanings, all of which are to be distinguished from the context in which it is used in the Chicago Convention, referring to the League of Nations' reference of 'the system of international supervision over colonial territories' (United Nations, 'UN Documentation: Researching UN Mandates', available at <research.un.org/en/docs/mandates#s-lg-box-2829995> accessed 5 May 2020). One of the ways in which it is used by the UN is in reference to the establishment of a peace-keeping mission, such as the mandate of the United Nations Interim Administration Mission in Kosovo (UNMIK), which established and enumerated the responsibilities of that mission (UNSC 1244 (10 June 1999) UN Doc S/RES/1244). In carrying out its responsibilities, UNMIK entered into the Multilateral Agreement on the establishment of a European Common Aviation Area, as an 'additional Associated Party' to the agreement (Multilateral Agreement on the Establishment of the European Common Aviation Area [2006] OJ L285/3). Despite the distinction between the UNMIK mandate and the term as it was used under the League of Nations, UNMIK has been described in colonial terms, as having 'assumed almost complete governing authority, essentially designating the Balkan province a UN protectorate' and exercising 'neocolonial powers as a third-party sovereign authority' (Alexander Cooley and Hendrik Spruyt, *Contracting States: Sovereign Transfers in International Relations* (Princeton University Press 2009) 200).

92 Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) ICLQ 279, 280; 'Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', finalised by Martti Koskeniemi (ILC 58th Session, 13 April 2006) 208.

93 ILC 'Report of the Study Group on Fragmentation of International Law' (n 92) 208.

94 Adamanita Rachovista, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 ICLQ 557, 559.

as customary international law.⁹⁵ This is important because the rules that fall within the scope of Article 30(3)(c) are only those ‘applicable in the relations between the parties’. The State parties to the Chicago Convention and UNCLOS do not align – notably, there are more State parties to the Chicago Convention – and so the capacity for its rules to bind these non-State parties rests on their recognition as customary international law.⁹⁶ The use of customary international law as a tool for interpretation in systemic integration is further discussed in Section 3.3.4.5.

This leaves the question of whether a rule under UNCLOS that is not customary international law can ever be used for the interpretation of a provision under the Chicago Convention. The ILC has examined this matter and determined that the best solution ‘is to permit reference to another treaty provided that the *parties in dispute* are also parties to that other treaty’.⁹⁷ Recognising that this allows for divergence in the interpretation of a treaty, the report acknowledges that this a fundamental element in the functioning of treaties in any case, as is evident in the various reservations that attach to them.⁹⁸ In the alternative, the absurd situation would result where a treaty that is widely ratified, such as the Chicago Convention, would increasingly be isolated from the wider body of international law, as any treaty with fewer State parties would be unable to be taken into account in interpreting the Chicago Convention, at least insofar as the rules were not codification of customary international law.⁹⁹ As mentioned in Section 1.1, and as will be further discussed in Section 5.4, the concept of archipelagic States was codified in UNCLOS and has led to an extension of the area that comes under the sovereignty of such State.

The provisions under UNCLOS relating to archipelagic States built on maritime claims by States, such as Indonesia and the Philippines, that pre-dated the convention¹⁰⁰ and State practice has broadly been consistent with the regime under UNCLOS since its adoption.¹⁰¹ This has led to debate that the archipelagic State regime and the related archipelagic sea lanes passage are customary international law¹⁰² and indeed, the United States, as a non-State party to UNCLOS, has declared archipelagic sea lanes passage to be customary international law.¹⁰³ As will be discussed further in Sections 5.4.3

⁹⁵ For the extension of the territorial sea from 3nm to 12nm and the drawing of straight baselines, see Section 2.2.3.1.

⁹⁶ See also, Section 2.7.1.

⁹⁷ ILC ‘Report of the Study Group on Fragmentation of International Law’ (n 92) 238.

⁹⁸ *ibid.*

⁹⁹ *ibid* 237.

¹⁰⁰ Alina Miron, ‘The Archipelagic Status Reconsidered in Light of the *South China Sea* and *Düzgit Integrity Awards*’ (2018) 15(3) Indonesian Journal of International Law 306, 308.

¹⁰¹ Carlos Jiménez Piernas, ‘Archipelagic Waters’ (Max Planck Encyclopedia of Public International Law 2009) 29. State practice is arguably too varied to establish customary international law, as to which see Sections 5.4.3 and 5.4.4.

¹⁰² Miron (n 100) 309–11.

¹⁰³ Hugo Caminos and Vincent P Cogliati-Bantz, *The Legal Regime of Straits* (CUP 2014) 472.

and 5.4.4, despite broad consistency with the UNCLOS regime, there are significant variations to State practice that are restrictive in finding a status of customary international law and rather, the regime for archipelagic States is more likely ‘based on interaction between custom and treaty’.¹⁰⁴ Despite this, ICAO stipulated upon the adoption of UNCLOS that ‘territory’ under the Chicago Convention now includes archipelagic waters.¹⁰⁵ Considering the foregoing discussion on the scope of Article 31(3)(c), it is difficult to see how non-State parties to UNCLOS would be bound by this interpretation of ‘territory’ under the Chicago Convention unless, like the US, they have specifically declared their intention to be bound by the provisions, or until the provisions are formally accepted as customary international law. At the same time, in the absence of express and ongoing opposition to it, ICAO’s position on the role of UNCLOS in interpreting the Chicago Convention in this instance may ultimately contribute to evidence of the customary international law status of the archipelagic State regime under UNCLOS, at least in part.

2.2.2.2 Article 1 of the Paris Convention (1919) to the Chicago Convention (1944)

The principle of complete and exclusive sovereignty over airspace for all States has been the foundation of international civil aviation law since the beginning: it was codified in the first multilateral agreement governing civil aviation, the Paris Convention, signed in 1919. Article 1 of the Paris Convention reads:

[t]he High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory’.

No objections were offered to the recognition of the principle in the Paris Convention during its drafting process, and no further discussion was recorded at the Chicago Conference regarding the principle as it appears in Article 1 of the Chicago Convention.¹⁰⁶ Despite this, the principle of sovereignty over airspace had been a point of contention between States in the lead-up to the Paris Convention, from the early 1900s. At this time, there were four main schools of thought on the matter.¹⁰⁷ One of these, not surprisingly, advocated exclusive sovereignty while, in direct opposition, another was a proponent of absolute freedom of air navigation. In between the two extremes was the belief that sovereignty should be accepted but

104 Jiménez Piernas (n 101) 29.

105 See Section 5.4.2.

106 Milde, *International Air Law and ICAO* (n 91) 36.

107 Peter H Sands, Jorge de Sousa Freitas and Geoffrey N Pratt, ‘An Historical Survey of International Air Law before the Second World War’ (1960–61) 7(1) McGill LJ 24, 28. The authors address these views as those of ‘publicists of international air law’. Refer to the source for the names of the most prominent publicists in each group.

with a vertical limitation, and finally, that sovereignty should be accepted but with functional limitations. The last of these – sovereignty with functional limitations – appeared to be the most dominant although opinion ‘widely differed on the question of the degree of limitation’, from innocent passage through national airspace to limitations by way of international agreement.¹⁰⁸ World War I or, more so the paramount importance of national security during this time, led to States¹⁰⁹ prohibiting the flight of foreign aircraft over their territories, which resulted in the creation of State practice that ‘evidenced a recognition of the principle of State sovereignty in the air’.¹¹⁰ It was this practice that came to be reflected in Article 1 of the Paris Convention and later under the Chicago Convention. In reaching the decision, States were required to consider whether the airspace above their land is part of their territory or whether, like the high seas, it is *res communis*.¹¹¹ The final decision to regulate international civil aviation with the sovereignty of States as the baseline principle ultimately quashed the voices of those who willed a law of the sea inspired freedom of the air; in the words of Havel and Sanchez, ‘there would be no global commercial airspace’.¹¹²

The Paris Convention provided, alongside the principle of sovereignty, freedoms in relation to overflight that did not withstand the Chicago negotiations. Specifically, under Article 2 of the Paris Convention, each State to the treaty was ‘in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States’. This appears to be a functional limitation to sovereignty but it was in fact ‘granted as a privilege... not conceded as a natural right’, and was therefore consistent with absolute sovereignty.¹¹³ With this in mind, the corresponding Article 15 was somewhat obscurely phrased, providing that ‘[e]very aircraft of a contracting State has the *right* to cross the air space of another State without landing’ (emphasis added).

¹⁰⁸ ibid.

¹⁰⁹ ibid. Including the Netherlands, Switzerland, Denmark, Sweden, Norway, Greece, Spain, Italy Romania, Bulgaria and China.

¹¹⁰ ibid 33.

¹¹¹ Ronald I C Bartsch, *Aviation Law in Australia* (4th edn, Thomson Reuters 2013) 6. Although freedom of the high seas was not codified until UNCLOS in 1982, it existed as customary law well before: ‘The oceans had long been subject to the freedom of the seas doctrine - a principle put forth in the seventeenth century essentially limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation’s coastline. The remainder of the seas was proclaimed to be free to all and belonging to none’ (United Nations Division for Ocean Affairs and the Law of the Sea, ‘The United Nations Convention on the Law of the Sea: A Historical Perspective’ (Paper prepared for the International Year of the Ocean, 1998), available at <www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm> accessed 21 August 2018). See Section 2.7.1 for further discussion on the customary status of freedom of the high seas.

¹¹² Brian Havel and Gabriel Sanchez, *The Principles and Practice of International Aviation Law* (CUP 2014) 38.

¹¹³ Sands, de Sousa Freitas and Pratt (n 107) 33.

2.2.2.3 The implications of sovereignty over national airspace

National security was a central consideration again during the drafting of the Chicago Convention¹¹⁴ but over the intervening decades from the Paris Convention to the Chicago Conference, the development of the commercial aviation industry meant that the ‘economic protection of the national air transport industry... became the dominant factor’ in the negotiations.¹¹⁵ This shift is reflected in the Chicago Convention under which *inter alia* the right of overflight has been restricted to non-scheduled flights under Article 5 and the more controversial matter of the right of overflight for scheduled air services – the first freedom of the air – is omitted, to be agreed upon separately by States.¹¹⁶

At the Chicago Conference, the United Kingdom (UK) was of the opinion that certain economic aspects¹¹⁷ of air transport should be tightly regulated at the international level in order to allow States to protect their national carriers.¹¹⁸ That is, States should impose economic restrictions on the operation of international services by foreign carriers to and from points in the first State’s territory. This view was met with direct opposition by, most prominently, the US, who at the time of the Chicago Conference had a strong international air transport network and civil aircraft fleet relative to the European States present, including the UK.¹¹⁹ Other States fell on either side of the debate, but not necessarily for the same reasons. New Zealand¹²⁰ and Australia,¹²¹ supported by France and Afghanistan,¹²² advocated for the internationalisation of the ownership and operation of air services. This position was incompatible with the UK’s restrictive approach and placed these States together with the US in their opposition to the UK approach, although the US was also unequivocally opposed to the international ownership of carriers.¹²³ On the other side of the debate, Canada supported

114 The Chicago Convention was, like the Paris Convention, negotiated in the wake of a world war and, particularly in World War II, the use of aircraft had a devastating impact.

115 Peter H Sands, James T Lyon and Geoffrey N Pratt, ‘An Historical Survey of International Air Law Since 1944’ (1960-61) 7(2) McGill LJ 125, 126.

116 The distinction between scheduled air services and non-scheduled flights and the exchange of overflight rights in respect to each will be discussed in Section 2.3.3.

117 Namely, routes, rates and frequencies (Proceedings to the Chicago Convention: Vol I, Pt I ‘Verbatim Minutes of Second Plenary Session, November 2’ (Document 42) 65); Bin Cheng, ‘The Right to Fly’ (1959) 42 Transactions of the Grotius Society: Problems of Public and Private International Law 99, 109.

118 Peter Haanappel, ‘Bilateral Air Transport Agreements – 1913-1980’ (1980) 5(2) Md J Int’l L 241, 243.

119 *ibid*; Pablo Mendes de Leon, *Introduction to Air Law* (10th edn, Wolters Kluwer 2017) 9-10.

120 Proceedings to the Chicago Convention: Vol I, Pt I ‘Verbatim Minutes of Second Plenary Session, November 2’ (Document 42) 79.

121 *ibid* 83.

122 Proceedings to the Chicago Convention: Vol I, Pt II ‘Verbatim Minutes of Joint Plenary Meeting of Committees I, III, and IV, November 22’ (Document 372) 457.

123 Proceedings to the Chicago Convention: Vol I, Pt II ‘Verbatim Minutes of Plenary Session, November 8’ (Document 117) 545-546; Cheng, ‘The Right to Fly’ (n 117) 109.

the UK's position of international control of certain economic aspects of air transport.¹²⁴ The US ultimately received insufficient support from other States for its pro-market position to succeed,¹²⁵ and international air transport has, as a result, traditionally been highly regulated in the economic sphere through a system of restrictive bilateral air services agreements (ASAs). In essence, complete and exclusive sovereignty of airspace led to national airspace being '*de iure* closed for foreign aircraft and their operators'.¹²⁶

In addition to national security and economic interests, State sovereignty is also at the heart of ensuring the safety of international civil aviation. Each State has a responsibility for safety oversight based on aircraft nationality and territorial jurisdiction, both of which stem from sovereignty.¹²⁷ This entails both rights and obligations of a State. States are required to ensure that international civil aviation is operated consistently with the international minimum Standards set out in the annexes to the Chicago Convention and that the aircraft bearing their nationality mark meet these Standards and comply with the laws and regulations of the States over whose territory they operate.¹²⁸ States have the right to exclude aircraft from their territory in the case that they act inconsistently with those laws and regulations, by revoking a carrier's operating permit.¹²⁹ At the same time, the fact that States are required to implement internationally agreed Standards with the aim of achieving international uniformity in the regulation of the safety of international civil aviation, is also a restriction

124 Proceedings to the Chicago Convention (Document 42) (n 120) 70-71.

125 Havel and Sanchez (n 112) 38. A compromise of sorts was reached by the States at the Chicago Conference in that it was decided that 'the first Freedom and the second Freedom be unconditionally embodied in a separate agreement', which went on to be the Transit Agreement (Proceedings to the Chicago Convention: Vol I, Pt II 'Minutes of Meeting of the Joint Sub-Committee of Committees I, III, and IV, December 2' (Document 463) 514).

126 Mendes de Leon (n 119) 10.

127 Jiefang Huang, *Aviation Safety and ICAO* (Kluwer Law International 2009) 31.

128 This is provided in ASAs between States, including in the Transit Agreement (see Section 2.6.1). These rights and obligations stem from various provisions in the Chicago Convention. Article 11 reads, 'the laws and regulations of a contracting State relating... to the operation and navigation of such aircraft while within its territory... shall be complied with by such aircraft... while within the territory of that State. Regarding specifically the Rules of the Air, '[e]ach contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force' (Article 12). Further articles addressing matters such as the provision of air navigation facilities (Article 28) and interception under Article 3 *bis*, provide States with rights and obligations aimed at helping to ensure the safety of international civil aviation over their territories.

129 This is provided in ASAs between States, including in the Transit Agreement (see Section 2.6.1).

on sovereignty.¹³⁰ As Huang explains: '[i]t follows from the principle of sovereignty that a State is free to enact aviation law in whatever form it prefers, provided that the enactment is compatible with its international obligations under the Chicago Convention and other applicable rules of international law' (emphasis added).¹³¹ The extent to which this applies depends on the degree to which a State views itself to be bound by Standards adopted in the annexes to the Chicago Convention which are, as discussed in Section 2.3.2, generally understood to be binding.

The concept of sovereignty over airspace is firmly entrenched in international civil aviation law but it is by no means static. In more recent years the third school of thought mentioned above – sovereignty with a vertical limitation – has been recognised by the space law community as a solution to the uncertainty of the physical scope of the legal regimes applying to airspace and outer space.¹³² In the Chicago Convention's silence on the matter, international space law may in the not-too-distant future require an implied vertical limitation to the interpretation of 'complete and exclusive sovereignty' under Article 1 of the Chicago Convention, as will be addressed in Section 2.2.4.

2.2.3 Horizontal delimitation of airspace

2.2.3.1 *The boundaries of the territorial sea*

Adjacent to those States that happen to be coastal States, their territorial sea is defined under Article 3 of UNCLOS, which provides that a territorial sea may extend to 12nm from the baseline of a State, where the baseline is generally the low-water line along the coast.¹³³ Within the bounds of this provision, States have the right to determine the extent of their territorial sea under their domestic laws.

Prior to UNCLOS the breadth of the territorial sea was debated and as a corollary, the horizontal limits of national airspace under the Chicago Convention were also uncertain. UNCLOS entered into force 37 years after the Chicago Convention and, although from the early 20th century until UNCLOS the breadth of territorial sea was recognised in most parts of the world under customary international law as 3nm, States had begun to

130 Huang (n 127) 62.

131 *ibid* 42.

132 Committee on the Peaceful Uses of Outer Space, Promoting the discussion of the matters relating to the definition and delimitation of outer space with a view to elaborating a common position of States members of the Committee on the Peaceful Uses of Outer Space: Working paper prepared by the Chair of the Working Group on the Definition and Delimitation of Outer Space of the Legal Subcommittee, 57th Session A/AC.105/C.2/L.302 (Vienna, 9-20 April 2018) 3.

133 UNCLOS, Articles 3 and 5. See the paragraph below on the determination of the baseline as to the inclusion here of the qualification 'generally'.

make increasingly expansive claims from the mid-20th century.¹³⁴ UNCLOS confirmed the 12nm territorial sea limit and this is now recognised as customary.¹³⁵ Most States declare their territorial sea to extend this distance from their baselines, including States that are not party to UNCLOS such as the US. However some States – Jordan and Greece – claim less, and others – Benin, Ecuador, El Salvador, Liberia, Peru, and Somalia – claim up to 200nm.¹³⁶ Claims extending beyond 12nm remain controversial and ‘call for careful assessment’,¹³⁷ but they are overwhelmingly in the minority and, leaving aside these few outlying States, the airspace over which a State is permitted to exercise its sovereignty in terms of the horizontal extent of its territory is clearly defined under international law.

The determination of the baseline, from which the territorial sea is measured, depends on the specific features of a coastline (see Figure 2.1). For example, in the *Anglo-Norwegian Fisheries Case*,¹³⁸ the ICJ declared that straight baselines, as opposed to baselines strictly following the curvature of the land, are legitimate depending on the circumstances. In this case, the decision was made on the basis that the section of Norway’s coastline in question contains deeply indented fjords, islands, islets, rocks and reefs. The ICJ’s decision on the drawing of straight baselines for the types of coast as considered in the *Anglo-Norwegian Fisheries Case* is recognised as customary and is codified in Article 7 UNCLOS.¹³⁹ UNCLOS sets out methods for determining the territorial baseline with consideration to features including but not limited to, reefs, deep indentations in the coastline or a fringe of islands off the coast, bays and ports.¹⁴⁰

¹³⁴ John Noyes, ‘The Territorial Sea and Contiguous Zone’ in Donald Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 93.

¹³⁵ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Rep. 2012 (Nov. 19) p. 624, p. 690.

¹³⁶ United Nations, ‘Table of Claims to Maritime Jurisdiction (as at 15 July 2011)’, available at <www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf> accessed 1 May 2018.

¹³⁷ Crawford, *Brownlie’s Principles* (n 84) 246.

¹³⁸ *Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Rep. 1951 (Dec. 18), p. 116.

¹³⁹ Crawford, *Brownlie’s Principles* (n 84) 244-45.

¹⁴⁰ UNCLOS, Arts 6, 7(1), 10 and 11, respectively. An Arbitral Tribunal of the Permanent Court of Arbitration (PCA) recently considered the legal status and delimitation of the Bay of Savudrija/Piran (as it is known in Croatia)/the Bay of Piran (as it is known in Slovenia), among other maritime delimitations, in the case of *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Signed on 4 November 2009 (Croatia v. Slovenia)*, P.C.A. Case No 2010-04, 29 June 2017. The Tribunal decided that the bay has the status of internal waters, divided between the States by a boundary line as determined by the Tribunal based on consideration of the *effectivités* invoked by the States, and that the bay is closed by a straight baseline from which Slovenia and Croatia’s territorial seas are measured (pp. 243-92 paras. 771-948 and pp. 370-71 VIII Dispositif, II A-C).

Baselines, and therefore the outermost limits of the territorial sea, can also be shifted seaward by permanent harbour works in accordance with Article 11 UNCLOS. Under this article, harbour works that 'form an integral part of the harbour system are regarded as forming part of the coast'. Furthermore, State practice indicates that human-induced extension of the natural coastline, that is, land reclamation, can extend the baseline where the reclaimed land is 'an integral part of the mainland or island'.¹⁴¹ This has occurred for instance, in the Netherlands where land has been reclaimed along the coastline for the purpose of extending the Port of Rotterdam.¹⁴² The implications of land reclamation for overflight will be addressed in Chapter 3.

To the landward side of the baseline sits a State's internal waters.¹⁴³ As part of the territory of a State the airspace above internal waters is *de facto* closed to the aircraft of other States under international civil aviation law, just as the airspace over other sovereign territory.

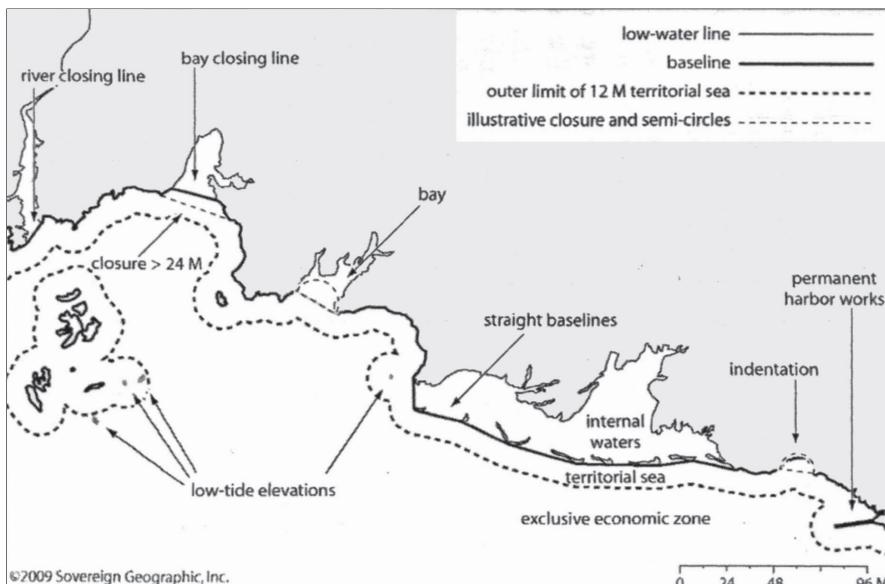


Figure 2.1: Depiction of a baseline calculated in consideration of various coastal features¹⁴⁴

¹⁴¹ Coalter G Lathrop, J Ashley Roach and Donald R Rothwell, 'Baselines under the International Law of the Sea: Reports of the International Law Association Committee on Baselines under the International Law of the Sea' (2018) 2(1-2) *The Law of the Sea* 1, 52-53.

¹⁴² *ibid.*

¹⁴³ UNCLOS, Article 8(1).

¹⁴⁴ Source: My Universities, 'Baselines', available at <myuniversities.wordpress.com/2013/10/24/baselines/> accessed 16 June 2018.

2.2.3.2 Overflight rights in territorial waters

Just as States have sovereignty over the airspace above their territorial waters,¹⁴⁵ so too do they have sovereignty over the territory beneath: the sea itself¹⁴⁶ and the bed and subsoil.¹⁴⁷ Despite this, the implications of State sovereignty differ for overflight and navigation in respect to the territorial sea.

