Protection of aviation security through the establishment of prohibited airspace

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1 Methodology, Terminologies and Preliminary Questions

This study examines the 'who, how, and when' of establishing prohibited airspace. Answers to these questions require a legal analysis of air law rules pertinent to prohibited airspace. The methodology employed in conducting this legal analysis is discussed in the present chapter, as are clarifications on key terms and preliminary questions.

1 Methodology of this study

1.1 Outline of methodology

This study features a normative analysis of air law rules relevant to prohibited airspace,[1] as complemented by case studies. The air law rules find their basis in the Chicago Convention[2] and ICAO regulations.[3] The study follows four steps: 1) to identify relevant rules on prohibited airspace; 2) to interpret these rules alongside recognized interpretation methods enshrined in the Vienna Convention on the Law of Treaties (VCLT);[4] 3) to examine the application of these rules in practice through case studies; and 4) to suggest how the implementation may be improved for rules that are already in place; and if non-existent, to propose new rules to safeguard aviation security in relation to prohibited airspace.

1.2 Normative legal study

This study first undertakes a normative study of existing rules on prohibited airspace. The primary source of rules can be found in the Chicago Convention. The Chicago Convention is a significant landmark in the development of

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1 The definitions of prohibited/area is presented in Section 2.2.3 of Chapter II.

2 *The Convention on International Civil Aviation*, 7 December 1944,15 U.N.T.S. 295.

3 ICAO, the International Civil Aviation Organization, was established by the Chicago Convention in 1947, when the Convention came into force. Article 43 of the Chicago Convention reads: "An organization to be name the International Civil Aviation Organization is formed by the Convention." The definition of 'ICAO regulation' is presented in Section 3 of this chapter.

4 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

international law and is, at the time of writing, the fundamental source of law in international civil aviation.[5] To interpret the Chicago Convention's prescription for prohibited airspace, this study refers to the treaty interpretation methods outlined in Articles 31 and 32 of the VCLT.[6]

1.2.1 Customary treaty interpretation rules

Articles 31 and 32 of the VCLT are recognized as the reflection of existing customary international law, because such status is confirmed by various international tribunals.[7] For instance, the Permanent Court of Arbitration (PCA) in the *Arbitration regarding the Iron Rhine* explained the following:[8]

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5 Michael Milde, *International Air Law and ICAO,* Eleven International Publishing 2016, p. 14.

6 Article 31. General Rule of Interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
Article 32. Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

7 See e.g. *Nicaragua v. Colombia*, Preliminary Objections, ICJ Reports, 2016, para. 35; *Croatia v. Serbia*, ICJ Reports, 2015, para. 138; *Peru v. Chile*, ICJ Reports, 2014, pp. 3, 28; *Costa Rica v. Nicaragua*, ICJ Reports, 2009, pp. 213, 237; ITLOS Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011, para. 57; *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, pp. 43, 109–10; *Indonesia/Malaysia* case, ICJ Reports, 2002, pp. 625, 645–6; *the Botswana/Namibia* case, ICJ Reports, 1999, p. 1045; *the Libya/Chad* case, ICJ Reports, 1994, pp. 6, 21–2; 100 ILR, pp. 1, 20–1; and the *Qatar v. Bahrain* case, ICJ Reports, 1995, pp. 6, 18; 102 ILR, pp. 47, 59. Other courts and tribunals have done likewise: see e.g. the GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna in 1994, 33 ILM, 1994, pp. 839, 892; the case concerning the Auditing of Accounts between the Netherlands and France, arbitral award of 12 March 2004, para. 59.

8 *Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium/Netherlands),* Award of 24 May 2005, p 23 para. 45, at www.pca-cpa.org, accessed 18 December 2017. See also Gardiner, R. *Treaty Interpretation*. Oxford University Press 2008, pp. 12-13 (emphasis added).

> It is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the [Vienna] Convention reflect pre-existing customary international law, and thus may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980.
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> The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955… and to a treaty concluded in 1890, bearing on rights of States that even on the day of Judgment were still not parties to the Vienna Convention… *There is no case after the adoption of the Vienna Convention 1969 in which the International Court of Justice or any other leading tribunal has failed to act.*

This case shows that Articles 31 and 32 of the VCLT can be applied to a treaty concluded in 1955. The VCLT was open for signature in 1969 and entered into force in 1980.[9] Interpretation rules in Articles 31 and 32 are customary international law; therefore, they can be applied retroactively to treaties predating 1969. Likewise, the Chicago Convention was concluded in 1944.[10] Articles 31 and 32 in the VCLT, due to their long-standing status as customary law, can apply retrospectively to the 1944 Chicago Convention, a multilateral treaty.

Furthermore, at the time of writing, the VCLT has 116 Contracting States,[11] less than that of the Chicago Convention, which is 193 signatories.[12] Nonetheless, interpretation rules in the VCLT, as reflected in Articles 31 and 32, are applicable to all Contracting Parties of the Chicago Convention, except for those States that have dissented from the start of the custom.[13] The Inter-

9 United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en, last accessed 12 April 2020.

10 On the establishment of the Chicago Convention, D. Goedhuis, *Problems of Public International Law* 81(11) *Recueil des Cours* pp. 205–307 (1952); H.A. Wassenbergh, *Post-War International Civil Aviation Policy and the Law of the Air*, Martinus Nijhoff 1962, p. 180; Haanappel, P.P.C., *The Law and Policy of Air Space And Outer Space: A Comparative Approach*, Kluwer Law International 2003, p. 17. Fifty two States signed the Final Act of the Chicago Conference. See *Proceedings of the International Civil Aviation Conference*, Vol.1 (United States Government Printing Office, Washington, 1948).

11 United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII1&chapter=23&Temp=mtdsg3&clang=_en, last accessed 12 April 2020.

12 https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf, last accessed 12 April 2020.

13 M N Shaw, *International Law*, CUP 2017, p. 68. See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 38, 130; 41 ILR, pp. 29, 67, 137, and The Third US Restatement of Foreign Relations Law, St Paul, 1987, vol. I, pp. 25–6. See also T. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 Harvard International Law Journal, 1985, p. 457, and J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 56 British Yearbook of International Law (1985), p. 1.

national Court of Justice (ICJ) has applied the interpretation rules set out in Articles 31 and 32 of the VCLT in many judgments,[14] even in cases where one party was not a party to the VCLT.[15] The United Nations International Law Commission (ILC) concluded that Articles 31 and 32 of the VCLT set forth, respectively, the general rule of interpretation and the recourse to supplementary means of interpretation: these rules apply as customary international law.[16] The United Nations General Assembly (UNGA) has taken note of the

14 See e.g. *Nicaragua v. Colombia*, Preliminary Objections, ICJ Reports, 2016, para. 35; *Croatia v. Serbia*, ICJ Reports, 2015, para. 138; *Peru v. Chile*, ICJ Reports, 2014, pp. 3, 28; *Costa Rica v. Nicaragua*, ICJ Reports, 2009, pp. 213, 237; ITLOS Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011, para. 57; *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, pp. 43, 109–10; *Indonesia/Malaysia* case, ICJ Reports, 2002, pp. 625, 645–6; *the Botswana/Namibia* case, ICJ Reports, 1999, p. 1045; *the Libya/Chad* case, ICJ Reports, 1994, pp. 6, 21–2; 100 ILR, pp. 1, 20–1; and the *Qatar v. Bahrain* case, ICJ Reports, 1995, pp. 6, 18; 102 ILR, pp. 47, 59. Other courts and tribunals have done likewise: see e.g. the GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna in 1994, 33 ILM, 1994, pp. 839, 892; the case concerning the Auditing of Accounts between the Netherlands and France, arbitral award of 12 March 2004, para. 59; and the Iron Rhine (Belgium/Netherlands), arbitral award of 24 May 2005, para. 45. See also *Oppenheim's International Law*, p. 1271.

15 See for instance, *Avena and other Mexican Nationals (Mexico v United States of America)* [2004] *ICJ Reports* 37 – 38, para 83: "The Court now addresses the question of the proper interpretation of the expression 'without delay' in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of 'without delay', as it is to be understood in Article 36, paragraph (1), is not defined in the Convention [on Consular Relations]. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties." The VCLT applies even though one party is not a party to the VCLT, as in *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)*: "The Court notes that Indonesia is not a party to the Vienna Convention of 23 May 1969 on the Law of Treaties; the Court would nevertheless recall that, in accordance with customary international law, reflected in Articles 31 and 32 of that Convention: a treaty must be interpreted in good faith… Moreover, with respect to Article 31, paragraph 3, the Court has had occasion to state that this provision also reflects customary law…", ICJ Reports 2002, pp. 23-24, para. 37. See also in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*: "The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted… Article 32 provides…", ICJ Reports 2002, p. 38, para. 94. On Art. 32 of the VCLT, the ICJ also affirms its application in *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objections, ICJ Reports 1996, p. 812, para.23; see, similarly, *Kasikili/Sedudu Island (Botswana/Namibia)* ICJ Reports 1999, p. 1059, para. 18; *Case concerning Legality of Use of Force (Servia and Montenegro v United Kingdom)*, Preliminary Objections, ICJ Reports 2004, pp. 36-37, para. 98.

16 Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018), Official Records of the General Assembly, Seventy-third Session, Supplement No. 10, A/73/10, p. 13-14.

ILC's conclusion in a resolution adopted in December 2018.[17] Having clarified that Articles 31 and 32 of the VCLT apply to the Chicago Convention, this chapter contends that it is appropriate to start with these customary rules for the interpretation of the latter's provisions on prohibited airspace.