Sovereignty under international civil aviation law has resulted in a situation where transit through, or any other use of a State's airspace, including that over its territorial seas, may only occur on the basis of permission from the State.¹⁴⁸ In contrast, under customary international law as recognised in Article 17 UNCLOS, ships have the right of innocent passage through another State's territorial sea. In other words, although the law of the sea recognises that the territorial sea of a State and the State's exercise of sovereignty over it extends from the subsoil up to and including the airspace, the privileges of other States differ depending on whether transit is on the sea or through airspace over the sea. Innocent passage is presumed to exist for the use of the sea but not, in accordance with international civil aviation law, for the use of its airspace.¹⁴⁹

2.2.4 Vertical delimitation of airspace

The vertical limit of a State's territory is less clearly defined or more specifically, there is no internationally agreed altitude at which a State's sovereignty over its airspace ends. This is important because, while States enjoy sovereignty over their airspace, it does not extend to outer space. The non-appropriation by States of outer space is one of the founding principles of space law and is provided in Article 2 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies ('Outer Space Treaty').¹⁵⁰ Article 2 reads:

'Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.

¹⁴⁵ As recognised under Articles 1 and 2 of the Chicago Convention, and also by Article 2(2) UNCLOS. Article 2(2) UNCLOS in this sense refers not just to the territorial sea but also to internal waters and archipelagic waters.

¹⁴⁶ UNCLOS, Article 2(1).

¹⁴⁷ *ibid* Article 2(2).

¹⁴⁸ Chicago Convention, Article 1 read together with Articles 3(c), 5, 6 and 8. See Sections 2.2.2.1, 2.3.3, 2.3.4 and 2.4.4.

¹⁴⁹ In contrast to the territorial sea, the internal waters of a State are also closed to foreign ships.

¹⁵⁰ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (London, Moscow, Washington, 27 Jan. 1967) 610 U.N.T.S. 8843 *entered into force* 10 Oct. 1967 ('Outer Space Treaty').

In other words, while the foundation of international civil aviation law is State sovereignty over airspace, the basis of space law is that no State may claim sovereignty over outer space.

On the cusp of the adoption of the Outer Space Treaty, John Cobb Cooper, member of the US delegation at the Chicago Conference, recognised the necessity of 'defining airspace', as he termed the task. He saw it as a pressing concern as operations involving craft – whether they ultimately be defined as air- or space- craft – become more commonly conducted by private enterprises in which case, at least part of the flight – that in airspace – may fall within the scope of the Chicago Convention:

'While it is true that most instrumentalities usable in outer space are not civil in character but are launched and controlled by a particular state, nevertheless this will not always be true'.¹⁵¹

Indeed, today, commercial private activity in space is more common than State activity.¹⁵²

Although the two principles – sovereignty over airspace and non-appropriation of outer space – require delimitation and although this has been acknowledged since the signing of the Outer Space Treaty, States have not agreed upon a fixed altitude that demarcates the two 'areas'.

The United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS), which among other things was established for 'studying legal problems arising from the exploration of outer space',¹⁵³ recognises two main approaches in the debate surrounding the delimitation of airspace and outer space: the functionalist approach and the spatialist approach.¹⁵⁴ The spatialist approach supports delimitation and argues that the altitude should be determined by science, for example by considering the aerodynamic characteristics of flight in accordance with the *von Kármán* line,¹⁵⁵ sitting at around 100 kilometres (km) above mean sea level where 'aerodynamic lift decreases to critical levels and the lowest perigees obtainable by

151 John Cobb Cooper, 'The Chicago Convention – After Twenty Years' (1965) 19(3) U Miami L Rev 333, 343-44.

152 Paul Stephen Dempsey and Maria Manoli, *Suborbital Flights and the Delimitation of Air Space vis-à-vis Outer Space: Functionalism, Spatialism and State Sovereignty*, A submission by the Space Safety Law and Regulation Committee of the International Association for the Advancement of Space Safety to the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, Vienna 9-20 April 2018, U.N. Doc. A/AC.105/C.2/2018/CRP.9 (29 March 2018) 13.

153 United Nations Office for Outer Space Affairs, 'Committee on the Peaceful Uses of Outer Space' <www.unoosa.org/oosa/en/ourwork/copuos/index.html> accessed 1 May 2018.

154 Working Paper of the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, GOAR, 57th Session U.N. Doc. A/AC.105/C.2/L.302 (Vienna, 9-20 April 2018) 2.

155 Stephan Hobe, Nicolai Ruckteschell and David Heffernan, *Cologne Compendium on Air Law in Europe* (Carl Heymanns Verlag 2013) 206-7.

space objects can be reasonably identified'.¹⁵⁶ The functionalist approach, on the other hand, argues that the applicable legal regime should be determined by the nature of the activity being conducted, including the vehicle, that is, an aircraft or a space object, and the objective of the activity, that is, for example, whether to transport people or cargo from one point on earth to another or whether to orbit the earth.¹⁵⁷ UNCOPUOS officially supports the spatialist approach, with delimitation based on the *von Kármán* line, a position 'based on the opinion not only of academics but also delegations to [UNCOPUOS] and the Conference on Disarmament'.¹⁵⁸

In the absence of an internationally agreed altitude for delimitation, national laws continue to define the vertical limits of the sovereignty of airspace, taking into account the national interests of the States implementing the legislation. For example, Denmark's legislation expressly defines outer space as the 'space above the altitude of 100km above mean sea level'.¹⁵⁹ This delimitation by Denmark has been described by Hulsroj and Pecujlic as 'a bold statement, indeed'.¹⁶⁰ In contrast, the UK's recently enacted *Space Industry Act 2018* refers to an altitude in order to establish the scope of the application of the legislation rather than to define outer space. Namely, the act refers to activities operating at or above the stratosphere,¹⁶¹ which is understood to extend to an altitude of approximately 50km above

¹⁵⁶ Working Paper of the Legal Subcommittee of UNCOPUOS (n 154) 3.

¹⁵⁷ Dempsey and Manoli (n 152) 11.

¹⁵⁸ Working Paper of the Legal Subcommittee of UNCOPUOS (n 154) 3. The Conference on Disarmament is a multilateral forum that meets annually to address arms control and disarmament (United Nations, 'Conference on Disarmament: An Introduction to the Conference', available at <www.unog.ch/80256EE600585943/(httpPages)/BF18ABFEFE5D344DC1256F3100311CE9?OpenDocument> accessed 13 March 2019). The debate continues with momentum though: in November 2018 the Fédération Aéronautique Internationale (FAI) proposed to the International Astronautical Federation that a workshop be held to consider new scientific analyses which suggest that the *von Kármán* line should be reduced from 100km to 80km (Fédération Aéronautique Internationale (FAI), 'Statement about the Karman Line' (30 November 2018), available at <www.fai.org/news/statement-about-karman-line> accessed 4 August 2016).

¹⁵⁹ The Danish Act on Activities on Outer Space, Act no. 409 of 11 May 2016, Article 4(4), translated from the original: 'Den del af rummet, der ligger over 100 km over havets overflade'.

¹⁶⁰ Peter Hulsroj and Anja Nakarada Pecujlic, *New in the Nest: The Danish Space Act* (2016) 41(3) A&SL 503, 504.

¹⁶¹ *Space Industry Act 2018* (UK), Articles 5(a) and (b) read together with Article 4. More specifically, it refers to both 'space activity' and 'suborbital activity' as 'spaceflight activities', where 'suborbital activity' is that of a craft which operates above the stratosphere or of a balloon that is capable of reaching the stratosphere. 'Space activity' refers to 'any activity in outer space', among other things, where outer space is not further defined (Article 4). For further discussion on this aspect of the Act see, Thomas Cheney, UK Public Bill Committee Debate - Space Industry Bill (24 January 2018); Lesley Jane Smith and Ruairidh JM Leishman, 'Up, up and Away: An Update on the UK's Latest Plans for Space Activities' (2019) 44(1) A&SL 1, 14-15; Georgina Hutton, *The Space Industry Bill 2017-2019* (HC Briefing Paper, 2 February 2018) 5-6.

the Earth.¹⁶² Similarly, Australia's national space legislation only applies to launches or attempted launches that go beyond 100km above mean sea level,¹⁶³ but the Australia government has made clear that this is not an attempt to define outer space¹⁶⁴ and that it is therefore not a recognition by Australia of an altitude at which its sovereignty over the airspace is extinguished.¹⁶⁵ While the legislation of these States is relatively consistent in terms of the altitude it applies to, not all national legislation follows the same trend: the equatorial States that are signatories to the Bogotá Declaration claim sovereignty over the geostationary orbits above their territories, which is at an altitude of approximately 36,000km above mean sea level.¹⁶⁶ The Bogotá Declaration does not purport to contribute to the discussion on the delimitation of airspace and outer space but it demonstrates the vastly different approach States take in their application of the non-appropriation principle under Article 2 of the Outer Space Treaty in the absence of an internationally accepted altitude.

On an international level, the absence of an international delimitation is an 'important legal lacuna'¹⁶⁷ and, as mentioned above, one that will become increasingly so in light of growing private commercial space activities and rapid technological developments transforming space transportation.¹⁶⁸ This study is limited to considering navigation through airspace and will not further address the laws applying to outer space.

2.3 OVERFLIGHT RIGHTS FOR CIVIL AIRCRAFT IN NATIONAL AIRSPACE

2.3.1 The different legal bases stemming from the Chicago Convention

In addition to the territory being overflowed – that is, whether it is national or international airspace – there are a number of relevant factors affecting the legal basis for overflight rights, as identified in Section 2.1. This section will examine those factors for the operation of civil aircraft and discuss the

¹⁶² Oxford English Dictionary, available at <www.oed.com/view/Entry/191344?redirectedFrom=stratosphere#eid> accessed 17 April 2019.

¹⁶³ Space Activities Act 1998 (Cth) s 8.

¹⁶⁴ National Legislation and Practice Relating to Definition and Delimitation of Outer Space – Note by the Secretariat A/AC.105/865/Add.1 (20 March 2006); House of Representatives, Commonwealth of Australia, Space Activities Amendment Bill 2002, Explanatory Memorandum (20 February 2002) Item 2.

¹⁶⁵ House of Representatives, Commonwealth of Australia, Space Activities Amendment Bill 2002, Explanatory Memorandum (20 February 2002) 4.

¹⁶⁶ Declaration of the First Meeting of Equatorial Countries (Bogotá 3 December 1976). The States are Brazil, Colombia, Congo, Ecuador, Indonesia, Kenya, Uganda and Zaire. Five of these States – Brazil, Ecuador, Indonesia, Kenya and Uganda – have ratified the Outer Space Treaty and Colombia is a signatory.

¹⁶⁷ Working Paper of the Legal Subcommittee of UNCOPUOS (n 154) 4.

¹⁶⁸ Dempsey and Manoli (n 152) 2.

corresponding legal basis for each of them. It will first address the distinction between scheduled air services and non-scheduled flights. It will then set out the multilateral exchange of the right of overflight for non-scheduled flights under Article 5 of the Chicago Convention and the exchange of overflight rights for scheduled air services pursuant to Article 6. In order to address this latter point in context, the distinction between transit rights and traffic rights, as defined in Section 2.3.3.1 below, will be addressed. Finally, this part will discuss the legal basis for the exchange of overflight rights for unmanned aircraft. Figure 2.2 provides a diagrammatic representation of the relationship between these elements.



Figure 2.2: Legal basis for overflight rights in national airspace¹⁶⁹

2.3.2 Air transport outside the normative powers of ICAO

Under Article 44 of the Chicago Convention, ICAO's role is twofold: first, 'to develop the principles and techniques of international air *navigation*' and second, 'to foster the planning and development of international air *transport*' (emphasis added).¹⁷⁰ International air navigation involves the non-commercial aspects of international civil aviation while international

¹⁶⁹ Source: made by the author.

¹⁷⁰ Chicago Convention, Article 44.

air transport encompasses the commercial/business aspects.¹⁷¹ Leclerc describes the division as follows:

'The first category relates to standards on air navigation. It is made up of technical and operational rules and includes regulations governing safety. The second category relates to standards on the economic and commercial aspects of international aviation. This specific branch of international civil aviation law is thus concerned with the economic regulation of international aviation, and at times comes down to the matter of traffic rights incorporating, in its broadest definition, the rules determining the allocation of routes, tariffs, capacity and frequency'.¹⁷²

This division is also reflected in the structure of the Chicago Convention itself: Part I addresses air navigation, while Part III addresses international air transport. It is in relation to the international air navigation aspects that the normative powers of ICAO sit, and consequently it is these aspects that the Chicago Convention annexes address. Normative powers here refer specifically to the competence of the ICAO Council to adopt Standards and Recommended Practices (SARPs) pursuant to Articles 54(l) and 90 of the Chicago Convention.

The Chicago Convention is an anomaly in public international law in the quasi-legislative function that it gives to the ICAO Council in relation to the adoption of SARPs for the air navigation aspects of international civil aviation. The SARPs comprise the annexes to the Convention and therefore become part of the rules that regulate international civil aviation, but they do not form part of the Convention itself. On whether SARPs have binding force, Milde has described the question as causing 'frequent misunderstandings', highlighting that some commentators consider Standards to have the same legal value as treaty provisions while others view SARPs as 'no more

171 Havel and Sanchez (n 112) 69: '...there are parallel frameworks that organize international air services. One is the product of the Chicago Convention and focuses primarily on setting the terms of international technical cooperation and harmonization. The other is much more specific economic system that is based on bilateral exchange where two States negotiate an air service agreement (ASA) that grants each party's carriers the privilege to carry passengers, cargo or a combination of both to points to, from, over, or beyond their respective territories'.

172 Translated from the original: 'La première catégorie se rapporte aux normes relatives à la navigation aérienne. Elle se trouve constituée de règles techniques et opérationnelles et englobe une réglementation liée dès l'origine à l'exigence de sécurité. La seconde catégorie se rapporte quant à elle aux normes encadrant les aspects économiques et commerciaux de l'activité aérienne internationale. Cette branche spécifique du droit international de l'aviation civile s'intéresse ainsi à la régulation économique de l'activité aérienne internationale, et se résume parfois à la question des droits de trafic intégrant, dans sa définition la plus large, les règles déterminant l'attribution des routes, des tarifs, des capacités et des fréquences' (Thomas Leclerc, *Les mesures correctives des émissions aériennes de gaz à effet de serre. Contribution à l'étude des interactions entre les ordres juridiques en droit international public* (PhD thesis, E.M. Meijers Instituut, Leiden University, 2017) 65-67).

than guidance material or ‘soft law’.¹⁷³ Cheng argues that the Standards are not binding, hence the term ‘quasi-legislative’ to describe the Council.¹⁷⁴ States are mixed in their positions, some considering Standards to be a form of soft law and others considering them to be binding.¹⁷⁵

There is a clear distinction, however, between the contribution of Standards, on the one hand, and Recommended Practices, on the other, to international air navigation. ‘Standards’ and ‘Recommended Practices’ are defined, respectively, as:

‘any specification for physical characteristics, configuration, matériel, performance, personnel or procedure...’,

‘the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation and to which Contracting States *will conform ...*’ (Standard; emphasis added), and, ‘the uniform application of which is recognized as *desirable* in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States *will endeavour to conform ...*’ (Recommended Practice; emphasis added).¹⁷⁶

Under Article 37 of the Chicago Convention, which applies to SARPs in general, each contracting State is required to ‘undertake to collaborate in securing the highest practicable degree of uniformity’ in regulations, standards, procedures and organisation. This is central to aim of the Convention

¹⁷³ Michael Milde, ‘Enforcement of Aviation Safety Standards: Problems of Safety Oversight’ (1996) 45 ZLW 3, 4.

¹⁷⁴ Cheng, *Law of International Air Transport* (n 90) 64.

¹⁷⁵ For example, consider the contrast between France, on the one hand, and the US and the Netherlands, on the other, as to which see, Vincent Correia and Béatrice Trigeaud, ‘Transport, Navigation et Sources du Droit International - Remarques Générales’ in Saïda El Boudouhi (ed), *Les Transport au Prisme du Droit International Public* (Editions A Pedone 2019) 54–55: ‘In France, the Council of State traditionally refuses to recognise the binding nature of the technical annexes of the Chicago Convention, which it considers to be mere recommendations, including with regard to standards’, translated from the original: ‘En France, le Conseil d’Etat refuse traditionnellement de reconnaître le caractère obligatoire des annexes techniques à la convention de Chicago, qui constituent selon lui de simples recommandations, y compris en ce qui concerne les normes’; The US and the Netherlands: ‘In the United States, for example, the standards are enforced by the US Department of Transportation (DOT) and the Federal Aviation Authority (FAA) without prior approval from Congress. Likewise, in the Netherlands, the technical annexes published in the *Tractatenblad* acquire a force comparable to the Chicago Convention, without being subject to the control of the Dutch Parliament’, translated from the original: ‘Aux Etats-Unis, par exemple, les normes sont appliquées par l’US Department of Transportation (DOT) et la Federal Aviation Authority (FAA) sans approbation préalable du Congrès. De même, aux Pays-Bas, les annexes techniques publiées au *Tractatenblad* acquièrent une force comparable à la convention de Chicago, sans être soumises au contrôle du Parlement néerlandais’.

¹⁷⁶ These definitions are in the Foreword to each annex to the Chicago Convention under the heading, ‘Status of Annex components’.

in ensuring the ‘safe and orderly’ development of civil aviation.¹⁷⁷ At the same time, national standards may be ‘more stringent’ than the SARPs¹⁷⁸ and States may also, under certain circumstances, deviate from them. In the case that a State deviates from a Standard – which, recalling the definition above, States ‘will conform with’ – it is required to file the difference with ICAO and immediately notify other States of the difference.¹⁷⁹ Article 38 of the Convention allows for the deviation from a Standard in the case that the State ‘deems it necessary’ to do so.¹⁸⁰ Where a State has filed a difference to an ICAO standard it is the responsibility of the aircraft of other States to ensure it meets the regulation of the State when within its territory.¹⁸¹

International air navigation, governed by these SARPs, includes both technical and operational aspects,¹⁸² with most areas of international civil aviation law entailing elements of each.¹⁸³ Safety is a principal aspect of international air navigation and ensuring it is a primary objective of ICAO, as recognised in the Preamble and Article 44 of the Chicago Convention.¹⁸⁴ The Chicago Convention was originally silent on the matter of security but, as is evident from the adoption of Article 3 *bis* and Annex 17, ‘Security’, it sits within the scope of ICAO’s normative powers by being, in the words of Huang, ‘but one important aspect of aviation safety’.¹⁸⁵ This is clear when considering the subtitle of Annex 17, ‘Safeguarding international civil aviation against acts of unlawful interference’,¹⁸⁶ together with the fact that aviation safety is defined as ‘the state of freedom from unacceptable risk of injury to persons or damage to aircraft and property’;¹⁸⁷ necessarily, aviation

177 Chicago Convention, Preamble.

178 ICAO, ‘The Convention on International Civil Aviation: Annexes 1 to 18’, available at <www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf> accessed 19 September 2018, 10.

179 Chicago Convention, Article 38.

180 *ibid.*

181 *ibid* Articles 11 and 12.

182 Ludwig Weber, *International Civil Aviation Organization* (Wolters Kluwer 2012) 19.

183 Annexes 9 and 17 though, addressing ‘Facilitation’ and ‘Security’ respectively, contain only operational aspects. The SARPs in Annex 9 outline, among other things, requirements for the entry and departure of aircraft, persons and baggage, and cargo, and Annex 17 provides measures to safeguard against acts of unlawful interference. Technical aspects on the other hand include, among numerous others, the technical airworthiness standards under Annex 8, pursuant to Article 33 of the Chicago Convention, and the specifications for the global navigation satellite system (GNSS), as used for aeronautical telecommunications under Annex 10, further to Article 37(a).

184 Specifically, Articles 44 (a), (d) and (h).

185 Huang (n 127) 5.

186 Chicago Convention, Annex 17 (10th edn, April 2017).

187 Huang (n 127) 4, citing ICAO AN-WP/7699, *Determination of a Definition of Aviation Safety* (11 December 2001) 2.2.

security is required for aviation safety. Environmental matters may also, but more controversially, be listed among the normative powers of ICAO.¹⁸⁸

ICAO's role in relation to international air *transport* is, in contrast, restricted to issuing guidance material, such as ICAO Documents and Assembly Resolutions, and States negotiate between themselves to facilitate this aspect of international civil aviation. Articles 5 and 6 of the Chicago Convention form the basis of this governance but beyond this, transport aspects sit outside the normative framework of the Chicago Convention and its annexes.¹⁸⁹

2.3.3 The multilateral exchange of overflight rights for non-scheduled flights and the express exclusion of the exchange for scheduled air services

Article 6 of the Chicago Convention, following from the basis of complete and exclusive sovereignty under Article 1, establishes the regime whereby the national airspace of a State is closed to the aircraft of other States operating scheduled air services until permission or authorisation to operate has been granted by the former State. More specifically, Article 6 expressly excludes the grant of access to airspace for scheduled international air services from the scope of the Convention:

'[n]o scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization'.

¹⁸⁸ Again, the Chicago Convention is silent on environmental regulation, which was not a concern at the time of the Convention's drafting. The argument that environmental matters are within ICAO's competence is based on the theory of implicit competence, as laid down by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Rep. 1949 (Apr. 11), p. 174, p. 182: 'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'. On this basis, Leclerc argues that ICAO 'is... invested with a mission to remove obstacles to the development of international civil aviation, at least in its technical and operational aspects'. In this sense, '[the] appearance of environmental data could only be naturally understood within this multilateral forum', translated from the original: 'se trouve (...) investie d'une mission de suppression des obstacles au développement de l'aviation civile internationale, du moins dans ses aspects techniques et opérationnels'. In this sense, '[l]l'apparition de la donnée environnementale ne pouvait donc qu'être naturellement appréhendée au sein de cette enceinte multilatérale' (Leclerc (n 172) 318). This argument is not without its critics however, for example see, Andrew Macintosh, 'Overcoming the Barriers to International Aviation Greenhouse Gases Emissions Abatement' (2008) 33(6) A&SL 403, 411.

¹⁸⁹ As noted briefly above in Section 2.2.2.3, Article 5 provides the legal basis for overflight rights for non-scheduled flights, while Article 6 expressly excludes from the Convention the exchange of the right of overflight for scheduled air services.

Bin Cheng, in 1962, framed this outcome as a failure of States and as a situation that was yet to be adequately dealt with:

'By far the most important sector of international civil aviation is scheduled international air transport, *a satisfactory multilateral solution for which has so far not been achieved* ... [A]t the Chicago Conference 1944, it was decided that, at least for the moment, *the matter would have to be regulated by bilateral agreements between States* and this need was expressly recognised in Article 6 of the Chicago Convention 1944' (emphasis added).¹⁹⁰

Given that today the Transit Agreement, as will be addressed in Section 2.3.3.1, has 133 State parties¹⁹¹ – as opposed to 60 in 1962 – the statement is now less relevant concerning overflight rights. The global trend towards greater liberalisation of air services also reduces the relevance of the statement to the exercise of rights beyond the second freedom. Having said this, the core of the issue persists: there is still no global multilateral agreement regulating scheduled international air services as a whole.