1.2.2 Interpretation methods in the Vienna Convention on the Law of Treaties

1.2.2.1 Ordinary meaning

Article 31(1) of the VCLT declares that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ICJ noted the importance of ordinary meaning in an advisory opinion entitled *Competence of Assembly regarding admission to the United Nations*, stating that:[18]

> the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur.[19]

Article 31(1) of the VCLT requires a lawyer first to apply textual interpretation. The ordinary meaning of the terms in a treaty is the starting point of an interpretation, but only if it is confirmed by investigating the context and object and purpose, and if on examining all other relevant matters, no contra-indication is found, is the ordinary meaning determinative.[20] With respect to the provisions concerning prohibited airspace in the Chicago Convention, this study will first examine the ordinary meanings of terms therein.

1.2.2.2 Context

The word "context" in the VCLT can refer to an immediate qualifier of the ordinary meaning, or it works to identify material which is to be taken into

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17 Resolution adopted by the General Assembly on 20 December 2018, A/RES/73/202, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Regarding the meaning of "take note of" in the United Nations' resolution, where a report recommends a specific course of action which requires a decision by the General Assembly, a decision or resolution taking note of such report in the absence of further comment by the organ concerned constitutes authorization of the course of action contained therein. Where a report does not propose or recommend any course of action which requires a decision by the General Assembly, taking note of such report merely takes cognizance that it has been presented and does not express either approval or disapproval. See Letter dated 2 April 2001 from the Chairman of the Fifth Committee to the Under-Secretary-General for Legal Affairs, the Legal Counsel, in A/C.5/55/42, 5 April 2001, 'Exchange of letters between the Chairman of the Fifth Committee and the Under-Secretary-General for Legal Affairs, the Legal Counsel'.

18 *Competence of Assembly regarding admission to the United Nations,* Advisory Opinion: I.C.J. Reports 1950, p. 4.

19 *ibid*, p. 8.

20 See Richard K Gardiner, *Treaty Interpretation,* Oxford University Press 2008, p. 166.

account, such as comparisons with other provisions on similar matters.[21] Where a provision at issue is not self-explanatory, a comparison of relevant provisions in the same treaty may assist in the interpretation.[22] For example, in a dispute between Nicaragua and Honduras, the ICJ had to consider two provisions of a treaty which made provision for the Court to have jurisdiction.[23] The ICJ compared these two provisions and noted that both provisions fitted in with separate ways of accepting its jurisdiction.[24]

Applying this approach to the Chicago Convention, this study identifies several provisions pertinent to, on the one hand, the right and jurisdiction, and on the other hand, conditions and requirements for the establishment of prohibited airspace. These provisions together form the context. Therefore, in interpreting elements in Article 9 of the Chicago Convention, Chapter II of this thesis will compare provisions in the treaty to clarify the ordinary meanings in the treaty context.

1.2.2.3 Object and purpose

Article 31(1) of the VCLT brings the teleological element into the interpretation rules.[25] Speaking of the object and purpose of a treaty, one of the commonly mentioned sources is a treaty's preamble.[26] The Chicago Convention's preamble reflects the object and purpose of the treaty.[27] Chapter II of this study presents the objects and purposes of the Chicago Convention to help ascertain the meanings of elements relevant to prohibited airspace.

1.2.2.4 Preparatory work

Article 32 of the VCLT prescribes that the preparatory work of a treaty can be used to confirm the meaning resulting from the application of Article 31 or to ascertain the ambiguous or obscure provisions.[28] Preparatory work is not

21 *ibid.*, pp. 177-178.

22 *ibid.*, p. 185.

23 ICJ, *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility) ICJ Reports* 1988, p. 69.

24 *ibid.*, pp. 88-89.

25 See Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford University Press 2008, pp. 343-344; Martin Ris, Treaty Interpretation and ICJ Recourse to *Travaux Preparatoires*: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 14 *Boston College International and Comparative Law Review*, 111, 118 (1991); Eirik Bjorge, The Evolutionary Interpretation of Treaties, Oxford University Press 2014, pp. 1-3.

26 See Richard K Gardiner, *Treaty Interpretation,* Oxford University Press, 2008, p. 192.

27 See Section 2 of Chapter II.

28 Article 32 of the VCLT reads: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable." E.g., in the Libya/Chad case, the Court held that: "Interpretation must be based above all

included in Article 31 of the VCLT, but it is referenced in Article 32 as a "supplementary means" to interpret treaties. Being supplementary does not mean that preparatory work is less critical.[29] There is no rigid line between Articles 31 and 32 of the VCLT, as affirmed in the ILC's commentary on its final version of the draft Articles:[30]

> Accordingly, the Commission was of the opinion that the distinction made in articles 27 and 28 (ultimately articles 31 and 32 of the VCLT) between authentic and supplementary means of interpretation is both justified and desirable. At the same time, it pointed out that the provisions of article 28 by no means have the effect of drawing a rigid line between the "supplementary" means of interpretation and the means included in article 27. The fact that article 28 admits recourse to the supplementary means for the purpose of "confirming" the meaning resulting from the application of article 27 established a general link between the two articles and maintains the unity of the process of interpretation.[31]

A treaty's preparatory work illustrates the roots and historic evolution of the law. The context of its origin and the causes of its evolution help demonstrate the wider social and cultural framework and could assist in better understanding and interpretation of the rules.[32] To understand the rules on prohibited airspace, Chapter II of this study elaborates on the preparations leading to the Chicago Convention. This preparatory history consists of recorded draft texts and consultations on prohibited airspace. The preparatory work of the Chicago Convention sheds light on the ambiguous terms found in the treaty and confirms the division between law of war and law of peace in applying the treaty's rules on prohibited areas.

1.2.2.5 Subsequent practices

According to Article 31(3) of the VCLT, subsequent practices can serve as supplementary information when interpreting a treaty. The ILC concluded that two situations of subsequent practice are relevant to treaty interpretation: first, unilateral conduct by one or more parties in the application of the treaty is

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upon the text of a treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty." *Territorial Dispute (Libyan Arab Jamahiririya/Chad), Judgment, ICJ Reports 1994*, p 6, para 41.

29 The designation "supplementary" for Article 32 of the VCLT is a victory to confirm the primary of a purely literal approach, which however is not free from to controversy and criticism. At the Vienna Conference, the US delegation failed an attempt to integrate the content of Articles 31 and 32, according to who, the quest for an ordinary textual meaning is impossible, See Richard K Gardner, *Treaty Interpretation*, Oxford University Press, 2008, 303-305.

30 Richard K Gardiner, *Treaty Interpretation*, Oxford University Press, 2008, p. 308.

31 Yearbook of the International Law Commission 1996, A/CN.4/SER.A/1996/Add.l, vol II, p 220, para.10.

32 *Milde*, p. 5.

a supplementary means of interpretation; and second, conduct that establishes the agreement of the parties regarding the interpretation of the treaty is an authentic means of interpretation.[33]

In constructing the legal regulations on prohibited airspace, this study explores, to the extent necessary, State practices subsequent to the conclusion of the Chicago Convention. Examples are the unilateral closing of Qatari airspace by the United Arab Emirates in 2017,[34] and the airspace ban over Iran and Iraq in 2020.[35] The presentation of subsequent practices will be done through case studies.

1.3 Case studies

In addition to conducting a normative analysis, this study also provides case studies in relation to the establishment of prohibited airspace. Real-life examples show how rules are implemented and help to identify the deficiencies therein. Specifically, according to Allison, there are four categories of cases:[36]

1) representative cases, which are typical or standard examples of a wider category;
2) atypical or 'deviant cases,' which are those that deviate from the expected;
3) crucial cases, which are either those considered most likely to demonstrate a given theory that do not or those considered least likely to support a theory that do, in fact, support the theory; and
4) archetypal cases, which are defining cases, in the sense that a case studied becomes the model that influences subsequent cases of the same type.

These four types of case studies contribute to value judgments through inductively identifying new variables, hypotheses, casual mechanisms, and casual paths.[37] Each of the four types of cases help elucidate one aspect of regulations on prohibited airspace. The "downing"[38] of flight MH17 in 2014 and flight

33 Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July-10 August 2018), Official Records of the General Assembly, Seventy-third Session, Supplement No. 10, A/73/10, p. 13-14.

34 See Chapter II, Section 3.3.

35 The Guardian, 'US bans airlines from flying over Iraq and Iran after attacks on military' https://www.theguardian.com/business/2020/jan/07/faa-ban-iran-iraq-us-airlines, last accessed 31 May 2020. See further in chapter V, Section 3.3.3.

36 Robert Yin, Case Study Research: Design and Methods (Applied Social Research Methods), SAGE Publications 2013, p. 87.

37 Alexander L. George & Andrew Bennett, *Case Studies and Theory Development In The Social Sciences*, MIT Press 2005, p. 75.

38 ICAO Council Adopts Unanimous Resolution Condemning MH17 Downing, see https://www.icao.int/Newsroom/Pages/ICAO-Council-adopts-unanimous-Resolution-condemning-MH17-downing.aspx, last accessed 7 May 2022/

PS752 in 2020 are 'representative cases',[39] because they exemplify how the establishment of prohibited airspace can enhance aviation security in times of armed conflict. The downing of MH17 and later PS752 are also 'deviant cases' because they deviate from expected operation of air transportation. Furthermore, the disputes between India and Pakistan in 2019[40] on prohibited airspace present 'archetypal cases' which illustrated conditions and requirements for establishing prohibited airspace. In addition, the closing of Qatari airspace by neighboring countries is a 'crucial case' that demonstrates a State's right and jurisdiction to establish prohibited airspace. Last but not least, the *Corfu Channel* case[41] is both a 'representative' and 'archetypal' case that has defined "elementary considerations of humanity" in establishing prohibited airspace.[42]

1.4 Interim conclusions

This study employs a methodology of normative analysis with case studies contributing to normative judgments. The normative analysis seeks, interprets and constructs legal rules on prohibited airspace. In accordance with Article 31 and 32 of VCLT, the focus is to seek ordinary meanings in light of the object and purpose of the Chicago Convention. Discussions on the preparatory work help to confirm the meanings of provisions on prohibited airspace. Case studies demonstrate the implementation of these provisions through subsequent State practices in relation to prohibited airspace.