The Chicago Convention does not provide a definition for 'scheduled international air service' but the ICAO Council later, in 1952, defined the term as: an air service that has all three of the following characteristics: (1) it passes through the airspace over the territory of more than one State; (2) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public, and; (3) it is operated so as to serve traffic between

190 Cheng, *The Law of International Air Transport* (n 90) 229. The bilateral system was seen at the time of the drafting of the Convention as an interim arrangement though, pending a multilateral exchange of rights (Havel and Sanchez (n 112) 75-76). There are some instances today of a non-bilateral exchange of rights. For example, the exchange of all transit and traffic rights for EU Member States under the EU single aviation market (Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) ('Regulation (EC) No 1008/2008')). At the same time though, EU Member States' aviation relations with non-EU Member States continue to be governed through separate bilateral ASAs in most cases. Also, consider the Multilateral Agreement on the Liberalization of International Air Transport (MALIAT) between Brunei, Chile, the Cook Islands, Mongolia (cargo only), New Zealand, Samoa, Singapore, Tonga, and the US (Multilateral Agreement on the Liberalization of International Air Transportation (Washington DC, 1 May 2001) 2511 U.N.T.S. 33, *entered into force* 21 Dec. 2001). Havel and Sanchez note though, that MALIAT 'amounts to little more than a "pooled" open skies accord', in that it essentially just 'regulate[s] the bilateral aviation relations of its signatories' (Havel and Sanchez (n 112) 113).

191 State parties to the Transit Agreement as at November 2020. See, ICAO, 'Current Lists of Parties to Multilateral Air Law Treaties – International Air Services Transit Agreement', available at <www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf> accessed 13 November 2020.

the same two or more points either according to a published timetable or with flights so regular or frequent that they constitute a recognizably systematic series.¹⁹²

A non-scheduled flight is *a contrario* a flight that falls outside this definition,¹⁹³ but that is international, that is, it meets the first criterion. As for the second criterion, a non-scheduled flight may or may not be for remuneration; non-scheduled flights include both commercial and non-commercial operations. Many non-scheduled flights are clearly not open to members of the public or operated according to a published timetable or so regular or frequent that they constitute recognisably systematic series, but others fit less clearly into the mould and so in practice, the distinction between scheduled air services and non-scheduled flights can be murky.¹⁹⁴

States have exchanged the right of overflight for non-scheduled flights on a multilateral basis through Article 5 of the Chicago Convention. Under this article, each contracting State agrees that aircraft engaged in non-scheduled flights have the right to:

‘make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission...’¹⁹⁵

Article 5 clearly provides for the exchange of the right of overflight for non-scheduled flights, but this does not mean that there is freedom of overflight for aircraft operating these flights in the sense of freedom of overflight of the high seas. The article exempts such aircraft from having to obtain prior permission for overflight, which had typically been granted through

¹⁹² ICAO Doc 7278-C/841, *Definition of Scheduled International Air Service* (1952). See also, more recently, ICAO WP/7, *Review of the Classification and Definitions Used for Civil Aviation Activities*, Presented by the Secretariat at the Statistics Division 10th Session, Montreal (16 October 2009), Appendix B; See also, ICAO Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (4th edn, 2017) Appendix 4.

¹⁹³ PPC Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International 2003) 111.

¹⁹⁴ *ibid*; Cheng, *The Law of International Air Transport* (n 90) 173-77.

¹⁹⁵ Chicago Convention, Article 5 (paragraph 1). The second paragraph of Article 5 applies to non-scheduled services when taking on or discharging passengers, mail or cargo for remuneration, and provides a State with the right to impose ‘regulations, conditions or limitations as it may consider desirable’ to govern those commercial operations in its territory. These rules are usually governed unilaterally by States, under their national legislation (ICAO Doc 9060/5, *Reference Manual on the ICAO Statistics Programme* (5th edn, 2013) 1.3.2 fn 2). Specifically charter services though, are governed under some States’ ASAs, for example, those between the US and the UK and Canada and Russia (*Air Transport Agreement between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland*, 28 November 2018, Article 2(5); *Air Services Agreement Between the Government of Canada and the Government of the Russian Federation*, 18 December 2000, Annex II, A) 5). For further discussion on the national regulation of the operation of non-scheduled services see, for example, Rigas Doganis, *Flying Off Course: Airline Economics and Marketing* (4th edn, Routledge 2010) 38-39.

diplomatic channels,¹⁹⁶ but they are still required to observe other entry requirements under the Chicago Convention and its annexes including, for example, an approved flight plan.¹⁹⁷

The State whose territory is being overflown can also require landing, and may, for safety purposes, require aircraft to 'follow prescribed routes or to obtain special permission' in the case that the aircraft wants to operate over a region that is 'inaccessible or without adequate air navigation facilities'.¹⁹⁸ The first of these – that the State being overflown can require landing – is unqualified under Article 5 but it must 'not be exercised in such a general way as to amount to a cancellation of the right granted to non-scheduled aircraft'.¹⁹⁹ The second right of the State – to require certain paths to be followed or for prior permission to be obtained – is again left to the discretion of the State but if airspace is closed, it should be justified and consistent with the Chicago Convention and its annexes, for example as a prohibited area under Article 9 of the Chicago Convention.²⁰⁰

The right of a State to designate the route to be followed over its territory is not restricted to non-scheduled flights: a State also holds this right under Article 68 of the Chicago Convention in respect to scheduled air services.²⁰¹ Unlike for non-scheduled flights, where the designation must be for safety purposes, under Article 68 a State is free to designate routes for scheduled services so long as it is in accordance with the Chicago Convention in general. As an illustration of the consequences of this right, on 1 July 2000, Canada and Russia began allowing commercial air transport to operate through routes over the North Pole, meaning that carriers would be able to operate direct services between certain Asian and North American cities for the first time. Nav Canada²⁰² estimated at the time that

196 Cheng, *The Law of International Air Transport* (n 90) 195.

197 Milde, *International Air Law and ICAO* (n 91) 110.

198 Chicago Convention, Article 5. See *Proceedings to the Chicago Convention: Vol I, Pt II 'Minutes of Meeting of Subcommittee 2 of Committee I, November 30'* (Document 449) 687.

In contrast to overflight, if an aircraft conducting a non-scheduled service wishes to make a stop to take on or discharge passengers, cargo or mail, for remuneration or hire, the State 'may impose such regulations, conditions or limitations as it may consider desirable'. This reservation has been interpreted so broadly so as to include prior permission, that is, that States can require prior permission to be obtained for the operation of non-scheduled services, which would effectively negate the purpose of Article 5 (Cheng, *The Law of International Air Transport* (n 90) 197). Prior permission should not be required as a general standard as it could frustrate or make impossible the operation of non-scheduled services (Cobb Cooper, 'The Chicago Convention' (n 151) 340).

199 ICAO Doc 9587, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (4th edn, 2017) Appendix 4.

200 ibid.

201 Chicago Convention, Article 68.

202 The corporation that owns and operates Canada's civil air navigation system.

this would cut five hours of flight time between Hong Kong and New York which, for a carrier operating the route once a day, would amount to cost savings of US\$12 million per year.²⁰³ The right of a carrier to operate on allocated routes in a foreign State relies on the fact that the State in which the aircraft is registered has already negotiated access to the airspace of the other State. The allocation of routes by Canada and Russia is, in this way, a secondary consideration to the discussion below in Section 2.3.3.1 regarding the exchange of overflight rights by these States on the basis that neither are party to the Transit Agreement.

When it comes to the operation of commercial non-scheduled services, the distinction between them and scheduled services is becoming less relevant both because non-scheduled services represent a diminishing proportion of overall international traffic and because the regulatory approaches to each are converging. Bin Cheng, again writing in 1962, stated that 'non-scheduled international air transport has greatly increased in importance since the Chicago Conference', a statement that applied equally over the following decades.²⁰⁴ In the 1970s, around 30 per cent of flights on North Atlantic routes were non-scheduled²⁰⁵ and in the early 1980s approximately half of air passengers travelling within Europe made their journeys on non-scheduled services.²⁰⁶ The growth in charter services, specifically, during this time was stimulated by the more liberal government regulation of them, particularly in the US and Europe, relative to the highly regulated market for scheduled air services.²⁰⁷ Deregulation of scheduled services in the US marked the decline of charter services, the former consequently losing their competitive advantage.²⁰⁸ The liberalisation of air services in the EU has reduced the relevance of the distinction between scheduled and non-scheduled services from a regulatory perspective and may eventually lead it to becoming obsolete.²⁰⁹ As a result of the third package of air transport liberalisation measures, adopted in July 1991, there is no regulatory distinction between scheduled and non-scheduled services in that non-scheduled carriers are permitted to operate scheduled services and sell directly to the

203 Joel Baglole, 'Canada, Russia's Decision to Permit Polar Routes Promises to Cut Hours' (*The Wall Street Journal*, 8 June 2000), available at <www.wsj.com/articles/SB96041581782182909> accessed 4 March 2018.

204 Cheng, *The Law of International Air Transport* (n 90) 27.

205 Haanappel, *The Law and Policy of Air Space and Outer Space* (n 193) 111.

206 ICAO Doc 9060/5, *Reference Manual on the ICAO Statistics Programme* (5th edn, 2013) 1.3.2.

207 Doganis (n 195) 39.

208 *ibid.*

209 Milde, *International Air Law and ICAO* (n 91) 109.

public.²¹⁰ Worldwide, non-scheduled services now play only a minor role in the delivery of air transport.²¹¹ ICAO estimates from 2017 suggest that revenue from non-scheduled passenger traffic in that year made up just 4.1 per cent of the total revenue for international traffic,²¹² representing a substantial decline even over the course of the preceding decade, from 8.1 per cent in 2007.²¹³

2.3.3.1 *The Transit Agreement and the value of transit rights*

Turning now to scheduled international air services, it is necessary at this point to draw a distinction between transit rights and traffic rights. Whilst States did not exchange the rights of access to their airspace multilaterally for scheduled air services under the Chicago Convention, the 133 States that are parties to the Transit Agreement, have exchanged the right of overflight on a multilateral basis.

At the Chicago Conference, two agreements were negotiated together with the adoption of the Convention to allow for the multilateral exchange of a limited number of co-called ‘freedoms’ (see Figure 2.3), or rights for scheduled international air services to fly over, make technical stops in, and to operate to, from and within another State: the aforementioned Transit Agreement and the International Air Transport Agreement (Transport Agreement).²¹⁴ The Transit Agreement, also known as the ‘two freedoms

210 The third liberalisation package was implemented through Regulation Nos 2407/92, 2408/92 and 2409/92, which have since been recast and consolidated into Regulation (EC) No 1008/2008. For a discussion on the consequences of the third package of liberalisation see, Commission of the European Communities, ‘Impact of the Third Package of Air Transport Liberalization Measures – Communication from the Commission to the Council and the European Parliament’ (Brussels, 22 October 1996, COM(96) 514 final) 18. The distinction between scheduled and non-scheduled services has also become irrelevant to EU legislation governing other aspects of aviation: Regulation (EC) No 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, applies to both scheduled and non-scheduled services in contrast to the legislation it repealed, Council Regulation (EEC) No 295/91 of 4 February 1991, which applied only to scheduled air transport. Recital 5 of Regulation (EC) No 261/2004 acknowledges the decreasing relevance of the categorisation: ‘Since the distinction between scheduled and non-scheduled air services is weakening, such protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours’.

211 Milde, *International Air Law and ICAO* (n 91) 109 and 111.

212 ICAO, ‘2017 Air Transport Statistical Results’, Table 7, available at <www.icao.int/annual-report-2017/Documents/Annual.Report.2017_Air%20Transport%20Statistics.pdf> accessed 12 March 2019. Non-scheduled traffic in these statistics covers both non-scheduled traffic of scheduled airlines and non-scheduled operators.

213 ICAO, ‘2016 Air Transport Statistical Results’, Table 7, available at <www.icao.int/annual-report-2016/documents/arc_2016_air%20transport%20statistics.pdf> accessed 2 March 2019. Non-scheduled traffic in these statistics covers both non-scheduled traffic of scheduled airlines and non-scheduled operators.

214 International Air Transport Agreement (Chicago, 7 Dec. 1944) 171 U.N.T.S. 387, *entered into force* 8 Feb. 1945 (‘Transport Agreement’).

agreement', provides for the exchange of the first two freedoms of the air for State parties, whilst the Transport Agreement provides for the exchange of the first five freedoms of the air.

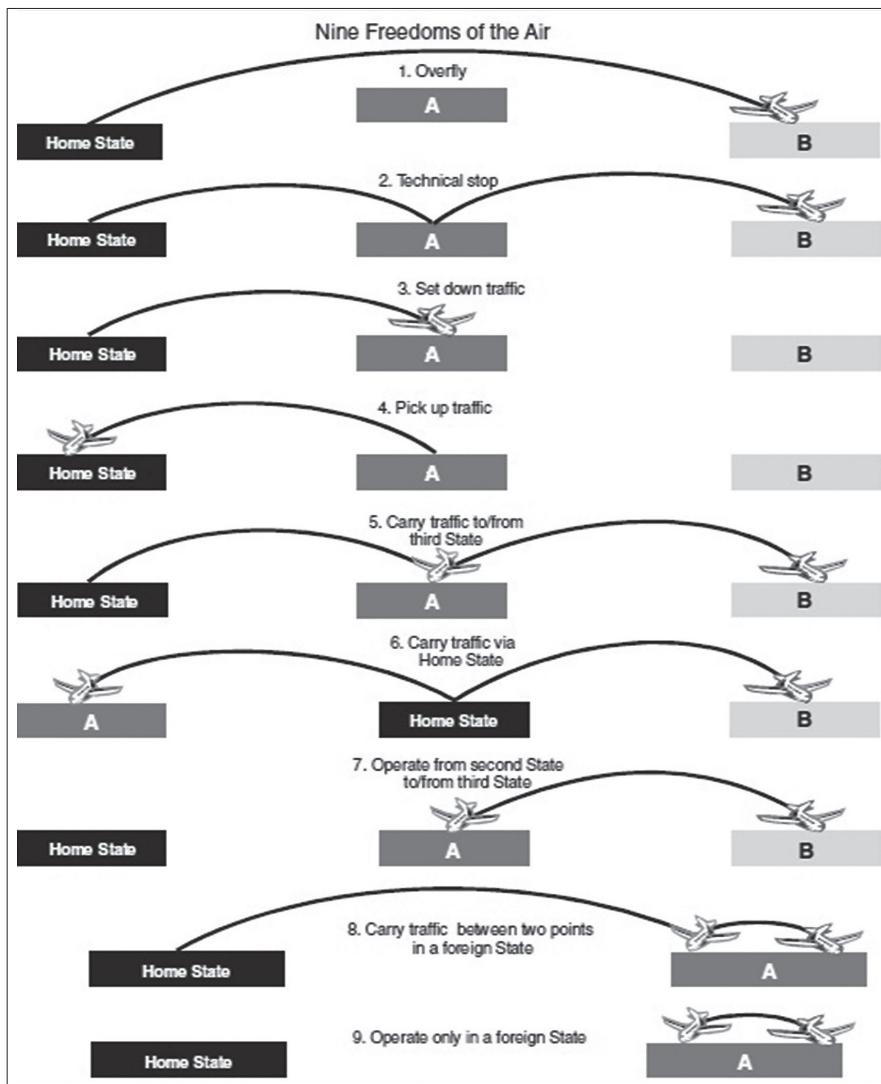


Figure 2.3: The freedoms of the air²¹⁵

215 Source: Air Cargo – How it Works, 'An Introduction to the Aircargo, Airfreight and Airmail Business', available at <air-cargo-how-it-works.blogspot.com/p/interest-organisations.html> accessed 12 July 2018.

In contrast to the Transit Agreement, the Transport Agreement has just 11 State parties.²¹⁶ A reason that States were, and remain, reluctant to sign the Transport Agreement is that the fifth freedom requires negotiation between two foreign States, in contrast to the first four freedoms which involve just one other State.²¹⁷

As mentioned above, the Transit Agreement provides for the first two freedoms of the air or more specifically, each State party grants to each other State party in respect to international air services: (1) the privilege to fly across its territory; and, (2) the privilege to land for non-traffic purposes. The second freedom is in practice the right to make a technical stopover and is defined in the Chicago Convention as 'landing for any purpose other than taking on or discharging passengers, cargo or mail'.²¹⁸ It involves stops for, for example, refuelling and repairs.

The first and second freedoms together are known as 'technical freedoms' or 'transit rights' and can be distinguished from the remaining freedoms of the air on the basis that the former do not involve traffic that originates or terminates in the State granting the rights, whilst the latter do. In other words, the third to ninth freedoms establish market access for international civil air transport. Although the first and second freedoms do not provide market access in the sense of the other freedoms, 'it must not be assumed that [they]... are of little economic value'.²¹⁹ Despite not being directly related to market access, the right of overflight has economic consequences.²²⁰ This point was emphasised by the Representative of Canada during the Chicago Conference when he explained that, 'the only bargaining power possessed by many countries in negotiating bilateral agreements is the possession of these two Freedoms'.²²¹ Mendes de Leon elaborates on this statement:

[c]ountries with a big airspace including but not limited to the Russian Federation, Indonesia, Canada and Brazil prefer not to accede to the International ASA [referring to the Transit Agreement] as they wish to keep their airspace as an asset in bilateral negotiations' (emphasis added).²²²

216 State parties to the Transport Agreement as at November 2020. See, ICAO, 'Current Lists of Parties to Multilateral Air Law Treaties – International Air Transport Agreement', available at <[www.icao.int/Secretariat/legal/List%20of%20Parties/Transport_EN.pdf](http://www.icao.int/Secretariat/legal>List%20of%20Parties/Transport_EN.pdf)> accessed 13 November 2020.

217 Mendes de Leon (n 119) 59.

218 Chicago Convention, Article 96(d).

219 Cheng, *The Law of International Air Transport* (n 90) 25.

220 Havel and Sanchez (n 112) 76.

221 Proceedings to the Chicago Convention (Document 463) (n 125) 510.

222 Mendes de Leon (n 119) 57.

Canada was a party to the Transit Agreement but denounced it in November 1986.²²³ It did so in response to a dispute with the UK in which the UK announced its intention to move Air Canada services from Heathrow to Gatwick.²²⁴ As British carriers used Canadian airspace to fly to the west of the US, Canada's withdrawal was a way of exerting pressure on the UK.²²⁵ Canada subsequently negotiated overflight rights for its territory with the signatories to the Transit Agreement by way of diplomatic notes and/or in its ASAs, including with the UK on the resolution of the dispute.²²⁶

The above provides an indication of how States can use not being a party to the Transit Agreement as leverage in negotiations as a result of the economic value of the right of overflight. The right of overflight is also economically significant by way of the imposition of overflight fees. As mentioned previously in Section 2.3.3, Canada and Russia opened up routes over the North Pole in 2000. In terms of the economic consequences of this, both countries stood to benefit from the collection of overflight fees from carriers for these routes, with Russia standing to attract an estimate at the time of up to US\$200 million per year.²²⁷ States are entitled to charge for the provision of air navigation facilities under international civil aviation law for both scheduled and non-scheduled services²²⁸ but, in accordance with Article 15 of the Chicago Convention, they must not be higher for foreign aircraft than for national aircraft²²⁹ and they must not be 'imposed by any contracting State in respect solely of the right of transit over... its territory'.²³⁰ Put another way, the ICAO Council in its *Policies on Charges for Airport and Air Navigation Services*, provides that they must be non-discriminatory and cost-related.²³¹ These policies, which were first published in 1974, direct States to impose fees only as part of a 'cost-recovery system' whereby 'the State may require the users of such services [air navigation services] to pay the portion of costs properly allocable to them' being 'the full cost of providing the service', as opposed to a greater cost.²³² This full

²²³ ICAO, 'Current Lists of Parties to Multilateral Air Law Treaties – International Air Services Transit Agreement', Note, page 3, available at <[www.icao.int/secretariat/legal/List%20of%20Parties/Transit_EN.pdf](http://www.icao.int/secretariat/legal>List%20of%20Parties/Transit_EN.pdf)> accessed 1 May 2020.

²²⁴ Email from Roland Dorsay to Pablo Mendes de Leon (6 November 2003).

²²⁵ Haanappel, *The Law and Policy of Air Space and Outer Space* (n 193) 121.

²²⁶ Email from Roland Dorsay to Pablo Mendes de Leon (6 November 2003).

²²⁷ Baglolle (n 203).

²²⁸ Chicago Convention, Articles 15 (a) and (b).

²²⁹ Chicago Convention, Articles 15 (a) and (b).

²³⁰ *ibid* Article 15 (final paragraph).

²³¹ ICAO Doc 9082, *ICAO's Policies on Charges for Airports and Air Navigation Services* (9th edn, 2012) vii. The ICAO Council also highlights the importance of the charges being imposed in a transparent manner and in consultation with users.

²³² *ibid* III-1.

cost includes the ‘cost of capital and depreciation of assets, as well as the cost of maintenance, operation, management and administration’.²³³

2.3.3.2 *The role of ASAs in the exchange of transit and traffic rights*

For those States that are not party to the Transit Agreement, the right of overflight for scheduled air services is provided along with the other freedoms through ASAs. Given that so few States have signed the Transport Agreement, almost all States exchange the third to fifth freedoms through ASAs. The right of overflight (along with the second freedom) is also commonly included in the ASAs between States that have ratified the Transit Agreement.²³⁴ For example, the ASA between Australia and New Zealand, both of whom are parties to the Transit Agreement, provides under Article 3(a) and (b) the right of overflight and the right to make a technical stopover.²³⁵ This is done for the purpose of ensuring such rights continue in the case of a State or States withdrawing from the Transit Agreement.²³⁶

ASAs provide for the exchange of the rights and also establish the conditions under which the services between the States operate, including routes, designation²³⁷ and the related ownership and control requirements, or equivalent, of carriers under domestic law, capacity, change of gauge,²³⁸ prices and safety, and security matters. As international air transport undergoes the process of liberalisation, the more restrictive aspects of ASAs are increasingly omitted.²³⁹ The features of the more liberalised ASAs today include freedom with respect to pricing, no capacity restrictions, multiple

²³³ *ibid* III-3.i. Although it is outside the scope of this research, Siberian overflight fees have been a source of conflict between Russia and the EU, with the latter claiming that the fees are not cost-related, transparent, or imposed non-discriminatorily (*‘Air Transport: Commission Welcomes Agreement on Siberian Overflights’* (European Commission, Press Release, 1 December 2011), available at <[europaeuropa.eu/rapid/press-release_IP-11-1490_en.htm](http://europa.eu/rapid/press-release_IP-11-1490_en.htm)> accessed 12 December 2018; Elena Carpanelli, ‘The Siberian Overflights Issue’ (2011) 11(23) *Issues Aviation L & Pol’y* 23.

²³⁴ Chicago Convention, Annex 2 (10th edn, 2005) Appendix 5 ‘ICAO Template Air Services Agreements’, 8.

²³⁵ Agreement between Australia and the Government of New Zealand relating to Air Services, signed 8 August 2002 [2003] ATS 18 (entered into force 25 August 2003).

²³⁶ Chicago Convention, Annex 2, Appendix 5 ‘ICAO Template Air Services Agreements’, 8.

²³⁷ That is, the carrier(s) permitted to exercise the rights that are exchanged under the ASA.

²³⁸ That is, the ‘transfer of passengers between aircraft at a foreign point for a through journey’ (Paul Stephen Dempsey, ‘Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation’ (2004) 32(2) *Ga J Int’l & Comp L* 231, 235). See, for example, *Air Service Agreement of 27 March 1946 between the United States of America and France (USA v France)* (1978) XVIII R.I.A.A. 417, which involved change of gauge between London and Paris, and which will be discussed in Section 3.3.2.1.

²³⁹ Havel and Sanchez (n 112) 70-71.

designation, and in terms of route rights, the 6th freedom for passenger services and the option of the 7th freedom for all-cargo services.²⁴⁰

2.3.4 Pilotless aircraft

The Chicago Convention imposes different requirements for admission to national airspace for pilotless aircraft.

In accordance with Article 8 of the Chicago Convention, special permission is required to operate pilotless aircraft over the territory of a contracting State:

‘No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft’.