2 TERMINOLOGIES

2.1 Introduction of terminologies

This section clarifies the terminologies to be used throughout this air law study. Air law itself is a selection and grouping of rules from different branches of law relevant for aviation.[43] Air law and general international law share many terms; still, meanwhile, air law has also developed distinctive connotations for particular terms relevant to prohibited airspace. Therefore, it is necessary to clarify terms that govern the whole study, and in light of VCLT customary interpretation rules, to facilitate interdisciplinary discussions. This section

39 See further in Chapter V, Section 3.3.

40 CNBC, 'Pakistan closed its air space, forcing airlines into drastic reroutes', https://www.cnbc.com/2019/03/01/india-pakistan-conflict-closing-of-air-space-disrupted-flights.html, last accessed 31 May 2020. See further in Chapter II of this study.

41 *Corfu Channel Case (United Kingdom v Albania),* Judgment, ICJ Reports 1949, p. 4.

42 *ibid*, 15-23.

43 *Milde*, pp. 173-174.

clarifies the usage of terms to prepare for the normative analysis of the legal requirements and conditions related to prohibited airspace.

2.2 Contracting States, States Parties, and Member States

This study examines air law rules relevant to prohibited airspace and their implementation by Contracting Parties, States Parties, or Member States. To avoid possible confusion, this section clarifies how and why the terms are used throughout this study.

2.2.1 Contracting Parties and States Parties

According to the VCLT, a Contracting State is a State that has consented to be bound by a treaty, whether or not the treaty has entered into force;[44] Party or State Party refers to a State which has consented to be bound by a treaty and for which the treaty is in force.[45] That is to say, a Contracting State becomes a State Party when the treaty has entered into force for that State.[46]

The text of the Chicago Convention confirmed this usage: it uses Contracting States to prescribe States' rights and obligations,[47] because the Chicago Convention had not entered into force when delegations drafted the text. The Chicago Convention uses only once "party to the Convention" in Article 94(b) on the amendment of the Chicago Convention.[48]

Nonetheless, the usage of 'Contracting Parties' or 'Member States' may vary in regional practices. For example, in the European Community, now European Union (EU), the 'Community' and/or to 'Member States' are referred to in the context of "matters pertaining to their respective competence and international obligations".[49]

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44 Article 2(f), VCLT.

45 Article 2(g), VCLT.

46 Regarding the entering into force of treaty amendments, be it *erga omnes* or *inter se*, see *Milde* pp. 27-28. States Parties are commonly reserved for those provisions dependent upon the treaty being in force, for example on treaty amendments and review conferences.

47 The Chicago Convention uses 'Contracting States' for 58 times. For instance, "the contracting States recognize…" (Art. 1); "the contracting States undertake…" (Art. 3); "Each contracting State agrees that…" (Art.5).

48 Art. 94 (b) reads: "If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention."

49 Contartese, Cristina. (2020). "Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States", International Organizations Law Review, 17(2), pp. 418-456. Christian Tomuschat, 'Liability for Mixed Agreements' in David O'Keeffe and Henry G Schermers (eds), Mixed Agreements, Kluwer, 1983, p. 127. For an example, see the Association Agreement with Greece in 1961 that defined the concept of 'Contracting Parties' as follows: "either the Community and Member States or the

While acknowledging the usage in EU law, this study follows the approach in the Chicago Convention: this study refers to 'Contracting States' in discussing a State's rights and obligations as to prohibited airspace under the Chicago Convention and its Annexes; a State Party, in contrast, is used for discussions dependent upon the convention being in force for the States concerned. This study uses the term 'States Parties' only in the context of treaty amendment and review conferences.

2.2.2 ICAO Member States

ICAO officially came into being on 4 April 1947, upon sufficient ratifications of the Chicago Convention.[50] The webpage of ICAO treats the list of "Member States" the same as "the official list of ICAO Contracting States", therefore, it seems that ICAO considers that the accession to the Chicago Convention directly implies ICAO membership.[51]

However, a State's accession to the Chicago Convention does not automatically lead to membership of ICAO in the sole case that the applicant State is considered as an *enemy state* as described in Article 93 of the Chicago Convention.[52] Article 93 of the Chicago Convention says that "participation in this Convention" by enemy states requires additional procedures: approval by any general international organization set up to preserve peace (i.e., the United Nations),[53] four-fifth vote of the ICAO Assembly, and other conditions prescribed by the ICAO Assembly such as the assent of any State invaded or attached during the World War II by the applicant State. On the membership of Italy and Japan, ICAO Assembly Resolution A1-9 entitled "Consideration of applications for membership in ICAO" said that Article 93 contains provisions concerning the "application of membership";[54] this is reiterated in ICAO

Member States alone or the Community alone … The meaning in each case is to be deduced from the relevant provisions of the Agreement and from the corresponding provisions of the Treaty establishing the Community" (Point 5 of Annex II to the Agreement) (OJ 293/63 ff, at 346/63).

50 'The History of ICAO and the Chicago Convention,' https://www.icao.int/about-icao/History/Pages/default.aspx, last accessed 12 April 2020.

51 See https://www.icao.int/about-icao/Pages/member-states.aspx, last accessed 20 December 2017.

52 Article 93, the Chicago Convention.

53 *Milde,* p. 32.

54 See ICAO Assembly Resolution A1-9.

Assembly Resolution A1-5 dealing the membership of Italy,[55] and in ICAO Assembly Resolution A7-2 about the membership of Japan.[56]

In the early days, the Chicago Convention was not generally open to adherence by all States.[57] ICAO was envisaged as a 'club' for the Allies and neutral countries in World War II.[58] Members of the Allies and neutral countries could adhere to the Chicago Convention and thus become members of ICAO without any special admission procedure. For an "enemy State",[59] an obsolete category,[60] ICAO membership is not a direct implication of adherence

55 *Milde*, p. 32. Milde said that "in 1947 Italy – a former ally of Germany – was admitted by resolution A1-5 without any conditions". However, the ICAO Assembly Resolution A1-5, *Admission of Italy to Membership in ICAO*, did specify some conditions. Resolution A1-5 reads: "The Assembly Resolves:
That Italy be admitted to participation in the Convention in the Convention on International Civil Aviation subject to approval by the General Assembly of the United Nations and to the assent of those States whose special assent is required by Article 93 of the Convention and on the condition that it adheres to the convention.
…That this Resolution, together with all supporting documents, be transmitted by the Secretary General of the ICAO to any State whose assent is required by Article 93 of the Convention and which does not cast its vote in favour of this Resolution for the assent of such State; …
That Italy shall be admitted to participation in the Convention on the thirtieth day after the last of the following events has taken place:
1. Adjournment of the first session of the General Assembly of the United Nations following receipt by the General Assembly of the said application without the General Assembly having recommended the rejection of the application;
2. Receipt by the Secretary General of the Organization of all necessary assents to the said application; and
3. Receipt by the Secretary General of the Organization of notice from the Government of the United States of the receipt of Italy's notification of adherence."

56 ICAO Assembly Resolution A7-2, *Admission of Japan to Participation in the Convention on International Civil Aviation*, reiterated that "WHEREAS Article 93 of the Convention makes provision for the admission to participation therein of certain States such as Japan; … THEREFORE THE ASSEMBLY RESOLVES: (1) That Japan be admitted to participation in the Convention on International Civil Aviation in accordance with the provisions of Article 93 of the Convention and on condition that it adheres to the Convention;… "

57 *Milde*, pp. 31-32.

58 *Milde*, p. 31.

59 See Articles 107 and 53 of the United Nations Charter.

60 *ibid*. Former enemy States have become members of the United Nations. As of the year April 2020, Cook Islands is an ICAO Member State, but not a UN Member State. See https://www.un.org/en/member-states/#gotoC, last accessed 12 April 2020. Liechtenstein is a UN Member State, but not an ICAO Member State. Nonetheless, the Chicago Convention applies to the territory of Liechtenstein. The Minister of Switzerland made the statement transmitting the Swiss Instrument of Ratification: "My Government has instructed me to notify you that the authorities in Switzerland have agreed with the authorities in the Principality of Liechtenstein that this Convention will be applicable to the territory of the Principality as well as to that of the Swiss Confederation, as long as the Treaty of 29 March 1923 integrating the whole territory of Liechtenstein with the Swiss customs territory will remain in force." See https://www.icao.int/publications/Documents/chicago.pdf, last accessed 12 April 2020.

to the Chicago Convention: in addition to adhering to the Chicago Convention, an 'enemy State' has to go through Article 93's procedures to get ICAO membership – thus, a two-step process.

Nonetheless, it is not necessary to maintain the distinction of friendly and enemy State as in Articles 92 and 93 of the Chicago Convention any longer, because all Contracting States of the Chicago Convention are currently ICAO Member States. In this study, the term Member State is to emphasize the fact being a member of an organization and therefore to be used in contexts relevant to ICAO-led activities.

2.2.3 Interim conclusions

The Chicago Convention was envisaged to deal with aviation matters among friendly countries, the Allies and neutral countries in World War II. An enemy State has to go through Article 93 procedures to become an ICAO Member State. In line with the Chicago Convention, this study uses 'Contracting Parties' for normative analysis of treaty provisions related to prohibited airspace. The term 'Member States' are reserved for ICAO-centered matters and 'States Parties' for treaty review and amendment processes.

2.3 Territory, sovereignty, and jurisdiction

This study's first and second research questions seek to identify the authority that has the jurisdiction to establish prohibited airspace, and how and where such authority can do so. The Chicago Convention prescribes the rules for designating prohibited airspace over a State's territory.[61] Territory and sovereignty, therefore, are the starting points for discussing the jurisdiction to establish prohibited airspace.