This article was incorporated into the Chicago Convention from Article 15 of the Paris Convention, where it appeared in similar form, and ICAO has clarified that its scope extends to ‘all unmanned aircraft, whether remotely piloted, fully autonomous or combinations thereof’.²⁴¹

ICAO’s regulation of unmanned aircraft has so far focused on remotely piloted aircraft (RPA), a subsection of the broader category of unmanned – pilotless – aircraft. An ‘RPA’ is defined in Annexes 2 and 7 of the Chicago Convention as ‘an unmanned aircraft which is piloted from a remote pilot station’.²⁴² The decision to streamline the development of international civil aviation law applicable to unmanned aircraft to focus on RPA in these early stages of regulation was made by the Unmanned Aircraft Systems Study Group (UASSG), a body established to assist the ICAO Secretariat in its work on integrating unmanned aircraft into airspace used by manned aircraft. The UASSG made this determination on the basis that only aircraft with some degree of control exercised over their operation – remotely

²⁴⁰ See, for example, Air Transport Agreement between the European Union and the United States of America [2007] OJ L134/5; Multilateral Agreement on the Liberalization of International Air Transportation (Washington DC, 1 May 2001) 2511 U.N.T.S. 33, *entered into force* 21 Dec. 2001; *Agreement between Australia and the Government of New Zealand relating to Air Services*, signed 8 August 2002 [2003] ATS 18 (*entered into force* 25 August 2003).

²⁴¹ ICAO Doc 10019 AN/507, *Manual on Remotely Piloted Aircraft Systems* (2015) 1.1. ‘RPAS’ is the current term used by ICAO to refer to such aircraft but accurately encompassing all aircraft without a pilot on board in a single term presents a definitional challenge. See, for example, Mikko Huttunen, ‘Unmanned, Remotely Piloted, or Something Else? Analysing the Terminological Dogfight’ (2017) 42(3) A&SL 349.

²⁴² Chicago Convention, Annex 2, 1-8 and Annex 7 (6th edn, July 2012) 1.

piloted, as opposed to autonomous – could be safely integrated.²⁴³ As a result, although Article 8 applies to pilotless aircraft more broadly, RPA will be the focus in this section.

The special permission under Article 8 is required regardless of whether the RPA is scheduled or non-scheduled, despite the apparent conflict with Article 5 in the case that the RPA aircraft is operating a non-scheduled flight. In other words, this aspect of Article 8 takes precedence over the conflicting element of Article 5 when both articles are applicable. The primacy of Article 8 is based on the principle of *lex specialis* and on the interpretation of the articles in accordance with their ordinary meaning.

The principle of *lex specialis* is not codified as a rule of treaty interpretation in the Vienna Convention on the Law of Treaties but it has been relied on a number of times by the ICJ.²⁴⁴ Koskenniemi describes the principle as a ‘pragmatic mechanism for dealing with situations where two rules of international law that are both valid and applicable deal with the same subject matter differently’, as is the case regarding prior authorisation under Articles 5 and 8 in the event of an operation involving a non-scheduled flight conducted by an RPA.²⁴⁵ In these cases, *lex specialis* dictates that the ‘if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former’.²⁴⁶ Article 5 of the Chicago Convention is the *lex generalis* in this context, in that it applies to all civil aircraft when conducting international non-scheduled flights. Article 8 in contrast, applies only to a subset of those aircraft: those that are RPA. Article 8 is thus the more specific rule that takes precedence.

The above interpretation is further supported by reading the two articles ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’, as dictated by the general rules of treaty interpretation.²⁴⁷ In its ordinary meaning, Article 5 provides that aircraft conducting non-scheduled flights do not require special authorisation or permission to overfly another State’s territory, whilst Article 8 requires that they do if they are RPA. Considering the articles in the broader context of the treaty, it is clear that Article 8 necessarily has precedence over Article 5 in the interest of safety. One of the principal purposes of the Chicago Convention is to help ensure that ‘international

²⁴³ ICAO Manual on Remotely Piloted Aircraft Systems (n 241) 1.2.14.

²⁴⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Rep. 2010 (Jul. 22) p. 403, p. 438 para. 83; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Rep. 1986 (Jun. 27) p. 14, p. 137 para. 274; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Rep. 1982 (Feb. 24), p. 18, p. 38 para. 24.

²⁴⁵ ILC ‘Report of the Study Group on Fragmentation of International Law’ (n 92) 30.

²⁴⁶ *ibid* 34–35.

²⁴⁷ Vienna Convention on the Law of Treaties, Article 31(1).

civil aviation may be developed in a safe... manner'.²⁴⁸ RPA pose different risks to civil aviation and have different requirements than manned aircraft, for example in terms of their detect and avoid capabilities and their detectability and conspicuity to other aircraft, as well their communication with ATS, among many other considerations.²⁴⁹ It is through the request for authorisation that the State whose territory is to be overflown is able to ensure that the operation will be conducted safely²⁵⁰ and it is for this reason that special permission is required under Article 8, whether or not the RPA operates a scheduled air service or a non-scheduled flight. The obligation on States to ensure RPA are operated safely is found in Article 8 itself: States are required to undertake to ensure that RPA 'shall be so controlled as to obviate danger to civil aircraft'. While the Chicago Convention's primary focus is *international* civil aviation, this article requires that the safety of all civil aircraft – on international or domestic flights – is protected.²⁵¹

The requirements for the special authorisation for overflight of an RPA through national airspace outside its State of Registry are included in Annex 2, Appendix 4 to the Chicago Convention, with supporting guidelines in ICAO's 2015 *Manual on RPAS*.²⁵² From an operational perspective, the requirements include that the request for authorisation is made to 'the appropriate authorities of the State(s) in which the RPA will operate', which is usually the Civil Aviation Authority (CAA), and that the request is made at least seven days before the intended flight.²⁵³ ICAO has issued a template form to submit the request,²⁵⁴ in accordance with the criteria under Annex 2, which includes a request for information about, for example, the RPA operator and technical details of the RPA.²⁵⁵

Beyond the scope of Article 8 of the Chicago Convention, States are not bound by how they grant overflight rights for RPA and States are free to deviate from the ICAO specifications mentioned in the above paragraph. In pursuance of ICAO's objective that international civil aviation is 'developed in a safe and orderly manner' and that air transport services are operated 'soundly and economically',²⁵⁶ it is in ICAO's interest that States eventually reach broader agreements facilitating the overflight of RPA, as has been

²⁴⁸ Chicago Convention, Preamble. This is reiterated in Article 44, where the aims and objectives of ICAO include ensuring (a) '...the safe ... growth of international civil aviation throughout the world' and meeting (d) '...the needs of peoples of the world for safe ... air transport'.

²⁴⁹ As identified by ICAO, for example, when stating that '[s]afety analyses may be needed to establish RPAS capabilities to mitigate consequences of each specific hazard that may be encountered' (*ICAO Manual on Remotely Piloted Aircraft Systems* (n 241) 10.2.5).

²⁵⁰ See the template 'Request for Authorization Form' provided by ICAO for a more comprehensive list of the considerations (*ibid* Appendix A).

²⁵¹ Cheng, *The Law of International Air Transport* (n 90) 112.

²⁵² *ICAO Manual on Remotely Piloted Aircraft Systems* (n 241) (2015).

²⁵³ Chicago Convention, Annex 2, Appendix 4, 3.1.

²⁵⁴ *ICAO Manual on Remotely Piloted Aircraft Systems* (n 241) Appendix A.

²⁵⁵ Chicago Convention, Annex 2, Appendix 4, 3.2.

²⁵⁶ *ibid* Preamble.

achieved for manned aviation. For this purpose, ICAO emphasises that ‘States may agree mutually upon simpler procedures through bilateral or multilateral agreements or arrangements for the operation of specific RPA or categories of RPA’.²⁵⁷

The obvious benefit of these broader bilateral or multilateral arrangements in favour of *ad hoc* authorisation is that they reduce the burden on both RPA operators who have to submit the requests and on the State authorities responsible for processing them.²⁵⁸ The operation of civil RPA is at present still predominantly restricted to national borders, although not exclusively. A 2016 ICAO survey found that, of the 61 Member States that responded, 26 had received requests in the last two years from foreign RPA operators, pursuant to Article 8 of the Chicago Convention, for ‘special authorisation’ to operate RPAs in their territories.²⁵⁹

State aircraft, whether they are RPA or manned aircraft, fall outside the Chicago regime, that is, from the Chicago Convention and its annexes. Overflight rights for their operation stem from an entirely independent framework from that which has been set out above for civil aircraft, as will be addressed in the following section.

2.4 OVERFLIGHT RIGHTS FOR STATE AIRCRAFT IN NATIONAL AIRSPACE

2.4.1 Preliminary matters

Under Article 3(b) of the Chicago Convention, ‘aircraft used in military, customs and police services shall be deemed to be State aircraft’ (emphasis added). In this sense, State aircraft are defined ‘not by ownership or even control, but by a purely functional test’.²⁶⁰ Whether an aircraft is a State aircraft or a civil aircraft is significant because State aircraft are expressly excluded from the scope of the Chicago Convention and its annexes.²⁶¹ The implications of this for national airspace will be addressed here below.

The focus in this section is the consequences of the exclusion for the exchange of overflight rights but the impact is much greater, going beyond the scope of the Chicago Convention, the annexes attached to it, and the ASAs that flow from it, to the applicability of insurance policies and international air law instruments more broadly.²⁶² For example, the criminal law

257 ICAO Manual on Remotely Piloted Aircraft Systems (n 241) 3.2.2. At the time of writing, the author is not aware of any such agreements or arrangements being in place.

258 ICAO Manual on Remotely Piloted Aircraft Systems (n 241) 3.2.2.

259 ICAO Working Paper LC/37-WP/2-1, *Remotely Piloted Aircraft Systems Legal Survey* (26 July 2017) 4.4.1 and Appendix A-9.

260 Bin Cheng, ‘The Destruction of KAL Flight KE007, and Article 3 bis of the Chicago Convention’ in JWE Storm van ‘s Gravensande and A van der Veen Vonk (eds), *Air Worthy – Liber Amicorum Honouring Professor Dr IHPh Diederiks Verschoor* (Kluwer 1985) 64.

261 Chicago Convention, Article 3(a).

262 Milde, *International Air Law and ICAO* (n 91) 77.

treaties in relation to international civil aviation do not apply to ‘aircraft used in military, customs or police service’²⁶³ and the Warsaw/Montreal regime is applicable to carriage performed by the State or by legally constituted public bodies, but States can make a reservation to exclude carriage performed directly by the State.²⁶⁴

Insofar as the exchange of overflight rights is concerned, in principle and without further negotiation between States, State aircraft are only permitted to fly above the territory of the State in which they are registered and over international airspace. In contrast to the regime for civil aircraft established through the Transit Agreement and ASAs, the framework that regulates the overflight of State aircraft is largely based on *ad hoc* arrangements between States.

The purpose of this section is first to briefly address the distinction between State aircraft and civil aircraft (Section 2.4.2) and second, to set out the framework governing the grant of overflight rights in relation to the international operation of State aircraft (Section 2.4.4). The legal basis of overflight rights under the framework stems from clearances or authorisations, known as ‘diplomatic clearances’, granted to a State aircraft, in respect of a certain flight or flights or for a certain duration of time, by the relevant authority of the State whose territory is to be overflowed, in response to an application made through diplomatic channels.

2.4.2 The definition of State aircraft

2.4.2.1 State aircraft under the Paris Convention (1919) and the Chicago Convention (1944)

The Paris Convention distinguished between State aircraft and civil aircraft and, like the Chicago Convention, also excluded the former from its scope.²⁶⁵ Under Articles 30(a) and (b) of the Paris Convention, military

²⁶³ Convention on Certain Other Acts Committed on Board Aircraft (1963) ICAO Doc 8364, Article 1(4) ('Tokyo Convention'); Convention for the Suppression of Unlawful Seizure of Aircraft (1970) ICAO Doc 8920, Article 3(2) ('Hague Convention'); and, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971) ICAO Doc 8966, Article 4(1) ('Montreal Convention 1971'). Neither does the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952) ICAO Doc 7364, Article 26 ('Rome Convention').

²⁶⁴ Convention for the Unification of Certain Rules for International Carriage by Air (1999) ICAO Doc 9740, Article 57 ('Montreal Convention 1999'); Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929) Conférence Internationale de Droit Privé Aérien (Warsaw), Article 2(1) ('Warsaw Convention'). The inclusion of carriage performed by the State under the Warsaw/Montreal regime makes sense considering that at the time of the drafting of the Warsaw Convention ‘in 1929 there were in fact no ‘private’ carriers and, except in the USA and possibly Japan, the airlines were government owned and government controlled’ (Milde, *International Air Law and ICAO* (n 91) 69).

²⁶⁵ Paris Convention, Article 30.

aircraft together with ‘aircraft exclusively employed in State service’ were expressly considered State aircraft, where State service included ‘posts, customs and police’. The Convention defined none of these terms although a definition of sorts was provided for military aircraft: ‘[e]very aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft’.²⁶⁶ Goedhuis criticised this definition for the fact that it failed to take into account the characteristics of the aircraft itself and his view that the article ought to be amended was shared by the International Commission for Air Navigation at the time.²⁶⁷

Further ambiguity arose as a result of Article 30(b) providing that all other aircraft are ‘private aircraft’²⁶⁸ and therefore within the scope of the Convention, but then proceeding to state that ‘[a]ll State aircraft other than *military, customs and police aircraft* shall be treated as private aircraft’ (emphasis added). This resulted in what has been described as a ‘curious feature’, whereby aircraft employed exclusively for postal services were initially included and then excluded from the definition of State aircraft.²⁶⁹ The overall ambiguity of Article 30 was compounded by the initial reference to ‘State service’ in Article 30(a) which suggested, through the use of the words ‘such as’, that ‘posts, customs, police’ were examples, rather than constituting an exhaustive list, of State services. Considering that all aircraft had to fall into one of the two categories – State aircraft or private aircraft – it is not possible for all aircraft other than military, customs and police aircraft to be private aircraft if the term ‘State aircraft’ included aircraft used for military, customs, police and postal services, *among others*.

266 ibid Article 31.

267 ‘Tegen deze begripsformuleering vallen ernstige bezwaren in te brengen. Het is onjuist het militaire karakter van een luchtvaartuig uitsluitend door een persoonlijk criterium (een militair als commandant) te doen bepalen, terwijl het objectieve criterium (de technische eigenschappen en de uitrusting van het toestel) buiten beschouwing blijft. Het feit, dat een militair luchtvaartuig niet onder militair commando wordt gevlogen, verandert niets aan het karakter van het luchtvaartuig’ (Daniel Goedhuis, *Handboek voor het Luchtrecht* (Martinus Nijhoff 1943) 62, translated: ‘There are serious objections to be raised regarding this method of interpretation. It is incorrect to determine the military character of an aircraft exclusively on the basis of the personality criterion (a military officer as commander), while disregarding the objective criterion (the technical characteristics and the equipment of the aircraft). The fact that the military aircraft is not under military command changes nothing of the character of the aircraft’. Goedhuis refers here to Resolution no 1055 of the International Commission for Air Navigation (ICAN) (27th Meeting, Copenhagen 1939) 39.1, recognising that an attempt by the Commission to amend Article 30 had at that point not been successful. See also, discussion of this in JP Honig, *The Legal Status of Aircraft* (Martinus Nijhoff 1956) 38.

268 The term ‘private aircraft’ refers to what we now term ‘civil aircraft’. This shift in language from the Paris Convention to the Chicago Convention took place as a result of a suggestion referred to the drafting Committee of Subcommittee 2 on 10 November 1944 (ICAO WP/2-1, *Secretariat Study on ‘Civil/State Aircraft’*, Presented by the Secretariat at the Legal Committee 29th Session, Montreal (3 March 1994) Attachment I at 2.2.1).

269 Honig (n 267) 37.

Article 3(b) of the Chicago Convention removes some of the confusion brought about by the Paris Convention, such as that regarding postal services, but it does not provide an unambiguous distinction between State and civil aircraft. The Chairman of the drafting committee of Article 3 of the Chicago Convention recognised in 1949, that the ‘language used was understood to be vague’ but that the final wording was preferable to an attempt to define aircraft in a fixed form, as opposed to by its use on a particular flight.²⁷⁰ Regardless, international civil aviation law must contend with the questions that Article 3 raises, a task that the ICAO Legal Committee Secretariat undertook in a 1994 report, echoing the Chairman’s words in its acknowledgment that ‘there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law’.²⁷¹

Article 3(b) states that aircraft that fall within the specified categories ‘shall be deemed to be’ State aircraft, but it does not define the term ‘State aircraft’. Like the Paris Convention, ‘military’, ‘customs’ and ‘police’ are also not defined. As was the case with the Paris Convention, it is also unclear from the wording of the article whether the list is exhaustive, that is, whether State aircraft are exclusively those used for military, customs and police services or whether aircraft used for other State functions, such as post or search and rescue, are also classified as State aircraft. Furthermore, the article leaves open the question of whether aircraft used for the services listed can ever be considered civil, rather than State, aircraft.

2.4.2.2 Subsequent ICAO consideration

The ICAO Legal Committee Secretariat, (‘the Secretariat’) interprets Article 3(b) restrictively, concluding that aircraft used for military, customs and police services are necessarily State aircraft²⁷² and that no other aircraft are State aircraft for the purposes of the Chicago Convention.²⁷³ In reaching this interpretation, the Secretariat considered, among other things, that the Chicago Convention does not explicitly deviate from the provision in the Paris Convention, which stated that all aircraft other than those listed as State aircraft were to be considered civil aircraft. Although this provision was omitted from Article 3 of the Chicago Convention, the fact that it did not expressly deviate from it is, according to the Secretariat, indicative that there was no intention to broaden the definition of State aircraft.²⁷⁴

Consistent with the ordinary meaning of Article 3(b) of the Chicago Convention, the Secretariat has furthermore emphasised that it is the *usage* that determines whether an aircraft is a State or civil aircraft and not ‘other

²⁷⁰ ICAO Secretariat Study on ‘Civil/State Aircraft’ (n 268) Attachment I at 5.2.4.

²⁷¹ ibid Attachment I at 1.1.

²⁷² ICAO Secretariat Study on ‘Civil/State Aircraft’ (n 268) Attachment I at 5.1.1.

²⁷³ ibid Attachment I at 5.2.3 – 5.2.4.

²⁷⁴ ibid Attachment I at 5.2.3.

factors, such as aircraft registration... ownership (public or private), type of operator (private/state), *except insofar as these criteria go towards showing the type of usage'* (emphasis added).²⁷⁵ Other factors, including the technical specifications of the aircraft, such as its speed and capacity, may also contribute in this respect.²⁷⁶

2.4.2.3 Distinctions in other legal frameworks specific to purpose

The ICAO Legal Committee Secretariat has also recognised that civil aircraft under the Chicago Convention may be treated as State aircraft in the context of other legal frameworks.²⁷⁷ Where this occurs though, it is not indicative of the categorisation of the aircraft for the purposes of the Chicago Convention.

As the ICAO Secretariat explains in the case of medical aircraft under the First Geneva Convention of 1949:²⁷⁸

'The fact that an aircraft is a medical aircraft under the Red Cross Conventions and the Protocol does not give it a special status vis-à-vis the Chicago Convention; an analysis will have to be made, as in the case of any other aircraft, to see if it falls under Article 3(b)'.²⁷⁹

Conversely, the Geneva Conventions:²⁸⁰

'...do not link their own scopes of applicability to the determination under the Chicago Convention of the status of an aircraft. The Conventions of 1949 refer to civil and military aircraft, but not to these terms as 'defined' under Chicago.'

²⁷⁵ ibid Attachment I at 1.3.

²⁷⁶ Milde, *International Air Law and ICAO* (n 91) 74–75. See also, for a discussion on factors that are taken into account, Ruwantissa Abeyratne, 'Legal Issues of the Snowden Case: State Aircraft vs. Civil Aircraft' (2013) 62(4) ZLW 648, 652.

²⁷⁷ ICAO *Secretariat Study on 'Civil/State Aircraft'* (n 268) Attachment I at 5.2.6.

²⁷⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 Aug. 1949) 75 UNTS 31 *entered into force* 21 Oct. 1950, Articles 36 and 37 ('First Geneva Convention').

²⁷⁹ ICAO *Secretariat Study on 'Civil/State Aircraft'* (n 268) Attachment I at 4.6.1.

²⁸⁰ In addition to the First Geneva Convention: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 Aug. 1949) 75 UNTS 85 287 *entered into force* 21 Oct. 1950 ('Second Geneva Convention'); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 Aug. 1949) 75 UNTS 135 287 *entered into force* 21 Oct. 1950 ('Third Geneva Convention'); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 Aug. 1949) 75 UNTS 287 *entered into force* 21 Oct. 1950 ('Fourth Geneva Convention'); together with Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 Jun. 1977) 1125 UNTS 3 *entered into force* 7 Dec. 1978 and Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 Jun. 1977) 1125 UNTS 609 *entered into force* 7 Dec. 1978.

Consequently, the provisions of the Chicago Convention does [sic] not, and cannot, determine whether and to what extent the flight crew of an aircraft is given protection by these Conventions'.²⁸¹

This is also the case in EU aviation law. For example, Regulation (EU) 2018/1139 (EASA Basic Regulation)²⁸² addresses regulatory matters such as airworthiness, environmental certification and flight crew licensing, excludes from its scope 'aircraft... while carrying out military, customs, police, search and rescue, fire fighting, border control, coastguard, or similar activities or services'.²⁸³

Eurocontrol, on the other hand, defines State aircraft and civil aircraft for ATM purposes using the terminology of the Chicago Convention. This position was clarified by the Provisional Council for Eurocontrol²⁸⁴ in 2001 when it issued a decision on the definition of State aircraft in which it stated that such aircraft are, 'with reference to article 3(b) of the Chicago Convention, only aircraft used in military, customs and police services' and that 'civil registered aircraft used by a State for other than military, customs and police service shall not qualify as State aircraft'.²⁸⁵ The same definition is used in the EU in the framework regulation for the Single European Sky (SES),²⁸⁶ and related legislation,²⁸⁷ which was implemented to meet the safety and capacity needs of the European ATM network, of which Eurocontrol is the network manager.

281 ICAO Secretariat Study on 'Civil/State Aircraft' (n 268) Attachment I at 4.6.1 - 4.6.2.

282 Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91 ('EASA Basic Regulation').

283 EASA Basic Regulation, Article 2(3)(a).

284 This body is 'responsible for implementing Eurocontrol's general policy' and consists of representatives of the Member States of the Agency at the level of Director General of Civil Aviation (Eurocontrol, 'Governing Bodies', available at <www.eurocontrol.int/info/governing-bodies> accessed 1 August 2020).

285 Eurocontrol, 'Decision of the Provisional Council – Definition of State Aircraft' (Session 11, 12 July 2001) Principle 1.

286 Regulation (EC) No 549/2004 of the European Parliament and of the Council of 10 March 2004 laying down the framework for the creation of the single European sky (the framework Regulation), Article 2(26).

287 Commission Regulation (EC) No 29/2009 of 16 January 2009 laying down requirements on data link services for the single European sky, Article 2(6); Commission Implementing Regulation (EU) No 1079/2012 of 16 November 2012 laying down requirements for voice channels spacing for the single European sky, Article 3(9). Although not related to the SES, also consider as an example of a piece of EU legislation that distinguishes between civil aircraft and State aircraft strictly in accordance with the terms of the Chicago Convention, Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, Article 2(2)(a).

Unlike EASA, Eurocontrol's ATM coordination division provides support to Member States for both civil aircraft and military aircraft and the distinction between the two is not for the purpose of excluding the latter but instead for ensuring an appropriate provision of ATM services based on the specifications of the aircraft involved. In the region under the management of Eurocontrol,²⁸⁸ air traffic is divided into general air traffic (GAT) and operational air traffic (OAT), where GAT includes 'all movements of civil aircraft, as well as movements of State aircraft (including military, customs and police aircraft) when these movements are carried out in conformity with the procedures of ICAO'.²⁸⁹ OAT is designed to facilitate flights involving aircraft that are not equipped to meet the requirements for GAT, such as those that lack certain communication or navigation tools or, particularly in the case of military aircraft, those that are expected to undertake activities that are not addressed by ICAO, such as airborne refueling or formation flying.²⁹⁰ Within a State, regulations applying to State aircraft, including military aircraft, may be a combination of OAT rules and rules determined through bilateral and regional arrangements.

2.4.2.4 Ambiguity of definition not a practical concern for States

Despite the ongoing lack of clarity in the distinction under the Chicago Convention, the question is, in recent years, no longer seen as a paramount concern to States. This is most evident in the response to a 2016 ICAO questionnaire on the subject, which was distributed to ICAO Member States in response to a Working Paper that was submitted the year prior on behalf of ten Member States addressing what they described as 'an absence of clear and generally accepted international rules' regarding the distinction between State aircraft and civil aircraft.²⁹¹ Fifty-five States responded to the

288 41 States including all EU Member States (as at November 2020).

289 Eurocontrol, 'General Air Traffic', available at <ext.eurocontrol.int/lexicon/index.php/General_Air_Traffic> accessed 20 February 2019.

290 Eurocontrol Specifications for Harmonized Rules for Operational Air Traffic (OAT) under Instrument Flight Rules (IFR) inside Controlled Airspace of the ECAC Area (EUROAT) (18 September 2016) 1.1.2. OAT applies to 'all flights which do not comply with the provisions stated for GAT and for which rules and procedures have been specified by appropriate national authorities' (Eurocontrol, 'Operational Air Traffic', available at <ext.eurocontrol.int/lexicon/index.php/Operational_Air_Traffic> accessed 20 February 2019). OAT follows ICAO rules as closely as possible and deviations from the rules are published by Eurocontrol.

291 ICAO WP/2-6, *State/Civil Aircraft Definition and its Impact on Aviation*, Presented by Poland, Bulgaria, The Czech Republic, Cyprus, Greece, Lithuania, Romania, Slovakia, Slovenia and Hungary at the Legal Committee 36th Session, Montreal (29 September 2015) 1.2.

questionnaire, with only eight of those reporting any concern.²⁹² As a result, at the 37th Session of the Legal Committee in September 2018, the matter of the distinction between State aircraft and civil aircraft was removed from the Committee's General Work Programme.²⁹³

Of course, at the heart of the matter is the concept of State sovereignty, on which some States see a global, harmonised approach as an encroachment. Echoing the words of the Chairman of the drafting committee of Article 3, Ecuador, addressing the matter, spoke of 'the legal straightjacket interfering with the sovereignty of States' and emphasised that '[t]he breadth with which the Article [Article 3(b)] had been drafted had made it possible for Contracting States to maintain their sovereignty and classify their aircraft under their own legislation'²⁹⁴ while Argentina likewise approved of the ambiguity of the article, which 'left it to the will of the States to determine whether an operation was 'State' or 'civil' in nature'.²⁹⁵ At the very least, the pursuit of a definition may be viewed as a losing battle by other States, with India having declared, in relation to finding a clear definition, that 'international affairs would always be subject to the problem of conflicting interpretations and that no detail of clarification could resolve this problem completely'.²⁹⁶

2.4.3 State aircraft not completely excluded from the Chicago Convention and its annexes

Before turning to the framework governing the grant of overflight rights in relation to the international operation of State aircraft, the following section provides a brief qualification to the statement that State aircraft are excluded from the scope of the Chicago Convention. Despite the express exclusion of State aircraft from the Chicago Convention under its Article 3(a), some provisions of the Convention and its annexes apply, or may be applied, to State aircraft.

This begins in Article 3 itself where Article 3(c), regarding the requirement for State aircraft to receive special authorisation, in effect results in the same requirements as the first part of Article 8 applying to pilotless aircraft. Furthermore, under Article 3(d), in issuing regulations for their State aircraft, contracting States are required to undertake to have due

²⁹² ICAO WP/2, *Consideration of other Items on the General Work Programme of the Legal Committee*, Presented by the Secretariat at the Legal Committee 37th Session, Montreal (12 July 2018) 4.4.

²⁹³ *ibid* 4.5 c).

²⁹⁴ ICAO Secretariat Study on 'Civil/State Aircraft' (n 268) Attachment 2 (Extract of the Draft Summary Minutes of the Eighth Meeting of the 140th Session of the Council held on 22 November 1993) at 15.

²⁹⁵ *ibid* at 10.

²⁹⁶ *ibid* at 8.

regard for the safety of navigation of civil aircraft. This is, again, consistent with the obligation imposed on States under the second part of Article 8 in relation to pilotless aircraft.²⁹⁷ ICAO also has a role in achieving coordination between military and civil aircraft pursuant to Article 3(d) of the Chicago Convention in order to help ensure that States exercise the required due regard under the article.

Huang has discussed this matter in relation to Article 3 *bis*,²⁹⁸ which addresses the obligation of States to refrain from the use of weapons against civil aircraft in flight, concluding, with reference to Article 32 of the Vienna Convention on the Law of Treaties, that such an interpretation ‘would lead to a result which is manifestly absurd or unreasonable’ if one were to conclude that [the article] is not applicable to state aircraft’.²⁹⁹ In particular, Huang highlights the fact that interception of civil aircraft under the article would most likely be carried out by State aircraft and so the requirement under Article 3 *bis* (a) – that it be done without jeopardising the lives of persons on board and the safety of the aircraft – and the corresponding rules for the interception of civil aircraft in the Appendix to Annex 2 are directed to any aircraft performing the task, whether it be a State aircraft or a civil aircraft.³⁰⁰ The willingness of States to provide ICAO with the power to legislate for State aircraft in this instance reflects the States’ recognition of the potentially catastrophic consequences for civil aircraft involved in interception and the role that regulation can play in helping to avoid such consequences.³⁰¹

Civil aviation rules have also been applied to State aircraft in the case of aircraft accident investigation. This occurred for instance after the 2010 aircraft accident in which the Polish President Lech Kaczyński, his wife, and a number of other Polish political and military leaders were killed, when the rules on aircraft accident and incident investigation under Annex 13 of the Chicago Convention were applied.³⁰²

The examples presented here are not comprehensive but are designed to demonstrate that, despite being explicitly excluded from the Chicago Convention, State aircraft remain subject to some of its provisions.

297 As such, whilst the provisions of Article 8 do not apply to RPAS employed for State purposes, similar considerations must be taken into account by contracting States that employ such RPAS, as a result of the general State aircraft provisions under the Convention.

298 See also, Section 2.3.2 in relation to Annex 17.

299 Huang (n 127) 111, in part quoting the Vienna Convention on the Law of Treaties, Article 31(3). See also, Cheng, ‘The Destruction of KAL flight KE007’ (n 260) 63.

300 Huang (n 127) 111.

301 The information contained in this sentence was provided by Professor Ludwig Weber (McGill University) through an interview with the author on 28 May 2019 at the Institute of Air and Space Law, McGill University, Montreal.

302 Piotr Kasprzyk, ‘Legal ramifications of the Investigations of the 2010 Polish President’s Aircraft Accident’ (2011) 36(3) A&SL 201.

2.4.4 The framework for the overflight of State aircraft

State aircraft operate over the territory of other States on the basis of diplomatic clearances. There is no international practice for this and the operation of State aircraft is instead largely negotiated on a bilateral basis. The authority responsible for granting the clearance depends on the structural and procedural peculiarities of the State and may also differ based on the type of State aircraft involved, that it, whether it is used for police, customs or military services. For example, in the US the clearances are granted by the Office of International Security Operations in coordination with the Department of Transportation, the Department of Homeland Security, the Department of Defense, US Secret Service and airport authorities, as relevant.³⁰³ In Sweden, the government body responsible depends on the purpose of the operation: the Department of Defence (Regeringskansliet) grants the clearance for military aircraft, while police and customs aircraft are considered by the Swedish Maritime Administration (Sjöfartsverket).³⁰⁴ In Singapore, the Ministry of Foreign Affairs is the responsible authority,³⁰⁵ in Australia it is the Department of Defence,³⁰⁶ and in Switzerland it is the Federal Office of Civil Aviation, in agreement with the Department of Foreign Affairs and the Swiss Air Force.³⁰⁷ Upon issuing the diplomatic clearance, the granting State provides the aircraft with a diplomatic clearance number, which is then required to be submitted with the flight plan.

The length of prior notice required for obtaining the clearance differs between States, as does the information required by the State of overflight. The type of information may include the purpose of the mission, whether there are weapons or harmful substances on board, and whether there are photographic sensors or cameras attached to the aircraft.³⁰⁸ The requirement for States to inform of and obtain permission for the carriage of weapons is an obligation that extends beyond bilateral diplomatic clearance arrangements for State aircraft to also include civil aircraft by way of Article 35 of the Chicago Convention. Under this article, States are prohibited from

-
- 303 US Department of State, 'Diplomatic Aircraft Clearance Procedures for Foreign State Aircraft to Operate in United States National Airspace', available at <www.state.gov/diplomatic-aircraft-clearance-procedures-for-foreign-state-aircraft-to-operate-in-united-states-national-airspace/> accessed 1 August 2020.
- 304 Swedish Armed Forces, 'Diplomatic Clearances', available at <www.forsvarsmakten.se/en/about/diplomatic-clearances/> accessed 18 March 2019.
- 305 Aeronautical Information Publication Singapore, GEN 1.2 Entry, Transit and Departure of Aircraft – 3.1.1.3 Civil Non-Scheduled Flights – Overflight (21 July 2016).
- 306 Australian Government, Department of Foreign Affairs and Trade, 'Diplomatic Clearances – Aircraft and Ships', available at <www.dfat.gov.au/about-us/foreign-embassies/protocol/Pages/diplomatic-clearances-aircraft-and-ships> accessed 5 January 2019.
- 307 Switzerland, Federal Office for Civil Aviation (FOCA), 'Diplomatic Clearances', available at <www.bazl.admin.ch/diplomaticclearances> accessed 1 August 2020.
- 308 See, for example, the EU Diplomatic Clearance Technical Arrangement (DIC TA) Form, available at <dic.eda.europa.eu/> accessed 13 March 2020.

carrying ‘munitions of war or implements of war in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State’.

Clearances under specific circumstances are also governed at a multilateral level, such as for example, those in the scope of the European Convention on Extradition.³⁰⁹ Article 21(4) of this Convention requires notification of overflight and unscheduled landing and a request for transit in the case of intended landing, for flights within the scope of the Convention. Although the article does not mention the term ‘State aircraft’, the aircraft on these flights would likely be classified as State aircraft because, even without regard to other relevant factors, extradition is an act of the State.

The result of this system of bilateral agreements is that an international flight of a State aircraft involving the overflight of more than one State in addition to the State in which the aircraft is registered, must generally be organised segment by segment. For example, a State aircraft flying from Romania to Spain will, in the absence of harmonised arrangements, as to which see below, need to obtain diplomatic clearances for each of the States whose airspace it operates over. In order to avoid the burden of having to obtain individual diplomatic clearances for each flight, or for each portion of territorial airspace for a flight where overflight of multiple countries is involved, some States and organisations have harmonised agreements in place. These agreements operate as a type of blanket arrangement for the operation of certain State aircraft, providing prior permission for the specified State aircraft of the participating States to operate in the airspace of the other participating States. For example, the European Union Defence Agency’s (EDA) Diplomatic Clearance Technical Arrangement (DIC TA) facilitates the overflight of military transport aircraft of the States involved over the other States’ territories.³¹⁰ Similarly, the North Atlantic Treaty Organization (NATO), which in peacetime uses bilateral agreements for the operation of its aircraft,³¹¹ has also considered implementing harmonised arrangements between NATO member States.³¹²

309 European Convention on Extradition (Paris, 13 December 1957) ETS 24.

310 The DIC TA was first signed by 11 Member States on 19 November 2012 and now, in its current form as amended in 2017, it has 17 Member State signatures (European Defence Agency, ‘Diplomatic Clearances’, available at <dic.eda.europa.eu/> accessed 3 January 2019). See also, European Commission, ‘Joint Communication to the European Parliament and the Council – Improving Military Mobility in the European Union’ (Brussels, 10 November 2017, JOIN(2017) 41 final) 4.

311 ‘NATO Policy for Civil/Military Aircraft Operating in Support of NATO or NATO-led Missions and Operations’ (NATO, 2016) 8. See also, ICAO European and North Atlantic Office EUR Doc 032, *Interim Guidance Material on Civil/Military Cooperation in Air Traffic Management* (2nd edn, 2016) 30.

312 European Commission, ‘Joint Communication to the European Parliament and the Council – Improving Military Mobility in the European Union’ (Brussels, 10 November 2017, JOIN(2017) 41 final) 4.

2.5 IN SUMMARY: THE GRANT OF OVERFLIGHT RIGHTS IN NATIONAL AIRSPACE

The legal basis for the right of overflight depends on the airspace in question – national or international – as well as the type of aircraft involved. This chapter so far has established the legal bases for overflight rights in national airspace for civil aircraft, taking into account whether the aircraft is manned or unmanned and whether the operation is a scheduled service or a non-scheduled flight, as well as for State aircraft, which fall outside the scope of the Chicago Convention.

Overflight rights are granted by a State in respect to the navigation of aircraft in the airspace over its territory. The first part of the chapter examined the relationship between sovereignty and territory in international civil aviation law and the interaction between this area of law and the law of the sea and space law in determining the limits of national airspace. Whilst the horizontal limits are clear under international law, despite some disputed claims to an extended territorial sea, the vertical extent of national airspace is yet to be delimited.

Over national airspace, the grant of overflight rights for civil aircraft is conducted pursuant to Articles 5, 6 and 8 of the Chicago Convention. If the navigation involves manned aircraft on a non-scheduled flight, the grant of overflight rights is provided on a multilateral basis under Article 5 for aircraft of State parties to the Convention. Under Article 6, scheduled air services are permitted to fly over the territory of another State only with prior permission from that State. This provision forms the basis of the framework of ASAs that facilitate international air transport. For the right of overflight however, the Transit Agreement provides for the exchange of the right on a multilateral basis. Despite this, the right of overflight, together with the right to make technical stopovers, is usually reiterated in the ASAs of States that are party to the Transit Agreement. For unmanned civil aircraft, special permission is required for operation over another State's territory. This is even in the case of unmanned aircraft conducting a non-scheduled flight because, in the case of Articles 5 and 8 applying, the latter, as *lex specialis*, takes precedence over the former.

State aircraft are explicitly excluded from the scope of the Chicago Convention and therefore from the legal framework that governs the overflight rights for civil aircraft. State aircraft are instead generally granted overflight rights through bilateral *ad hoc* arrangements. As with the grant of special permission to facilitate the overflight of civil unmanned aircraft, in some instances arrangements have been put in place for a move towards a more harmonised approach to the grant of overflight rights for State aircraft, which would decrease the burden on both the granting and requesting States. In the case of State aircraft, the discussion surrounding a more harmonised approach is at present centred around the operation of aircraft within the activities of specific agencies (EDA) and organisations (NATO), rather than the international operation of State aircraft on a general basis.

The chapter up to this point has provided the foundation for the analysis in the remainder of the chapter which first examines the restriction of overflight rights over national airspace and, second, the basis for overflight rights in international airspace, where the interaction of the law of the sea with overflight is a central consideration.

2.6 RESTRICTION AND REGULATION OF OVERFLIGHT RIGHTS IN NATIONAL AIRSPACE

2.6.1 Withdrawal, suspension and revocation

The grant of the right of overflight by a State to the aircraft of another State is subject to compliance with applicable laws under both international law and the domestic law of the granting State. This section will consider the general circumstances giving rise to the withdrawal, suspension and revocation of overflight rights rather than look at specific ASAs or domestic laws. As such, reference to revocation under ASAs will be based on the template ASAs (TASAs) provided by ICAO. In the words of ICAO, the TASAs ‘include draft provisions on traditional, transitional and most liberal approaches to various elements in an air services agreement’ representing ‘a distillation of the most common and current usage by States’.³¹³ The TASAs have no legal value but are provided as guidance to States in drafting their ASAs.

As has been outlined above in Section 2.3.3.1, for international civil aviation most States have exchanged overflight rights for scheduled air services in relation to their territory through the Transit Agreement, concluded in 1944 together with the Chicago Convention. For those States that are not party to the Transit Agreement, the exchange is made through ASAs on a bilateral basis, to be exercised by the designated carrier under the ASAs or, in the case of a more liberalised ASA, by all carriers of each State under the agreement.

Regardless of the source of the overflight right, in order for a carrier to exercise it, the granting State – or, more accurately, the aeronautical authority of the State – must have provided the carrier with operating authorisations and technical permissions based on a number of conditions, which are set out in the Transit Agreement and ASAs. The circumstances that are considered in the initial grant of the authorisation are in turn those that give rise to the right to withdraw, revoke or suspend a carrier’s operating authorisation.³¹⁴ Of course, further to the right to retract overflight rights as a result of the circumstances that will be discussed in this section, States also reserve the right to denounce and withdraw from the Transit

313 Chicago Convention, Annex 2, Appendix 5 ‘ICAO Template Air Services Agreements’, 1.

314 *ibid* 9 and 13.

Agreement and the ASAs that they enter into, with the standard period of notice being twelve months.³¹⁵

Two overarching scenarios provide a State with the right to withdraw, revoke or suspend overflight rights under both the Transit Agreement and ASAs: when the State granting the authorisation to the carrier is not satisfied that the ownership and control requirements, or equivalent, are met by the carrier; and, when the carrier has contravened the domestic law of the granting State.³¹⁶ The latter obligation, to operate in accordance with the domestic laws of the State whose territory is being overflowed, reflects Article 11 of the Chicago Convention, which imposes an obligation on aircraft operating in the territory of another State to comply with the laws and regulations of that State regarding the operation and navigation of aircraft.

The ownership and control requirements on the other hand are imposed to determine which carriers are entitled to receive the special permission or authorisation referred to in Article 6 of the Chicago Convention, by way of allocation as a designated carrier under the ASA. The requirement that the carrier is substantially owned and effectively controlled by the State or nationals of the State in which it is registered is part of the traditional, restrictive approach to air transport governance and while the formula is gradually being replaced by more liberal requirements, it persists in a majority of ASAs.³¹⁷ The definitions of 'substantial ownership' and 'effective control' are subject to domestic law in the absence of internationally agreed definitions. In many cases though, such as for EU Member States under Regulation (EC) 1008/2008, a carrier meets the 'substantial ownership' criterion if more than 50 per cent of its equity is owned by the State or nationals of the State.³¹⁸ The US differs in this respect, requiring at least 75 per cent of the voting equity to be owned by the State or national of the State in order for the carrier to be able to be considered as an US designated carrier.³¹⁹ The approach to 'effective control' is more varied across jurisdictions and measuring it is more difficult. In the EU for instance, again under Regulation (EC) 1008/2008, it involves consideration of 'the possibility of directly or indirectly exercising a decisive influence on an undertaking', including consideration of the right to use its assets and of involvement in decision-

³¹⁵ This is provided in the Transit Agreement under Article III.

³¹⁶ *ibid* Article 1, Section 5.

³¹⁷ Chicago Convention, Annex 2, Appendix 5 (ICAO Template Air Services Agreements), 9.

³¹⁸ Regulation (EC) No 1008/2008, Article 4(f). The same hurdle applies under domestic law, for example, in Australia, although there it only applies to carriers flying international routes and there are no restrictions on foreign ownership for carriers operating purely domestic services.

³¹⁹ US Department of Transportation, 'How to become a Certified Air Carrier' (Information Packet, September 2012) 12-13. In Japan, foreign ownership is restricted for all carriers to 33%. For a comparison of these rules, see 'Airline Ownership and Control Rules: At Once both Irrelevant and Enduring' (CAPA – Centre for Aviation), available at <centre-foraviation.com/analysis/reports/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816> accessed 3 July 2017.

making regarding, for example, the composition, voting or running of the undertaking.³²⁰ Once a carrier has been put forward as a designated carrier under an ASA by the State in which it is registered, it is then for the State granting the operating authorisation to determine whether the carrier meets the first State's ownership and control requirements. In other words, for the purpose of granting the authorisation, the granting State is 'the sole judge of whether the ownership and control criteria have been met'.³²¹

More liberalised agreements typically omit the ownership restrictions and require effective *regulatory* control rather than effective control,³²² where effective regulatory control entails both safety and financial responsibility. As to the former, it involves the State ensuring that the carrier holds a valid operating licence or permit issued by the licensing authority, such as an air operator certificate (AOC), and for the latter, it includes considerations such as the carrier holding a valid air carrier licence and being of sound financial fitness. A transitional ASA – in between a traditional and fully liberalised ASA – may require, in addition to effective regulatory control, that the carrier's principle place of business is in the State of designation. This involves, for instance, that the carrier is established and incorporated in the State in accordance with its laws and regulations, that substantial operations and capital investment are in the State, and that it pays income tax in the State.

Although they will generally form part of a State's national laws and regulations, ASAs also expressly provide for withdrawal, revocation or suspension on the basis of failure to comply with the minimum ICAO Standards applying to safety and, more recently, security aspects.³²³ Annex 17, 'Security', to the Chicago Convention was adopted in 1974 but it did not immediately become an express basis on which authorisation could be revoked under ASAs. For example, the Bermuda II agreement³²⁴ between the UK and the US, which was adopted in 1977, referred to security in both its preamble and in a specifically dedicated article (Article 7) but it was not an express basis for revocation or suspension, in contrast to safety aspects (under Article 5). In today's ASAs, security and safety standards are expressly provided as bases for revocation.

Finally, under Article 1 of the Transit Agreement, overflight rights (along with second freedom rights), are suspended outside of peacetime:

'in areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities'.³²⁵

320 Regulation (EC) No 1008/2008, Article 2(9).

321 Chicago Convention, Annex 2, Appendix 5 (ICAO Template Air Services Agreements), 9.

322 *ibid* 15-16.

323 *ibid* 21 and 24.

324 United Kingdom of Great Britain and Northern Ireland and United States of America, Agreement Concerning Air Services (with Annexes, Exchange of Letters and Agreed Minute dated 22 June 1977) (Bermuda, 23 Jul. 1977) 1079 UNTS 21 (No 16509).

325 Transit Agreement, Article 1, Section 1.

This provision is consistent with the multilateral exchange of the right of overflight for non-scheduled flights under Article 5 of the Chicago Convention as a consequence of the fact that the Convention as a whole is suspended in case of war or national emergency as declared by a State, further to Article 89.³²⁶ The distinction between war and national emergency is made in this article because, strictly speaking, a State is free to choose whether it suspends all or part of the Convention in the case of war but in the case of a national emergency it must first make a declaration to the ICAO Council notifying it of the intention to suspend the treaty.³²⁷ ASAs traditionally contained a clause addressing the operation of services during armed conflict or a similar change of circumstances,³²⁸ but States typically omit such a provision from their ASAs today. On this note, Bin Cheng, speaking of Article 89 of the Chicago Convention, states that '[i]t is believed that such a provision is merely declaratory of international law',³²⁹ in which case regardless of a treaty's silence on the matter, a State would have a right to terminate or suspend the treaty.³³⁰

States also have the right to restrict or prohibit access to their airspace under specific circumstances in accordance with Article 9, which will be addressed in the following section. The formalities under Article 89 are not required for the prohibition or restriction of airspace under Article 9.³³¹

326 Chicago Convention, Article 89. The full provision, titled 'War and emergency conditions', reads as follows: 'In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council'.