2.3.1 Sovereignty

2.3.1.1 Airspace sovereignty

The competence of a State with respect to their territory is usually described in terms of sovereignty and jurisdiction, but the two terms are not employed consistently in legal sources.[62] An orthodox view of sovereignty puts emphasis

61 Article 9 of the Chicago Convention. Detailed analysis is presented in Chapter II of this study.

62 Ian Brownlie, *Principles of Public International Law*, 7th edn, Oxford University Press 2008, p. 204. ('Brownlie')

on territory,[63] so does the Chicago Convention. Article 1 of the Chicago Convention provides:

> The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory.[64]

This provision is the leading principle in air law recognizing Contracting States' sovereignty over national airspace.[65] The concept of complete and exclusive air sovereignty means, in the first place, the exclusive *jurisdiction* of a Contracting State to adopt laws and regulations relating to the status and uses of its airspace and to implement such laws by administrative decisions and sanctions – all to the exclusion of any other State's jurisdiction.[66]

Sovereignty means independence,[67] but as soon as an independent State adheres to the international legal order, its sovereignty becomes constrained by the terms of this legal order.[68] Article 1 of the Chicago Convention has to be read in the context of other peremptory rules of general international law, such as the fulfillment of international obligations in good faith.[69] As elaborated in the *Palmas* case,

> Sovereignty in the relations between States signifies independence … [T]erritorial sovereignty … involves the exclusive right to display the activities of a State. This right has a corollary duty: the obligation to protect within the territory the rights of other States [.][70]

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63 James Crawford, *The Creation of Studies in International Law*, 2nd edn, Oxford University Press 2007, p. 47. Cédric Ryngaert, *Jurisdiction in International Law*, Oxford Univesity Press 2008, Ch. 3. 'the Territoriality Principle'. Steven Truxal, *Economic and Environmental Regulation of International Aviation*, Routledge 2017, pp.37-40: "Territorial sovereignty is defined as supreme and exclusive authority within a State's territory, thereby defining the 'territorial State'. See also Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *The International History Review* 21, no. 3, (1999), p. 570.

64 Article 1 of the Chicago Convention.

65 This study therefore uses 'sovereign airspace' and 'national airspace' interchangeably for the airspace under a State's sovereignty.

66 *Milde*, p. 36. Mind of the division of internal and external sovereignty, sovereignty being supreme for internal affairs and independent from external interferences, it is not easy to make a distinction. Of relevance to this Section, the authors means to emphasize the independence dimension of sovereignty, so to speak the external sovereignty. See Steven Truxal, *Economic and Environmental Regulation of International Aviation*, Routledge 2017, p. 37.

67 Mendes de Leon, 'The Dynamics of Sovereignty and Jurisdiction in InternationalAviation Law', p. 486. *Island of Las Palmas Case (or Miangas), United States v. Netherlands*, Award (1928) IIRIAA 829 ICGJ 392.

68 Pablo Mendes de Leon, *Cabotage in Air Transport Regulation*, Martinus Nijhoff Publishers 1992, p. 29.

69 *Milde*, p. 36.

70 *Island of Las Palmas Case (or Miangas), United States v. Netherlands*, Award (1928) IIRIAA 829 ICGJ 392.

It is only by limiting the manner in which sovereign States may exercise their sovereignty that international society can ensure respect for the sovereignty of all States.[71] The principle of complete and exclusive sovereignty is not a self-centered entitlement;[72] it may be limited by common law, international agreements and other instruments and factors.[73] More specifically, the exercise of airspace sovereignty is qualified and "requalified" according to trends pertaining to arrangements within a State, that is with autonomous entities, as well as between States and international or supranational organizations, and is also subject to liberalization of air services and privatization of providers of such services.[74]

Last but not least, it is critical to distinguish sovereignty and sovereign rights. Both concepts denote a sense of exclusivity. Sovereignty is exercisable solely within the territory in question over all matters and all people in an exclusive matter;[75] whereas sovereign rights are limited to the matters defined by international law.[76] Considering that the term "sovereign rights" does not appear in the Chicago Convention but in the United Nations Convention on the Law of the Sea (UNCLOS) for economic exploration and exploitation in maritime zones,[77] this study thus avoids the usage of sovereign rights for discussion in relation to the air. When it comes to a specific matter within a Contracting State's territory, such as the right to establish prohibited airspace,[78] this thesis does not refer it as sovereign right, but sees it as the exercise of *sovereignty*.

2.3.1.2 Airspace sovereignty in relation to jurisdiction

In contrast with sovereignty denoting a sense of exclusive competence, jurisdiction is related to particular rights or the accumulation of rights quantitatively less than sovereignty.[79] Sovereignty is a shorthand for the legal personhood

71 Anders Henriksen, *International Law*, OUP 2017, p. 12. See also *Milde,* p. 28: " [The Chicago Convention] is to create a functioning mechanism, a 'club' of States following the shared aims, principles and expectations in a particular field of activities and in such an organization the States willingly accept a certain limitation of their sovereign powers by accepting the rule of a constitutional majoirity in the decision-making."

72 *Milde,* p. 36.

73 See Anna Konert, 'The Development of Civil Aviation and Its Impact on Sovereignty', in Pablo Mendes de Leon, & Buissing, Niall. *Behind and beyond the Chicago Convention: The evolution of aerial sovereignty*, Wolters Kluwer 2019, Chapter 29.