327 Cheng, *The Law of International Air Transport* (n 90) 113.

328 See for example Bermuda II, which provided that '[i]f, because of armed conflict, political disturbances or developments, or special and unusual circumstances, a designated airline of one Contracting Party is unable to operate a service on its normal routing, the other Contracting Party shall use its best efforts to facilitate the continued operation of such service...' (United Kingdom of Great Britain and Northern Ireland and United States of America (n 324) Article 2(5)).

329 Cheng, *The Law of International Air Transport* (n 90) 483.

330 The question of a treaty's status in the case of war is not as clear in other areas of international law though and it is a matter that remains heavily disputed. The ICJ has not delivered a judgment or advisory opinion to clarify the point the Vienna Convention on the Law of Treaties only states that it does not address such matters (Vienna Convention on the Law of Treaties, Article 73: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States'). State practice indicates that it depends on the object and purpose of the treaty as to whether it continues to apply between belligerent States during conflict (Silja Vöneky, 'Armed Conflict, Effect on Treaties' (Max Planck Encyclopedia of Public International Law 2011), 1, 3 and 5).

331 Cheng, *The Law of International Air Transport* (n 90) 113.

2.6.2 Prohibited and restricted areas

The terms ‘prohibited area’ and ‘restricted area’ are regulated in Article 9 of the Chicago Convention, as to which see below, and are defined in Annexes 2, 4 and 15. The terms refer to areas of ‘defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is prohibited or restricted ‘in accordance with certain specified conditions’.³³²

A State can restrict or prohibit its airspace in accordance with two categories, depending on the situation in response to which the area has been established and each involve different conditions.

The first category, under Article 9(a) of the Chicago Convention, is ‘for reasons of military necessity or public interest’³³³ and the second, under Article 9(b), is ‘in exceptional circumstances or during a period of emergency or in the interest of public safety’.³³⁴

In the first instance, certain areas of airspace may be restricted or prohibited if the restriction or prohibition applies in a uniform manner to all aircraft conducting international scheduled services, both of the State whose territory is concerned and the aircraft of other States. Differential treatment is permitted under this article though, between national and foreign aircraft engaged in non-scheduled flights. In terms of the size of the prohibition or restricted area, it must be of a ‘reasonable extent and location so as not to interfere unnecessarily with air navigation’.³³⁵ Whilst this leaves the State with some discretion in establishing the physical and temporal limitations of the area, it is clear that they must be commensurate with the activity for which the area has been designated. States reserve significant portions of their airspace for military purposes under Article 9(a). For example, India allocates 35 per cent of its airspace for military use, while it is estimated that Thailand reserves up to 70 per cent of its airspace for these purposes,³³⁶ as does China, where the situation creates delays to international civil aviation and has both economic and environmental consequences.³³⁷ This has also been problematic in the past in Europe, although a focus on dual use – military/civil – airspace has improved the situation.³³⁸

³³² Chicago Convention, Annex 2, Chapter 1, 1-7 and 1-8; Annex 4 (11th edn, July 2009) Chapter 1, 1-8; and, Annex 15 (16th edn, July 2018) Chapter 1, 1-8 and 1-9.

³³³ Chicago Convention, Article 9(a).

³³⁴ *ibid* Article 9(b).

³³⁵ *ibid* Article 9(a).

³³⁶ ICAO WP/04 Secretariat, *Civil/Military Cooperation*, Presented by the Secretariat at the 1st Meeting of the ICAO Asia/Pacific Seamless ATM Planning Group, Bangkok (31 January – 3 February 2012) 2.9 and 2.10.

³³⁷ Justin Bergman, ‘This is Why China’s Airports are a Nightmare’ (BBC, 29 April 2016), available at <www.bbc.com/capital/story/20160420-this-is-why-chinas-airports-are-a-nightmare> accessed 8 May 2019.

³³⁸ Haanappel, *The Law and Policy of Air Space and Outer Space* (n 193) 45.

Under the second category, in Article 9(b), the whole of the State's airspace may be restricted or prohibited and with immediate effect, but only temporarily.³³⁹ The restriction or prohibition must be applied without distinction to the aircraft of other States,³⁴⁰ – both scheduled and non-scheduled services – however 'national aircraft may be exempt from such restriction or prohibition'.³⁴¹ It is by way of their authority under this article that the US and Canada closed their airspace following the attack on the World Trade Centre and the Pentagon on 11 September 2001³⁴² and that parts of EU airspace were closed following the eruption of the Icelandic volcano, Eyjafjallajökull, in 2010.³⁴³

Under both Article 9(a) and Article 9(b), the State whose territory is concerned has a right to 'effect landing as soon as possible' of aircraft entering restricted or prohibited spaces,³⁴⁴ with Annex 2 providing principles that States must observe and actions that intercepted aircraft are obliged to adhere to.³⁴⁵

2.6.3 ICAO Council decisions regarding prohibition of overflight

ICAO's dispute settlement mechanism under Chapter XVIII of the Chicago Convention tasks the ICAO Council with 'adjudicat[ing] legal disputes concerning the interpretation and application of the Chicago Convention and its Annexes'.³⁴⁶ Out of the seven cases to have been brought before the ICAO Council, five have involved overflight rights and two of those have specifically been in respect to Article 9 of the Chicago Convention. The first, brought by India in 1952, involved the closure of airspace by Pakistan on its western border, which prohibited Indian flights from operating from points in India to Kabul over Pakistan. At the same time, Iran's airline was permitted to continue operating over the airspace and as a result, India submitted that Pakistan had violated Article 9 (in addition to Article 5 and the Transit Agreement). The second case was brought by the UK against Spain in 1967 as a result of a prohibited area established by Spain in the Bay of Algeciras, which the UK claimed compromised the safety of take-off

³³⁹ Chicago Convention, Article 9(b).

³⁴⁰ *ibid.*

³⁴¹ Cheng, *The Law of International Air Transport* (n 90) 124.

³⁴² Haanappel, *The Law and Policy of Air Space and Outer Space* (n 193) 45.

³⁴³ Havel and Sanchez (n 112) 43.

³⁴⁴ Chicago Convention, Article 9(c).

³⁴⁵ Chicago Convention, Annex 2, Chapter 3, 3.8 and Appendix 2.

³⁴⁶ Mathieu Vaugeois, 'Settlement of Disputes at ICAO and Sustainable Development' (McGill Centre for Research in Air and Space Law Occasional Paper Series No IV, June 2016) 4. This dispute settlement mechanism is established by Article 84 of the Chicago Convention.

and landing from its nearby airport in Gibraltar.³⁴⁷ The most recent case to have been brought before the ICAO Council – the 2017 disagreement between Qatar and a number of Gulf States, as will be discussed in Chapter 4 – involved claims of violations of Article 9, but as part of a much broader series of claims relating to access to national airspace, including in respect to the Transit Agreement, relevant ASAs, and Articles 5 and 6 of the Chicago Convention.

Despite the India/Pakistan and UK/Spain cases directly addressing Article 9, they provide little in the way of legal analysis of the article, or further in respect to overflight rights more broadly, for two key reasons. *Firstly*, as with the other cases that have been brought before the Council, including the 2017 Qatar case, neither resulted in a final decision based on the merits. The India-Pakistan case was resolved in a settlement between the two governments and the UK-Spain dispute was deferred *sine die* by the parties in 1969 and is therefore technically an ongoing dispute.³⁴⁸ *Secondly*, the cases themselves and the dispute settlement process are inherently political. Bin Cheng highlights the importance of the ICAO Council acting ‘in an impartial and judicial capacity’ in carrying out its functions as a dispute settlement body,³⁴⁹ but in practice the ICAO Council, as an organ consisting of representatives of sovereign States following the instructions of their governments, is not able to act as an independent, unbiased judicial power.³⁵⁰ Furthermore, the cases are founded on political disputes, with aviation reflecting just one element in a much wider web of implications. As Milde points out in reference to the overflight dispute between India and Pakistan in 1971,³⁵¹ but which applies equally to all of the overflight cases brought before the ICAO Council, ‘it is apparent that the centre of gravity of the dispute was of a political nature and that the ‘aviation’ aspect could not be meaningfully addressed without a more general solution of the underlying political issues’.³⁵²

347 For a brief summary of these cases see, Milde, *International Air Law and ICAO* (n 91) 204–8, in which the other two cases involving overflight are also discussed: (1) Pakistan brought a claim against India in 1971 for breach of Article 5 of the Chicago Convention and the Transit Agreement after India suspended the overflight rights of Indian carriers following hostilities between the two countries, including the hijacking of an Indian aircraft by pro-Pakistani Kashmiri nationalists; (2) Cuba brought a claim against the US after the US suspended the overflight rights of Cuban carriers in response to the shooting down of a US registered aircraft by Cuban Air Force aircraft over the high seas. Cuba submitted that the suspension was a violation of Article 5 of the Chicago Convention and of the Transit Agreement.

348 *Ibid* 205–6.

349 Cheng, *The Law of International Air Transport* (n 90) 101.

350 Milde, *International Air Law and ICAO* (n 91) 203. Bin Cheng also acknowledged these inherent challenges in the ICAO Council performing a judicial function (Cheng, *The Law of International Air Transport* (n 90) 104).

351 See above n 347.

352 Milde, *International Air Law and ICAO* (n 91) 207; See also, Vaugeois (n 346) 7.

2.6.4 An obligation to close airspace?

The restriction and prohibition of airspace under Article 9 of the Chicago Convention is a right and not an obligation.³⁵³ According to the Dutch Safety Board in its 2015 report on the shooting down of MH17, which was published just over a year after the accident, it was not practice for States to close their airspace during armed conflict at that time³⁵⁴ and this remains the case today.³⁵⁵ After MH17, a group was formed by ICAO to review the application of international civil aviation law to conflict zones and as part of this review, the group considered whether Article 9 of the Chicago Convention should be amended to include an obligation to close airspace for safety reasons, finding that at this stage there is no need to do so.³⁵⁶ This finding is consistent with the typical use by States of Article 9 ‘to maintain national interests in the use of their sovereign airspace’.³⁵⁷

2.6.5 Danger areas

In addition to prohibited and restricted areas, ICAO provides procedures for the notification of ‘danger areas’.³⁵⁸ These are the only three terms that ICAO recognises as internationally agreed to denote areas for which States

³⁵³ This is clear from the wording of Article 9. See also, Marieke de Hoon, ‘Navigating the Legal Horizon: Lawyering the MH17 Disaster’ (2017) 33(84) Utrecht J Int'l and Eur L 90, 101-3; Wouter Oude Alink, ‘How ‘Safe’ Airspace was not Safe: The Downing of Flight MH17’ (Leiden Law Blog, 9 September 2014), available at <leidenlawblog.nl/articles/how-safe-airspace-was-not-safe-the-downing-of-flight-mh17> accessed 18 July 2019.

³⁵⁴ ‘Crash of Malaysia Airlines flight MH17 Hrabove, Ukraine, 17 July 2014’ (Dutch Safety Board, October 2015) 204.

³⁵⁵ The Dutch Safety Board conducted a follow-up investigation to assess the implementation of the recommendations it made in its 2015 report on the MH17 crash. It published the results of this follow-up investigation in February 2019 and among them: ‘[t]he investigators found that very few changes relating to airspace management by nations dealing with armed conflict within their territories have been made’ (Dutch Safety Board, ‘More Attention Devoted to Overflying Conflict Zones’, available at <www.onderzoeksraad.nl/en/page/13613/more-attention-devoted-to-overflying-conflict-zones> accessed 10 July 2019).

³⁵⁶ ICAO WP/14325, *Report on the Outcome of the Meeting of the Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones (SGRAIT-CZ)*, Presented by the Secretariat at the Council 206th Session (20 October 2015) 2.2.

³⁵⁷ Stefan A Kaiser, ‘Legal Considerations about the Loss of Malaysia Airlines Flight MH17 in Eastern Ukraine’ (2015) 40(2) A&SL 107, 119.

³⁵⁸ Chicago Convention, Annex 4, 2.13, 7.9.2, 8.9.2, 9.9.2, 10.9.2, 11.10.3, 12.10.3 and 16.9.4, 17.9.4 and 18.8.3 (Recommendation) and 21.9.2, in relation to their inclusion on aeronautical charts; Annex 2, Chapter 3 3.8 and Appendix 2 Section 1.1, and Appendix 1 Section 3, respectively for interception and signalling protocol relating to danger areas; Annex 15, 6.3.2.3 p), regarding the inclusion in NOTAMs of the establishment of or changes to a danger area. Danger areas are identified in Aeronautical Information Publications (AIPs) under ENR 5.1 (ICAO Doc 8126, *Aeronautical Information Services Manual* (6th edn, 2003) Chapter 5, Appendix, 5-A-24).

can provide warnings and/or limit flight in a given airspace.³⁵⁹ Unlike prohibited and restricted areas, the Chicago Convention does not mention the term 'danger area', which appears only in the annexes to the Convention, classified as 'an airspace of defined dimensions within which activities dangerous to the flight of aircraft may exist at specified times'.³⁶⁰ ICAO has recognised that danger areas involve 'the least degree of restriction' towards other airspace users out of the three types of areas.³⁶¹ In accordance with its definition, the right to establish a danger area is limited in that it must be of defined dimensions, and only for a specified time, as opposed to for an indefinite or undefined period.³⁶² As also indicated by its definition, a State cannot physically prohibit or restrict the overflight of other States' aircraft through the imposition of a danger area but, in practice, the calculated risks in any given airspace will ultimately inform the decision of whether to operate an aircraft in the airspace.³⁶³ In the past, pilots have avoided danger areas but under 'current safety management practices' certain aircraft may operate in danger areas according to 'appropriate risk assessment'.³⁶⁴ A key difference of a danger area compared to restricted and prohibited areas, for the purpose of this research, is that it can be established by a State in international airspace.³⁶⁵ In order to adequately present the concept of danger areas, this section will briefly consider their use in international airspace before continuing to address overflight in national airspace, as has been the focus of this study up to this point.

359 ICAO SN/12, *Harmonised Notification of Areas of Volcanic Ash*, Presented by Steven Hill at the 5th Meeting of the Aeronautical Information Services – Aeronautical Information Management Study Group, Montreal (10 October 2011) 1.1: 'ICAO Annex 15 permits the notification by NOTAM of Prohibited, Restricted or Danger areas, which are the only three internationally-agreed terms that States can use to identify the presence of hazards which may affect air navigation or to limit access to a particular area'.

360 Chicago Convention, Annex 2, 1-5; Annex 4, 1-3; and, Annex 15, 1-4.

361 ICAO Doc 9426, *Air Traffic Services Planning Manual* (1992) 3.3.2.2.

362 This is despite the formal appearance of permanent danger areas on some aeronautical charts: 'The United States (and quite possibly most other major military users of international airspace) often establishes its version of warning areas on a continuous-use basis. The practical reason for not charting each area anew as it recurrently comes into use is that extensive, but interrupted, use justifies neither recharting for each exercise or series of activities conducted therein, nor even issuance of Notices to Airmen (NOTAMs). Unfortunately, the consequence of his practice is an uninterrupted depiction of these areas on charts, giving the questionable impression to other users and nations that the areas are under the constant use, domination, and control (i.e., de facto) of the United States' (George S Robinson, 'Military Requirements for International Airspace: Evolving Claims to Exclusive Use of a Res Communes Natural Resource' (1971) 11 Nat Resources J 162, 174-75).

363 See Section 3.3.3.3.

364 ICAO, *ATM Contingency Plan: Africa and Indian Ocean Region* (July 2019) 71.

365 ICAO *Air Traffic Services Planning Manual* (n 361) 3.3.2.2 and 3.3.2.4; ICAO European and North Atlantic Office IP/03, *ICAO Provisions Related to Access to the High Seas*, Presented by the Secretariat at the 3rd Meeting of the European Air Navigation Planning Group Flexible Use of Airspace Task Force, Paris (16 January 2009) 2.3.

The annexes to the Chicago Convention do not provide examples of the circumstances in which danger areas may be established, but over the high seas they are commonly implemented for the purpose of conducting military exercises.³⁶⁶ The term is also used at ICAO in the context of risk management of flight operations in volcanic ash, although this is in a slightly different sense from how it is used in its more general application.³⁶⁷ All States have the right to use international airspace in a manner that requires the establishment of a danger area, regardless of which State is responsible for the FIR. Recalling Chapter 1, and as will be discussed in more detail below in Section 2.7.1, all States, both coastal and landlocked, enjoy the high seas freedoms set out in Article 87(1) UNCLOS, including freedom of overflight, which also applies in the EEZ.³⁶⁸ The use of the high seas for military activities, whilst not explicitly mentioned in UNCLOS as a high seas freedom, is accepted as being encompassed by the freedom insofar as the purpose is peaceful.³⁶⁹ Military activities are also legitimate in a State's EEZ, although this position is not universally accepted, as will be discussed in Section 4.3.3.2. Relevant to this study, military activities include those on the surface of the sea that may impact on the safety of overflight in the airspace above, as well as aerial military activities as part of the right to freedom of overflight.³⁷⁰ Just as the principle of freedom of overflight means that a State responsible for an FIR cannot prohibit the aircraft registered in another State from operating within the FIR,³⁷¹ neither can it prevent the aircraft of another State from undertaking activities in international airspace within its FIR where those activities are accepted as being within the scope of the freedoms of the high seas.

This does not give a State an unfettered right to undertake activities requiring a danger area in all locations of international airspace, or to do so without coordination with the ATS authority in the FIR. Under Article 87(2) UNCLOS, freedoms of the high seas must be conducted with due regard for the interests of other States in the exercise of their freedoms, which

366 John R Brock, 'Legality of Warning Areas as Used by the United States' (1966-67) 21(3) *The JAG Journal* 69, 71; Pépin (n 90) 69.

367 ICAO Doc 9974, *Flight Safety and Volcanic Ash* (1st edn, 2012) (x) and 5.4 d 1); ICAO, *ATM Contingency Plan: Africa and Indian Ocean Region* (July 2019) 71.

368 UNCLOS, Article 58(1).

369 Myron H Nordquist, Neal R Grandy, Sataya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary – Volume II* (Martinus Nijhoff 1993) 85.

370 Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea' (1983) 77 *Am J Int'l L* 490, 503: 'Freedom of the high seas includes, *inter alia*, use of the ocean space for military exercises, aerial reconnaissance, and all other activities of civil and military aircraft if due regard is paid to the rights and interests of third states'.

371 See Chapter 1. As also discussed in, ICAO European and North Atlantic Office IP/03, *ICAO Provisions Related to Access to the High Seas*, Presented by the Secretariat at the 3rd Meeting of the European Air Navigation Planning Group Flexible Use of Airspace Task Force, Paris (16 January 2009) 2.1.

includes the freedom of overflight of other States' aircraft.³⁷² Furthermore, recalling Section 2.4.3, contracting States are required to have due regard for the safety of navigation of civil aircraft in issuing regulations for their State aircraft.³⁷³ Annex 11 of the Chicago Convention details the type of considerations to be made in respect to these due regard obligations. Standard 2.19.2 requires that the arrangements 'avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft', with the accompanying recommendations outlining that the location should, for example, be 'selected to avoid closure or realignment of established ATS routes, blocking of the most economic flight levels, or delays of scheduled aircraft operations, unless no other option exists'.³⁷⁴ Where potential hazards to civil aviation exist, a State undertaking the activity is required under Annex 11 to coordinate the activity with the State responsible for the FIR. Specifically, Standard 2.19.1 provides that:

'The arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be coordinated with the appropriate air traffic services authorities. The coordination shall be effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15'.³⁷⁵

The ATS authorities are then responsible for the promulgation of the information regarding the establishment of the danger area, including by way of the issuance of a Notice to Airmen (NOTAM).³⁷⁶

When aerial military activities are conducted by a State in international airspace under an FIR for which another State is responsible, prior notification and coordination is only required in the case that a defined airspace is necessary to protect civil aircraft navigating in the vicinity from potential safety hazards arising from the military activities. If the activities can be carried out without endangering civil aircraft, there is no obligation on the State to coordinate with the authorities of the State responsible for the FIR. Danger areas will be returned to throughout this study in both Chapters 3 and 4.

372 In addition, and once again as will be addressed in Section 4.3.3.2, States must have due regard in carrying out their rights in an EEZ for the coastal State's EEZ rights.

373 Chicago Convention, Article 3(d).

374 Chicago Convention, Annex 11 (15th edn, July 2018) 2.19.2 and 2.19.2.1 a) *Recommendation*.

375 ibid 2.19.1. See also, *ICAO Provisions Related to Access to the High Seas* (n 371) 2.4.

376 ibid 2.18.3. See above n 358 for the specific requirements regarding the communication of danger areas under Annexes 2, 4 and 15. A NOTAM is defined as 'a notice distributed by means of telecommunication containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations' (Chicago Convention, Annex 11, 1-6).

2.6.6 Closure of airspace under non-aviation specific international law

The ICAO Council dispute settlement mechanism discussed above in Section 2.6.3 includes, as a tool of aiming to ensure compliance, the enforcement of a prohibition of overflight for any airline that acts contrary to the terms of a final decision.³⁷⁷ Another way in which overflight can be prohibited multilaterally under international law is through a United Nations Security Council (UNSC) resolution. In contrast to the enforcement of the prohibition of overflight for airlines under the Chicago Convention, the sanctions under UNSC resolutions do not necessarily require there to have been a breach of international law, but rather they can be adopted when 'it appears conducive to the maintenance of international peace and security'.³⁷⁸ Such resolutions are made by the UNSC pursuant to Articles 41 and 42 of the UN Charter. Under Article 41, the UNSC may take economic measures against a State, including the interruption of air services by way of a ban on flights. A UNSC resolution of this kind would require States to, for example, suspend the transit and traffic rights of aircraft registered in the sanctioned State. Article 42 provides that the UNSC may, if the measures under Article 41 are inadequate, 'take such action by air... as may be necessary to maintain or restore international peace and security'. It is under this article that the UNSC imposes no-fly zones, which are established for humanitarian purposes, to facilitate humanitarian relief efforts and to prevent attacks on the civilian population from the air.³⁷⁹ A no-fly zone achieves this goal by depriving the State of its effective control over its airspace, providing that control to another State or States, or an international organisation.³⁸⁰ A UNSC resolution may include both a flight ban and a no-fly zone, as was the case in the 2011 Resolution applying to Libya.³⁸¹

³⁷⁷ Chicago Convention, Article 87: 'Each contracting States 'undertakes not to allow the operation of an airline of a contracting State through the airspace above its territory'. Under Article 88, any contracting State that 'is found in default under the provisions' of the Chapter will have its voting rights in the ICAO Assembly and Council suspended by the Assembly.

³⁷⁸ UN Charter, Articles 39 and 41, as discussed in, Jeremy Farrall, 'Sanctions' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (OUP 2016) 604. This is a feature of all measures under Chapter VII of the UN Charter, the chapter under which this mechanism falls.

³⁷⁹ Stefan A Kaiser, 'No-Fly Zones Established by the United Nations Security Council' (2011) 60 ZLW 402, 411. This article draws the distinction between, and discusses the implications of, UNSC measures applying to airspace taken under Articles 41 and 42 of the UN Charter (see, in particular, pp 408-9).

³⁸⁰ ibid 402.

³⁸¹ UNSC 1973 (17 March 2011) UN Doc S/RES/10200, paras 6-12 (no-fly zone) and paras 17-18 (ban on flights). Other UNSC Resolutions affecting overflight include, UNSC Res 748 (31 March 1992) UN Doc S/RES/748, para 4 (Libya); UNSC Res 917 (6 May 1994) UN Doc S/RES/917, para 2 (Haiti), UNSC Res 1127 (28 August 1997) UN Doc S/RES/1127, para 4 (Angola) (as discussed in, Nico Krisch, 'Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, OUP 2012) 1313).

Once adopted, it is widely accepted that the terms of the resolution are binding and that they override existing obligations of the States, for example, to permit overflight under the Transit Agreement.³⁸²

A State may also restrict or prohibit overflight of its territory by the aircraft of another State as a countermeasure under international law, in response to an internationally wrongful act committed by the second State. A countermeasure, as conduct which would otherwise be inconsistent with international law, may be legitimate when imposed in accordance with certain conditions, including that it is proportionate, temporary and reversible.³⁸³ In relation to a countermeasure targeting aviation, a State could, for example, suspend another State's transit and/or traffic rights. In this case, the first State's responsibility to allow the transit/traffic rights to be exercised by the second State in respect to its territory would not be terminated, but rather, the wrongfulness of the first State's conduct in prohibiting the exercise of those rights would be precluded.³⁸⁴ In contrast to fulfilling an obligation under a UNSC resolution, determining the legality of a State restricting or prohibiting overflight through such sanctions involves consideration of the actions of and the relationship between the two States, including the terms of any treaty relevant to the dispute. It can be made more challenging when the decision-making process leading to the countermeasure is not fully transparent. This is the case in the ban on Qatari flights imposed by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (UAE) in June 2017, which will be addressed in Section 4.2.2.

2.6.7 In summary: The restriction and regulation of overflight in national airspace

Sovereignty over national airspace, as recognised under Article 1 of the Chicago Convention, is the cornerstone of international civil aviation law. One of the defining features of a State is its capacity to enter into relations with other States and it is through this exercise of their sovereign rights that States negotiate the grant of access to their airspace for the aircraft of other States. The right of overflight, along with the other freedoms of the air, are privileges and, as has been demonstrated in this chapter, there are various mechanisms through which States can retract or restrict these privileges as a result of the complete and exclusive sovereignty that they retain over their airspace.

382 Nico Krisch, 'Ch. VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41' in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus, Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, OUP 2012) 1310.

383 YILC (2001) Vol. II, Part 2, as corrected, 76.

384 *ibid* 75 (Commentary para 4 to Article 22).

Both the Transit Agreement and ASAs provide a State with the right to withdraw, suspend or revoke the rights granted to the carriers of another State where the domestic laws of the granting State have not been complied with. A State may also withdraw from the agreements entirely, in which case the rights granted under them also cease. States are also permitted under the Chicago Convention, to establish prohibited and restricted areas in their airspace in certain circumstances and subject to specific requirements. This is not however, an obligation. Finally, pursuant to UNSC resolutions, States may be obliged to prohibit the aircraft of another State from operating in their airspace. The obligation of States to adhere to the terms of the resolution overrides any existing treaty obligations that the States may have towards the State targeted by the sanctions. States make also prohibit overflight on the basis of countermeasures against a State. An example of this is the sanctions imposed on Qatar in 2017 by its neighbouring States, a situation that is complex and intrinsically political.

Having established the basis of overflight rights in national airspace in earlier sections of this chapter, for both civil aircraft and State aircraft, and the right of a State to close its airspace to the aircraft of other States in this section, the chapter will now address the legal basis of freedom of overflight, as codified in UNCLOS.

2.7 OVERFLIGHT RIGHTS IN INTERNATIONAL AIRSPACE

This section will consider the legal basis of freedom of overflight and the provisions under UNCLOS and the Chicago Convention with implications for the right. It will set out the maritime areas over which freedom of overflight exists and establish the express rights of coastal States in these areas as provided under UNCLOS. The remainder of the study, in subsequent chapters, will build on this, examining the more ambiguous aspects of the rights of coastal State in respect to overflight in these maritime areas.

2.7.1 Freedom of overflight

Outside national airspace there is so-called ‘freedom of overflight’. Freedom of overflight is founded on the concept of the broader principle of *mare liberum*, or freedom of the seas, as codified in UNCLOS.³⁸⁵ The 1956 ILC commentary on the law of the sea recognised that the principle of freedom of the seas ‘has governed maritime law since Grotius’³⁸⁶ and the subsequent 1958 Convention on the High Seas stated in its preamble that the provisions in the convention were ‘generally declaratory of established principles of

³⁸⁵ UNCLOS, Articles 87(1) and 58(1).

³⁸⁶ YILC (1956) Vol. II, 266.

international law'.³⁸⁷ The principle means that 'no state may purport to subject any part of them [the high seas] to its territorial sovereignty'.³⁸⁸ As a consequence of the principle of freedom of the seas, the law of the sea has developed on the basis that, outside the territorial sea, the sea is open to all users.³⁸⁹ In addition to recognising the principle, UNCLOS stipulates specific freedoms that are entailed in such enjoyment, including the freedom of navigation and, closely tied to this, the freedom of overflight. The drafting history of the 1958 Convention on the High Seas considered and ultimately concluded that freedom of overflight in international airspace has customary status:

'During the discussions in the International Commission for Air Navigation at its extraordinary session of June 1929, the Commission 'recognized that flight over the sea, outside territorial waters, is free'.

The minutes of the Chicago Conference contain no record of any discussion on this subject, but the representatives present seem to have regarded the principle as already established for, under article 12 of the Convention, the right to make rules relating to the flight and manoeuvres of aircraft over the high seas is vested not in the Contracting States but in ICAO; furthermore, the rules established by ICAO are binding on the said States.

Article 27 of the draft [of the 1958 Convention on the High Seas] contains in its second sentence the following statement: 'Freedom' of the high seas comprises, *inter alia*: '... (4) Freedom to fly over the high seas.' This provision confirms a principle of customary international law, which the Commission [the ILC] itself emphasizes in the first paragraph of its commentary to article 27: 'Freedom to overfly the high seas is expressly mentioned in this article because the Commission considers that it follows directly from the principle of the freedom of the sea'.³⁹⁰

Just as with freedom of navigation applying to vessels, freedom of overflight means that the aircraft of all States have the right to use the airspace within the bounds of international law and, as the reference to Article 12 of the Chicago Convention in the citation above indicates, the rules relating

³⁸⁷ Convention on the High Seas (Geneva, 29 Apr. 1958) 455 U.N.T.S. 455 11, *entered into force* 30 Sep. 1962, Preamble ('Convention on the High Seas 1958'). The Convention on the High Seas 1958 was adopted at the First UN Conference on the Law of the Sea, together with three other conventions addressing: the territorial seas and the contiguous zone, the continental shelf, and fishing and the conservation of living resources of the high seas. The former three will be referred to at various stages throughout this research. Many UNCLOS articles are based on these conventions. The provisions in the 1958 conventions are in turn based on the ILC Draft Articles resulting from the ILC's 8th Session.

³⁸⁸ Jennings and Watts (n 72) 726.

³⁸⁹ Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 2.

³⁹⁰ Pépin (n 90) 68; Nicholas Grief, *Public International Law in the Airspace of the High Seas* (Springer 1994) 2.

to the flight and manoeuvre of aircraft in international airspace are those established by ICAO, not by the contracting States. As to what these rules are, Section 2.7.2.2 discusses them in more detail.

The EEZ was formally recognised under international law in 1982, as to which see Section 2.7.3.1, which explains why it was not referred to in the above quotation. As of the adoption of UNCLOS however, it is indisputable that freedom of overflight applies in both the high seas and the EEZ. This is codified under UNCLOS, which provides for the freedom of overflight in international airspace in two articles, Article 87(1)(b) and Article 58(1) reading, respectively,

‘The high seas are open to all States, whether coastal or land-locked. ... It comprises... (b) freedom of overflight’ (emphasis added)

and,

‘In the exclusive economic zone, all States, whether coastal or land-locked, enjoy... the freedoms referred to in article 87 of navigation and overflight...’ (emphasis added).

ICAO recognition of freedom of overflight applying in the high seas and the EEZ can be seen, for example, in this discussion regarding the freedom applying in the EEZ, shortly after the adoption of UNCLOS:

‘There is, your Rapporteur would suggest, no need for the Legal Committee to become involved in general questions of the status of the EEZ. It is sufficient to take note that, without ambiguity, the same right of freedom of navigation is enjoyed by aircraft over the EEZ as is enjoyed by aircraft over the high seas, which is the plain meaning of Articles 58 and 87 of UNCLOS.³⁹¹

Figure 2.4 depicts the EEZ and the high seas. In this image they appear to be overlapping, which they do not in practice, however this depiction is representative of the fact that it is the prerogative of a coastal State to declare an EEZ and so, in the case it does not do so, the high seas meet the outer limit of the State’s territorial sea.

³⁹¹ ICAO WP/5-41, *Report by the Rapporteur on Agenda Item 5: Consideration of the Report of the Rapporteur on ‘United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Air Law Instruments’*, Presented at the Legal Committee 26th Session, Montreal (4 February 1987), reproduced in (1987) 3 Int’l Org & L Sea: Documentary YB 262, 269.

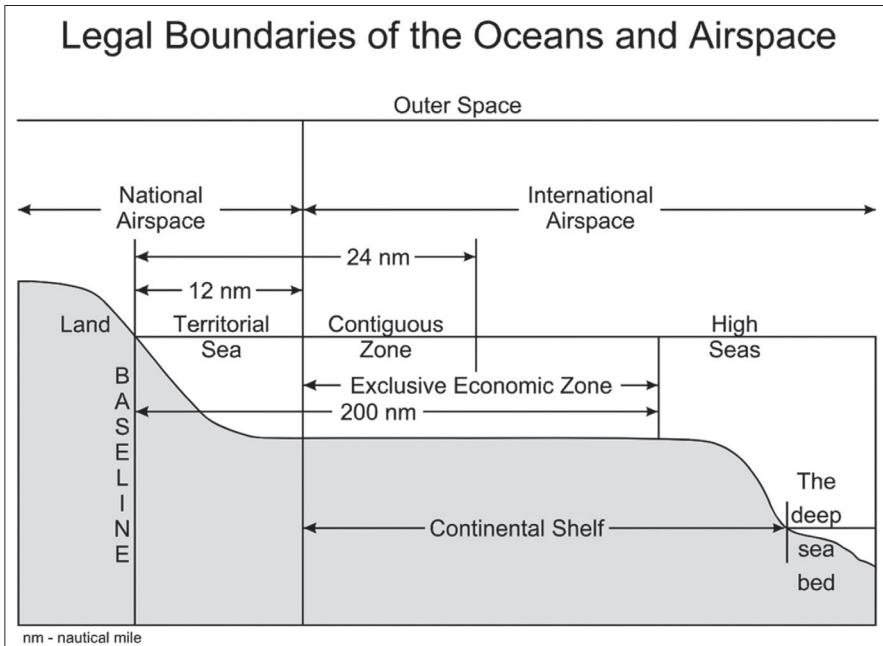


Figure 2.4: Maritime delimitations of the sea and the airspace above the sea³⁹²

Freedom of overflight applies in international airspace independently of UNCLOS, on the basis of its customary status. This is relevant for those States that are not party to UNCLOS. Although UNCLOS is widely ratified,³⁹³ around 15 per cent of States are not party to it, including the US, Turkey, Colombia, Israel, Peru and Venezuela. As a result, Treves emphasises that it is ‘important to assess whether certain provisions of UNCLOS correspond to customary international law [because] [w]hen it is so, it may be held that the rules set out in UNCLOS are binding also for non-parties’.³⁹⁴ Article 311(1) of UNCLOS provides that the Convention prevails

392 The Commander’s Handbook on the Law of Naval Operations (Department of the Navy - Department of Homeland Security and US Coast Guard, August 2017) 1-2.

393 167 State parties and the EU as at November 2020 (United Nations Division for Ocean Affairs and the Law of the Sea, ‘UNCLOS Status Table’, available at <www.un.org/Depts/los/reference_files/UNCLOS%20Status%20table_ENG.pdf> accessed 13 November 2020).

394 Tullio Treves, ‘UNCLOS and Non-Party States before the International Court of Justice’ in Carlos Espósito, James Kraska, Harry N Scheiber and Moon-Sang Kwon (eds), *Ocean Law and Policy: Twenty Years of Development under the UNCLOS Regime* (Brill Nijhoff 2016) 367. Further to this though, the provisions under UNCLOS largely reflect customary international law, as to which see, for example, Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Brill Nijhoff 2007) 4: ‘It is widely understood that the Law of the Sea Convention constituted a codification of customary rules, existing at the time, and contained also instances of progressive development of international law, which have become in a very short period of time customary rules in their own right’.

over the 1958 conventions between State parties. For those States that are not party to UNCLOS but are party to the 1958 conventions though, it is the latter conventions that continue to apply.³⁹⁵ Considering this, this study will consider the customary status of UNCLOS provisions, as well as the 1958 conventions in relation to the subject matter being discussed, where relevant. The drafting histories of the 1958 conventions are also considered in examining the intentions of the drafters of UNCLOS, to examine why amendments were or were not made to those provisions in UNCLOS that have their basis in the earlier conventions.

Beyond providing for freedom of overflight, UNCLOS does not directly regulate it. It does though ‘envisage the use of aircraft’³⁹⁶ including in the case of piracy³⁹⁷ the hot pursuit of foreign ships³⁹⁸ and the right of visit in certain instances.³⁹⁹ Hot pursuit will briefly be addressed in Chapter 3 in establishing the jurisdiction of a coastal State in a safety zone around its maritime construction in its EEZ. However, beyond this, hot pursuit and the right of visit are outside the scope of this research as they do not provide coastal States with jurisdiction over the operation of foreign States’ aircraft, either explicitly or tacitly, and nor have they been used by coastal States in an attempt to justify the exercise of jurisdiction over such aircraft.⁴⁰⁰

395 These include the US, Venezuela and Israel (although Israel has signed but not ratified the Convention on Fishing and Conservation of the Living Resources of the High Seas 1958). Colombia has ratified the Convention on Fishing and Conservation of the Living Resources of the High Seas 1958 and the Convention on the Continental Shelf 1958 and signed but not ratified the Convention on the High Seas 1958 and the Convention on the Territorial Sea and the Contiguous Zone 1958 (United Nations Treaty Collection, ‘Multilateral Treaties Deposited with the Secretary General – Chapter XXI: Law of the Sea’, available at <treaties.un.org/pages/Treaties.aspx?id=21&subid=A&clang=_en> accessed 13 November 2020).

396 Grief, *Public International Law in the Airspace of the High Seas* (n 390) 3.

397 UNCLOS, Articles 101-107. The definition of piracy is set out in Article 101: ‘(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)’.

398 *ibid* Articles 111(5) and (6).

399 *ibid* Article 110(4).

400 Both the right of hot pursuit and the right of visit apply to measures against ships rather than aircraft. Insofar as which States have that right, there is a difference between the two. The right of visit is for ‘a warship [as well as military aircraft and other duly authorized... aircraft clearly marked and identifiable as being on government service (Articles 110(4) and (5)) which encounters on the high seas a foreign ship’ (Article 110(1)) and so is not restricted to the coastal State. On the other hand, only the ‘competent authorities of the coastal State’ have the right to hot pursuit, ‘by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect’ (Article 111(5)).

The piracy provisions under UNCLOS provide States with the right to seize an aircraft or vessel taken by piracy on the high seas or area outside the jurisdiction of a State and to arrest the persons and seize the property onboard.⁴⁰¹ As a threat to national security, an aircraft taken by piracy would be a threat that ADIZs are designed to address (Chapter 4), but as a specific crime it will not be further discussed in the context of this research. This is because the provisions on piracy under UNCLOS, recognised as customary international law,⁴⁰² provide States with jurisdiction over aircraft taken by piracy, regardless of ADIZs. Furthermore, States have universal jurisdiction in respect to piracy,⁴⁰³ and thus, it does not fit within the scope of this research which focuses on the balance between coastal State rights and freedom of overflight.

2.7.2 High seas

2.7.2.1 *Geographic extent of the high seas*

The high seas constitute 64 per cent of the ocean's overall surface⁴⁰⁴ and are defined under UNCLOS in terms of what they are not, that is, they include 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.⁴⁰⁵ In fact, this is the geographic scope of application of Part VII UNCLOS entitled 'High Seas', and is as close as UNCLOS comes to defining the area. These maritime zones that are excluded from Part VII are not addressed in the Chicago Convention: for the purpose of international civil aviation law, airspace is either under a State's sovereignty, or it is international airspace, with the exception of the very small portion of the Earth that is of undetermined sovereignty.⁴⁰⁶ No State may claim sovereignty over any part of the high seas.⁴⁰⁷

401 UNCLOS, Article 105.

402 Crawford, *Brownlie's Principles* (n 84) 286.

403 UNCLOS, Article 100. This is consistent with the fact that 'the principle of universal jurisdiction over piracy is well established under customary international law' (Ved P Nanda, 'Exercising Universal Jurisdiction over Piracy' in Michael P Scharf, Michael A Newton and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015) 74).

404 Steven Katona, '2014 High Seas Regional Assessment' (Ocean Health Index, 2014), available at <www.oceanhealthindex.org/news/2014_highseas_assessment> accessed 12 May 2018.

405 UNCLOS, Article 86.

406 In areas of undetermined sovereignty, in accordance with the Chicago Convention, Annex 11, Chapter 2.1.2: 'Those portions of the airspace over the high seas *or in airspace of undetermined sovereignty* where air traffic services will be provided shall be determined on the basis of regional air navigation agreements'.

407 UNCLOS, Article 89.

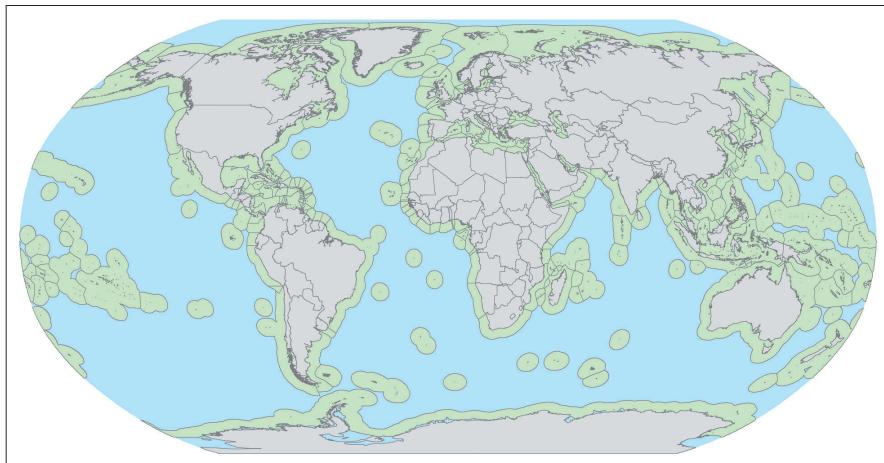


Figure 2.5: Global map indicating EEZs (green) and high seas (blue)⁴⁰⁸

2.7.2.2 Application of the Chicago Convention and its annexes to the high seas

2.7.2.2.1 'The rules and regulations relating to the flight and maneuver of aircraft'

The Chicago Convention refers to the high seas once, under Article 12, which states that 'over the high seas, the rules in force shall be those established under this Convention'. The term 'high seas' in this context is to be read as referring to 'international airspace' and is therefore also applicable in the EEZ.⁴⁰⁹ Although this is now definitive, the codification of the EEZ upon the adoption of UNCLOS led to some debate on the matter, which is addressed below in Section 2.7.3.2.

Article 12 was adopted because it was recognised by the drafters of the Chicago Convention that in the absence of sovereignty over the high seas, it is necessary to ensure that aircraft, regardless of their nationality,

408 Source: Public Library of Science (PLOS), 'Close the High Seas to Fishing?', available at <doi.org/10.1371/journal.pbio.1001826.g001> accessed 12 May 2020

409 This interpretation of the term 'high seas' is consistent across air law conventions, including the Rome Convention, Article 23(2): 'For the purpose of this Convention a ship or aircraft on the high seas shall be regarded as part of the territory of the State in which it is registered'; and, the Tokyo Convention, Article 1(2) 'Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.'; and, Article 5(1) 'The provisions of this Chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the State of registration or over the high seas or any other area outside the territory of any State unless the last point of takeoff or the next point of intended landing is situated in a State other than that of registration, or the aircraft subsequently flies in the airspace of a State other than that of registration with such person still on board'.

operate under the same essential rules.⁴¹⁰ As to what these rules are, there was some debate after the adoption of Article 12: do they refer to Standards and Recommended Practices in the annexes to the Chicago Convention or just to Standards?; which Standards or SARPs are included in the scope of Article 12?; can States file differences to the rules? In terms of which rules are included, it was decided that it is those that Article 12 itself refers to in its opening: ‘the rules and regulations relating to the flight and maneuver of aircraft’. At the time of the adoption of Annex 2, the ICAO Council resolved that the ‘Annex constitutes *Rules relating to the flight and manoeuvre of aircraft* within the meaning of Article 12 of the Convention’.⁴¹¹ Other annexes also contain standards that are relevant to the manoeuvre of aircraft above international waters. Those rules are primarily contained in Annexes 6, 11 and 12⁴¹² and also 10.⁴¹³ Annex 11 is particularly relevant to this research, however Annexes 2 and 12 will also be revisited throughout the study.

2.7.2.2.1.1 Annex 2: Rules of the air

Annex 2 ‘Rules of the Air’ contains only Standards and, unlike the other annexes listed, it applies in its entirety over the high seas, that is, no State can derogate from it.⁴¹⁴ Some of the provisions in Annex 2 though ‘implicitly require strict compliance with other rules of great importance to the safety of aircraft over the high seas’. So, whilst other annexes are not mandatory in their entirety, certain aspects of those mentioned in the previous paragraph are required to be followed.⁴¹⁵ Annex 2 contains fundamental rules for the operation of aircraft from that the pilot-in-command has the final authority as to the disposition of the aircraft,⁴¹⁶ to that distress signals are to be issued in accordance with established protocol.⁴¹⁷ Specific to the high seas, it sets out, for example, requirements that the lights on aircraft must be consistent with the rules established under the International Regulations

410 Jean Carroz, ‘International Legislation on Air Navigation over the High Seas’ (1959) 26 J Air L & Comm 158, 160.

411 Chicago Convention, Annex 2, (v).

412 Mendes de Leon (n 119) 14, addressing, respectively: Operation of Aircraft, Air Traffic Services, and Search and Rescue; Eugène Pépin, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at Its Eighth Session (A/CONF.13/4)* – Extract from the *Official Records of the United Nations Conference on the Law of the Sea*, Volume I (Preparatory Documents), United Nations Conference on the Law of the Sea, Geneva, 24 February–27 April 1958, 68.

413 Grief, *Public International Law in the Airspace of the High Seas* (n 390) 62, addressing Aeronautical Telecommunications.

414 Chicago Convention, Annex 2, (v). See also, Pépin (n 90) 68.

415 Pépin (n 90) 67–68; Grief, *Public International Law in the Airspace of the High Seas* (n 390) 62–63. For example, under Standard 2.2 of Annex 2, the operation of aircraft must be in compliance with the visual flight rules or instrument flight rules, whichever is relevant, the specifications of which are contained in Annex 11.

416 Chicago Convention, Annex 2, 2.4.

417 *ibid* Appendix 1, 1.1.

for Preventing Collisions at Sea (COLREGs),⁴¹⁸ and that the ‘appropriate authority’ over the high seas for matters such as the dropping or spraying of anything from an aircraft, is the State of Registry of the aircraft.⁴¹⁹

2.7.2.2.1.2 Annex 6: Operation of aircraft

Annex 6 provides SARPs regarding the ‘Operation of Aircraft’. In the words of the ICAO, ‘the operation of aircraft engaged in international air transport must be as standardized as possible to ensure the highest levels of safety and efficiency’ and the annex is designed to help achieve this aim.⁴²⁰ Essentially, it provides rules and regulations for the operation of all types of aircraft, from one-seat gliders to long-range jets, including a wide range of matters from maintenance to the responsibility of personnel.

2.7.2.2.1.3 Annexes 11 and 10: ATS and Aeronautical Telecommunications

Annex 11 of the Chicago Convention, ‘Air Traffic Services’, applies over the high seas although States may opt to file differences to the SARPs therein.⁴²¹ This decision was ultimately reached on the basis that States are able to file differences in relation to the provision of ATS over their territories. If it was not therefore also permitted over the high seas, it would result in an untenable situation where States responsible for the provision of ATS over parts of the high seas would be required to offer two sets of differing services: one over their territory and one over the portion of the high seas for which they are responsible.⁴²² The conclusion is reflected in the Foreword of Annex 11, to which a note was added indicating that a Contracting State ‘accepting such responsibility [for providing air traffic services over the high seas or in airspace of undetermined sovereignty] may apply the Standards and Recommended Practices in a manner consistent with that adopted for

418 *ibid* 3.2.6.2, *Note 2*; The International Regulations for Preventing Collisions at Sea 1972 (COLREGs) are issued by the International Maritime Organization (IMO) and set out internationally agreed rules for navigation at sea: International Maritime Organization, ‘Convention on the International Regulations for Preventing Collisions at Sea (COLREGs)’, available at <www.imo.org/en/About/Conventions/ListOfConventions/Pages/COLREG.aspx> accessed 24 January 2018.

419 Chicago Convention, Annex 2, Chapter 1, definition of ‘appropriate authority’, read together with 3.1.4.

420 ICAO, ‘The Convention on International Civil Aviation: Annexes 1 to 18’, available at <www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf> accessed 11 November 2017.

421 Chicago Convention, Annex 11, (ix): ‘The Standards and Recommended Practices contained in Annex 11 apply... wherever a Contracting State accepts the responsibility of providing air traffic services over the high seas or in airspace of undetermined sovereignty. A Contracting State accepting such responsibility *may apply the Standards and Recommended Practices in a manner consistent with that adopted for airspace under its jurisdiction*’ (emphasis added).

422 Carroz (n 410) 162. See also, Hailbronner, ‘Freedom of the Air’ (n 370) 491: ‘It was feared that mandatory application of the ICAO standards might deter states from supplying air traffic control services over the high seas’.

airspace under its jurisdiction'.⁴²³ The same is also acknowledged in a note to Standard 2.1.2. This is not without restriction though. ICAO has stated that 'specific national provisions may only be applied to the extent that these are essential to permit the State the efficient discharge of the responsibilities it has assumed under the terms of the regional air navigation agreement'.⁴²⁴ Schubert questions the legal basis of States providing ATS in international airspace in a manner that deviates from the multilaterally adopted SARPs in Annex 11 on the basis that these legal sources providing for the deviation – the Foreword to Annex 11 and a note following an ICAO Standard – do not carry any legal status.⁴²⁵

Finally, Annex 10, 'Aeronautical Telecommunications', is closely related to Annex 11 and, as the name suggests, contains technical and operational SARPs on aeronautical communication, navigation and surveillance systems.

2.7.2.2.1.4 Annex 12: Search and rescue

Annex 12, providing SARPs in relation to search and rescue, was adopted in response to an identified need to more quickly locate survivors of aviation accidents.⁴²⁶ As the title suggests, the purpose of the annex is 'the establishment, maintenance and operation of search and rescue services... [and the] coordination of such services between States', as delivered in both the territories of Contracting States and over the high seas.⁴²⁷ The SARPs in Annex 12 provide a general framework for search and rescue operations conducted by air. However, they are specifically targeted towards search and rescue of aircraft in distress and survivors of aircraft accidents. In terms of its application to the high seas, it provides that where search and rescue operations are conducted over the high seas or areas of undetermined sovereignty, the search and rescue services responsible will be determined by so-called regional air navigation agreements.⁴²⁸ Annex 12 is supplemented by the International Aeronautical and Maritime Search and Rescue (IAMSAR)

⁴²³ Chicago Convention, Annex 11, (ix).

⁴²⁴ ICAO *Air Traffic Services Planning Manual* (n 361) 1.3.3. As referred to in, ICAO WP/02, *ICAO Provisions, Policy and Guidance Material on the Delegation of Airspace over the High Seas*, Presented by the Secretariat at the First Unassigned High Seas Airspace Special Coordination Meeting, Lima (22 June 2019) 2.6.

⁴²⁵ Francis Schubert, 'State Responsibilities for Air Navigation Facilities and Standards - Understanding its Scope, Nature and Extent' (2010) *Journal of Aviation Management* 21, 29. This has also been questioned by Carroz who states, in relation to the comment in the above-mentioned foreword to Annex 11: 'Insofar as these rules relate to the flight and maneuver of aircraft, it is questionable whether such a procedure is in conformity with Article 12' (Carroz (n 410) 162).

⁴²⁶ ICAO, 'The Convention on International Civil Aviation: Annexes 1 to 18', available at <www.icao.int/safety/airnavigation/NationalityMarks/annexes_booklet_en.pdf> accessed 11 November 2017.

⁴²⁷ Chicago Convention, Annex 12 (8th edn, July 2004) (v).

⁴²⁸ *ibid* 2.1.1.1.

Manual,⁴²⁹ which aims to, as one of its main objectives, ‘foster cooperation’ between aeronautical and maritime authorities in order to ‘promote harmonization of aeronautical maritime services’ in the provision of search and rescue services at sea.⁴³⁰ Aeronautical search and rescue and the coordination of these services with maritime search and rescue, including the role of the IAMSAR Manual, will be addressed further in Chapter 4.

2.7.3 Exclusive Economic Zone

2.7.3.1 *The development of the EEZ as a maritime area and the general rights associated with it under UNCLOS*

UNCLOS does not explicitly state that the EEZ is not part of the high seas but given that the scope of Part VII ‘High Seas’ under Article 86, applies to ‘all parts of the sea that are not included in the *exclusive economic zone...*’ (emphasis added), it is accepted as being separate from the high seas. A precise legal classification of the EEZ is elusive but it ‘appears a *sui generis* zone, as a transition zone between the territorial sea and the high seas’.⁴³¹

The EEZ extends the sovereign rights of the coastal State in respect to certain matters, but not the territorial sovereignty, to a breadth of up to 200nm from the baseline of the territorial sea of the State (see Figure 2.4 and Figure 2.5).⁴³² The ICJ recognised the customary status of the EEZ in 1982 in the *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, in which the Court stated that the concept of the EEZ ‘may be regarded as part of modern international law’.⁴³³ The Court reaffirmed the EEZ’s customary status in its 1985 judgment of the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*: ‘[i]t is in the Court’s view incontestable that... the institution of the exclusive economic zone... is shown by the practice of States to have become part of customary international law’.⁴³⁴ Although the concept of the EEZ is customary, not all provisions relating to the EEZ in UNCLOS are recognised as such.

⁴²⁹ The IAMSAR Manual is jointly published by the International Maritime Organization (IMO) and ICAO and provides guidelines for the organisation of search and rescue services.

⁴³⁰ International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, Volume I: Organization and Management (2016) 1.1.3.

⁴³¹ Umberto Leanza and María Cristina Caracciolo, ‘The Exclusive Economic Zone’ in David Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: Vol 1 - Law of the Sea* (OUP 2014) 185. *Sui generis* means ‘of its own kind’ and in the context of the EEZ, it refers to it having a distinct legal character from other maritime areas (See statement made by Chile upon signature of UNCLOS: United Nations Treaty Collection, ‘Chapter XXI: Law of the Sea, Declarations and Reservations - Chile’, available at <treties.un.org/Pages/Declarations.aspx?index=Chile&lang=_en&chapter=21&treaty=463> accessed 3 February 2020).

⁴³² UNCLOS, Article 57.

⁴³³ Judgment, I.C.J. Rep. 1982 (Feb. 24), p. 18, p. 74 para. 100.

⁴³⁴ Judgment, I.C.J. Rep. 1985 (Jun. 3), p. 13, p. 33 para. 34.

The concept of the EEZ was codified under UNCLOS largely in response to State claims, led by the US and soon after taken up by Iceland and a number of States in Latin America, for preferential fishing rights within the waters adjacent to their territorial sea.⁴³⁵ These early claims resulted in fisheries zones, which very few States still possess as a result of the fact that the rights attributed to a State in their EEZ encompass fishing rights, together with rights in relation to all other natural resources. More specifically, in their EEZs, States have sovereign rights 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living' as well as jurisdiction over marine scientific research and the protection and preservation of the marine environment.⁴³⁶ Importantly for the purpose of this research, the coastal State also has the exclusive right in the EEZ to construct, operate and use artificial islands.⁴³⁷ Third States making use of a coastal State's EEZ have a due regard obligation towards the rights and duties of the coastal State and an obligation to comply with the laws and regulations of the coastal State adopted in accordance with UNCLOS.⁴³⁸ In exercising its rights in the EEZ, a coastal State in turn has an obligation to act with due regard for the rights and duties of other States in the zone and to act consistently with UNCLOS more broadly.⁴³⁹ One of these rights of other States is the right to freedom overflight.⁴⁴⁰

2.7.3.2 *The EEZ as part of the high seas for the purpose of international civil aviation law*

As mentioned above,⁴⁴¹ the codification of the EEZ in UNCLOS led to debate at ICAO, and amongst scholars, as to whether it formed part of the high seas for the purpose of international civil aviation law. Ultimately, this matter was concluded in the affirmative, however the logic supporting the decision was varied.

Heller considered the consequences of the EEZ on freedom of overflight in the lead-up to the adoption of UNCLOS. One option he suggested was for the law applying to overflight in the EEZ to reflect that of the coastal State, that is, for it to be the rules of the air and 'all the regulations applying to operation and navigation, as they apply in the coastal State', including any differences to the rules of the air filed by that coastal State.⁴⁴² As for how that would work over artificial islands in the EEZ, he proposed that the

435 Crawford, *Brownlie's Principles* (n 84) 260-61.

436 UNCLOS, Articles 56 (1)(a) and (b)(ii) and (iii).

437 See Chapter 3.

438 UNCLOS, Article 58(3).

439 *ibid* Article 56(2).

440 *ibid* Article 58(1).

441 See Section 2.7.2.2.1.

442 Paul P Heller, 'Air Space Over Extended Jurisdictional Zones' in John King Gamble (ed) *Law of the Sea: Neglected Issues* (Law of the Sea Institute, University of Hawaii 1979) 146.

provision that went on to become Article 60(2) UNCLOS, as to which see Section 3.2.3, could ‘grant the coastal state further jurisdiction with regard to civil aviation regulation on artificial islands, installations and structures’.⁴⁴³

Hailbronner, considering the safety implications of Heller’s approach, highlighted that the uniformity of the rules applying in international airspace is important for aviation safety and that this was in fact a driving factor in the decision to impose the mandatory uniform application of Annex 2 of the Chicago Convention. In the words of Hailbronner, ‘[b]y developing a uniform aviation code widely accepted by States, the Chicago system has made considerable progress in promoting safe and efficient international air transport’.⁴⁴⁴ On this note, in respect to the impending developments prior to the adoption of UNCLOS, he questioned:

‘whether or not a coastal State’s regulatory authority extends to aircraft movements within the EEZ [considering that] [a]n affirmative answer to this question would... result in the possibility that coastal State’s [sic] control over aircraft movement with respect to large areas of the airspace above the oceans might be established, differing from the legal regime of the ICAO Rules of the Air, mandatory for the airspace above the high seas’.⁴⁴⁵

Hailbronner’s interpretation ultimately prevailed although, as will be seen, safety was just one factor, along with the scope of coastal State rights in the EEZ and freedom of overflight, that contributed to the decision. The position as it is accepted today was proposed by the ICAO Secretariat and confirmed by the Rapporteur, AWG Kean, in 1987. The Secretariat reached the conclusion by consideration of the purpose of the EEZ and the specific rights it confers on a coastal State:

‘... the coastal States are not granted by the Convention any rights or jurisdiction over the airspace above the EEZ and no regulatory power with respect to flights over the EEZ. For all practical and legal purposes, the status of the airspace above the EEZ and the regime over the EEZ is the same as over the high seas and the coastal States are not granted any precedence or priority. Consequently, for the purposes of the Chicago Convention, its Annexes and other air law instruments, the EEZ should be deemed to have the same legal status as the high seas and any reference in these instruments to the high seas should be deemed to encompass the EEZ’.⁴⁴⁶

⁴⁴³ ibid.

⁴⁴⁴ Hailbronner, ‘Freedom of the Air’ (n 370) 491.

⁴⁴⁵ Kay Hailbronner, ‘The Legal Regime of the Airspace Above the Exclusive Economic Zone’ (1983) 8(1) *Air Law* 30, 35-36.

⁴⁴⁶ ICAO WP/5-1, *Secretariat Study on Agenda Item 5: Consideration of the Report of the Rapporteur on ‘United Nations Convention on the Law of the Sea – Implications, if any, for the Application of the Chicago Convention, its Annexes and other International Air Law Instruments’*, Presented at the Legal Committee 26th Session, Montreal (4 February 1987), reproduced in (1987) 3 *Int’l Org & L Sea: Documentary YB* 243, 256.

The Rapporteur respected this line of reasoning, reiterating that:

'UNCLOS grants the coastal State only rights of economic exploration, exploitation, conservation and management of the resources of the waters and of the seabed, together with supporting jurisdiction; it grants no right to regulate air traffic over those waters. Your Rapporteur considers this a convincing argument'.⁴⁴⁷

At the same time though, the Rapporteur reached his conclusion via a slightly different line of reasoning, that is, on there being freedom of overflight over the EEZ as over the high seas and therefore the Rules of the Air should equally apply over the former: '[i]t would follow that, as a consequence of Articles 58 and 87 of UNCLOS, the Rules of the Air applying over the EEZ are to be identical with those applying over the high seas'.⁴⁴⁸

Echoing the concerns of Hailbronner, the Rapporteur also recognised the validity of the arguments of safety, as put forward by IFALPA, which support the application of the rules of the air to the EEZ:

'Your Rapporteur [is]... impressed by a further argument advanced by the International Federation of Airline Pilots' Associations (IFALPA), which makes a valid point of purposive interpretation: 'The Federation believes that, in the interests of international standardization of safety standards, the rules established under the Chicago Convention should be applicable not only in the airspace above the high seas but also in the airspace above any Exclusive Economic Zone (EEZ) which may have been established by a State either on the basis of UNCLOS or in any other manner'.⁴⁴⁹

It is now unambiguous that the 'high seas' as the term is used under international civil aviation law, encompasses both the high seas and the EEZ. As can be seen from the above, this conclusion was reached as a result of the limited scope of a coastal State's rights and the application of freedom of overflight in the EEZ, and is supported by the implications for aviation safety.

2.7.4 Continental shelf

The concept of the EEZ 'parallels that of the continental shelf in attributing certain limited rights to coastal States beyond the reach of the territorial sea'.⁴⁵⁰ In the continental shelf, a coastal States 'exercises... sovereign rights for the purpose of exploring it and exploiting its natural resources',⁴⁵¹ where the 'rights and the status of the continental shelf are distinct from the legal

⁴⁴⁷ ICAO Report by the Rapporteur on Agenda Item 5 (n 391) 269.

⁴⁴⁸ *ibid.*

⁴⁴⁹ ICAO Report by the Rapporteur on Agenda Item 5 (n 391) 269.

⁴⁵⁰ Peter-Tobias Stoll, 'Continental Shelf' (Max Planck Encyclopedia of Public International Law 2008) 6.

⁴⁵¹ UNCLOS, Article 77(1).

regime governing the water column'.⁴⁵² This latter point is reflected in the definition of the continental shelf: it 'comprises the seabed and subsoil of the *submarine areas* that extend beyond its territorial sea throughout the natural prolongation of its land territory' (emphasis added) (see Figure 2.6).⁴⁵³

UNCLOS explicitly provides that a coastal State's rights over the continental shelf 'do not affect the legal status of the superjacent waters' and that the exercise of the rights 'must not infringe on or result in any unjustifiable interference with navigation'.⁴⁵⁴ Despite this, and despite being restricted to the submarine areas, the continental shelf is relevant to this research insofar as the regime applying to the EEZ in relation to artificial islands, installations and structures, applies *mutatis mutandis* to the continental shelf. So, although the continental shelf will not be directly addressed in this study, the implications for overflight rights in the EEZ in this context are equally applicable in the continental shelf. This is particularly relevant when a State's EEZ and continental shelf do not share an outer boundary, that is, when a coastal State has either not declared an EEZ or when the continental shelf extends beyond the outer limit of the EEZ. In this case, any portion of the waters above a continental shelf that does not intersect with an EEZ, if it exists, is considered part of the high seas.

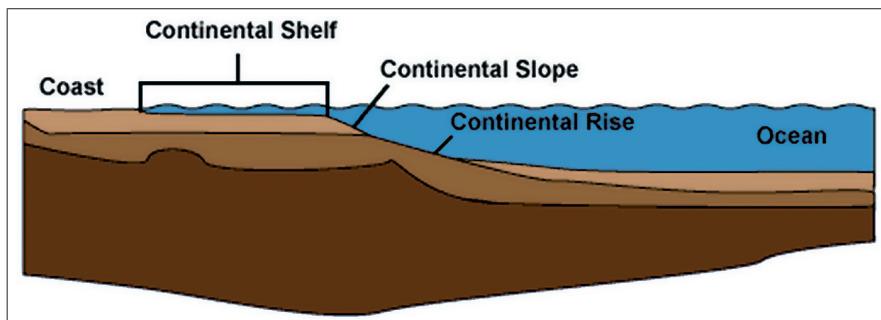


Figure 2.6: Cross section depiction of a continental shelf, demonstrating the essential feature of the shallow 'natural prolongation' of the land territory⁴⁵⁵

⁴⁵² Stoll (n 450) 1.

⁴⁵³ UNCLOS, Article 76(1). The continental shelf extends to the outer edge of the continental margin, as defined in Article 76(3), or to a distance of 200 nautical miles from the territorial sea baseline in the case that the continental margin does not reach that distance (Article 76(1)).

⁴⁵⁴ *ibid* Articles 78(1) and (2).

⁴⁵⁵ Source: World Atlas, 'What is a Continental Shelf?', available at <www.worldatlas.com/articles/what-is-a-continental-shelf.html> accessed 17 November 2016, originally sourced from the US Navy.

2.7.5 Contiguous zone

A contiguous zone must be claimed by a coastal State⁴⁵⁶ and if a State does so, it will either form part of that State's EEZ, if the State has also claimed an EEZ, and otherwise it will be part of the high seas (see Figure 2.4). The zone, which is simply described by UNCLOS as being, in relation to a State, 'a zone contiguous to its territorial sea',⁴⁵⁷ extends beyond the territorial sea up to 24nm from the territorial sea baseline. The contiguous zone is dependent upon the territorial sea; its sole purpose is to prevent and punish breaches of the law within the territorial sea and it vests the coastal State with both prescriptive and enforcement jurisdiction in this capacity. Within its contiguous zone, a coastal State may exercise the control necessary to 'prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory and territorial sea' and to 'punish infringement of the above laws and regulations committed within its territory or territorial sea'.⁴⁵⁸ The distinction between 'prevent' and 'punish' may be seen as generally applying to incoming and outgoing ships, respectively.⁴⁵⁹ Despite UNCLOS being silent on the matter, and the above provisions being exhaustive, some States also act in the contiguous zone on the basis of national security.⁴⁶⁰ In 1956, the ILC considered the question of the inclusion of security within the scope of the provisions and concluded that it is 'unnecessary, and even undesirable' on the basis of two considerations: first, in most cases the customs head of power will suffice, and; secondly, States have an inherent right to self-defence, under which right they are able to act in the case of a threat to their security.⁴⁶¹

The *travaux préparatoires* of the 1958 UN law of the sea conventions identified a commentator who had described ADIZs as 'contiguous air space' zones.⁴⁶² The response to this, also recorded in the *travaux préparatoires*, was that ADIZs 'can hardly be regarded as airspaces connected with the sea areas which the Commission [the ILC] terms "contiguous zones"', based on the limited breadth of contiguous zones relative to ADIZ and the fact that in the contiguous zone, 'the coastal State may only exercise control... for the purpose of preventing and punishing infringements of its customs, fiscal or sanitary regulations'.⁴⁶³ Furthermore, given the silence of UNCLOS in this respect and that fact that other provisions of the Convention expressly

456 Kevin Aquilina, 'Territorial Sea and the Contiguous Zone' in David Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The Manual on International Maritime Law: Volume 1 - The Law of the Sea* (OUP 2014) 60.

457 UNCLOS, Article 33(1).

458 *ibid* Articles 33(1)(a) and (b).

459 Aquilina (n 456) 64.

460 Crawford, *Brownlie's Principles* (n 84) 251.

461 YILC (1956) Vol. II, 5-6.

462 Pépin (n 90) 70 (the commentator was S/Ldr. Murchison).

463 *ibid* 71.

include the airspace in their scope, the rights of the coastal State in the contiguous zone are understood to be restricted to the surface of the sea.⁴⁶⁴ As a result, the contiguous zone will not be further discussed in the context of this study.

2.7.6 In summary: Overflight rights in international airspace

In contrast to national airspace, there is freedom of overflight over international airspace. UNCLOS expressly provides for this right, however it also codifies certain rights of coastal States in international waters. The rights of coastal States associated with the establishment of maritime constructions in the EEZ, applying *mutatis mutandis* to the continental shelf, form the basis of Chapter 3, the focus of which is an examination of whether the coastal State has the right to prohibit overflight on the basis of extending the safety zones around the construction to encompass the airspace above them. Furthermore, certain annexes to the Chicago Convention apply in international airspace pursuant to Article 12. The rules on ATS under Annex 11, which form the foundation of the provision of these services not just over national airspace, but also over international airspace by way of FIRs, will be addressed in Chapter 4. Chapter 4 will also consider the establishment by some coastal States of ADIZs in international airspace, some of whom attempt to justify the zones on the basis of *inter alia* their rights and jurisdiction in their EEZs. Keeping in mind that freedom of overflight applies beyond national airspace, these subsequent chapters will examine how freedom of overflight applies in practice, in light of the rights and responsibilities of the coastal States under UNCLOS and the annexes of the Chicago Convention.

2.8 CONCLUSION TO CHAPTER

This chapter has introduced the concept of overflight, drawing the distinction between overflight of sovereign territory, as national airspace, and of the EEZ and the high seas as international airspace, the latter of which is the focus of this study. Overflight is regulated in national airspace through international treaties, with the Chicago Convention as the foundation of this regulatory framework. The basis of overflight rights differs depending on whether the overflight involves a scheduled service or a non-scheduled flight, a manned aircraft or an unmanned aircraft, and whether the aircraft is a State or civil aircraft.

In contrast, in international airspace, the above categories relevant to overflight in national airspace are irrelevant to freedom of overflight, which applies to all aircraft. As will be addressed in the following chapters

⁴⁶⁴ Aquilina (n 456) 59.

however, the reporting obligations of an aircraft in international airspace differ depending on whether it is a State aircraft or a civil aircraft, and the rules on interception apply differently depending on whether the intercepted aircraft is a State aircraft or a civil aircraft. Furthermore, recalling Chapter 1, coastal States attempt to regulate international airspace in the maritime areas adjoining their national airspace for, among other purposes, national security reasons. In these instances, although the distinction may not be drawn explicitly by the coastal State, State aircraft, usually perceived to pose a greater threat, are the key targets of the regulation.