74 Pablo Mendes de Leon, 'The Dynamics of Sovereignty and jurisdiction in International Aviation Law', in *State, Sovereignty, and International Governance,* ed. Gerard kreijen, OUP 2002, p. 486.

75 Yoshifumi Tanaka, 'Jurisdiction of states and the law of the sea', in *Research Handbook on Jurisdiction and Immunities in International Law.* Edward Elgar Publishing 2015, p. 114.

76 *ibid,* pp. 115-129.

77 See Chapter IV, Section 2.3.

78 To be explained in Chapter II.

79 *Brownlie,* p. 204.

of a State, whereas jurisdiction concerns particular aspects and scope of such personhood, especially rights or claims, liberties, and powers.[80]

States are able to share jurisdiction with or transfer such competence to a supranational organization or another State.[81] A technical way to distinguish sovereignty from jurisdiction is to identify the existence of consent.[82] For example, State A may manage air traffic or provide navigation services within the boundaries of State B. If, however, these rights exist with the consent of the host State, then State A has no claim to sovereignty over any part of State B.[83] State A does not gain sovereignty consequently over the said airspace.

This study focuses on prohibited airspace in Article 9 of the Chicago Convention and relevant Annexes;[84] this analysis does not mean to challenge the territoriality-linked sovereignty as supported by Articles 1 and 2 of the Chicago Convention. The writing thus follows such usage that sovereignty means the traditional territorial sovereignty; jurisdiction, in comparison, is sustained by not only sovereignty but also particular rights or competences[85] conferred by States with consent, expressed in internal law, bilateral agreements or multilateral treaties.[86] Both territorial sovereignty and jurisdiction demotes a sense of scope and extent, which is spatial by nature: territorial sovereignty means "the complete spatial jurisdiction"[87] whereas jurisdiction may be limited to certain space, as explained in Chapter III on delegated airspace.

2.3.2 Territory

Since the Chicago Convention mentions sovereignty in a way linking to territory, it is necessary to explore the meaning of territory in air law. Accord-

80 *ibid*.

81 See further Section 2.3.3 of this chapter. Mendes de Leon, 'The Dynamics of Sovereignty and Jurisdiction in International Aviation Law' in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, OUP 2002, pp 484 & 488. Pablo Gbenga Oduntan, *Sovereignty andJurisdiction in the Airspace and Outer Space: Legal Criteria for Spatial Delimitation*, Routledge 2012, pp. Robert Jennings, 'Sovereignty and International Law' in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, OUP 2002, p. 29. Asha Kaushal, 'The Politics of Jurisdiction' (2015) 78(5) The Modern Law Review, p. 780. Cédric Ryngaert, 'The Concept of Jurisdiction in International Law' in Alexandre Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar Publishing 2015 , p. 67.

82 *Brownlie,* p. 204.

83 See also Hendry I. & Dickson S., *British Overseas Territories Law,* Hart Publishing 2011, pp. 339-42.

84 See Chapter II, Section 2.

85 See Section 2.3.3 of this chapter.

86 See further Chapters III and IV on jurisdiction to provide ATS in cross-border situations and over the high seas.

87 Yoshifumi Tanaka, 'Jurisdiction of states and the law of the sea', in *Research Handbook on Jurisdiction and Immunities in International Law.* Edward Elgar Publishing 2015, p. 114.

ing to Article 2 of the Chicago Convention, the concept of territory is defined as follows:

> 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.[88]

Article 2 of the Chicago Convention specifies that the territory of a State refers to land areas and territorial waters under the sovereignty, suzerainty, protection, and mandate of such State. The terms suzerainty, protectorate, and mandate were concepts of the League of Nations.[89] Such dependency relationships, exemplified by vassalage and trusteeship, have ceased to exist.[90] Removing suzerainty, protectorate and mandate from Article 2, then readers can see only sovereignty remains. Consequently, territory is a legal concept denoting areas under sovereignty. It is consistent with the definition of territory in public international law;[91] in addition to sovereignty, land, water and sea may also be governed *res nullius* and *res communis*.[92]

When it comes to airspace management, according to Article 28 of the Chicago Convention, a Contracting State is obliged to provide air traffic services (ATS) and infrastructure in its *territory*.[93] Since territory is only associated with sovereignty, a Contracting State is entitled to provide air traffic services in its sovereign airspace only; nevertheless, ICAO regulations provide that a Contracting State determines the provision of air traffic services for territories under its *jurisdiction*.[94] As clarified in the previous section, sovereignty is distinguishable from jurisdiction. Jurisdiction is used more in technical contexts where States make agreements as to particular rights, powers or

88 Chicago Convention, Article 2.

89 *Milde,* p. 37. Pablo Mendes de Leon, *Cabotage in Air Transport Regulation,* Martinus Nijhoff Publishers 1992, p. 27. Palau, the last United Nations trust territory, gained independence in 1994. See https://www.un.org/en/Sections/about-un/trusteeship-council/, last accessed Sep 14, 2020.

90 See Higgins, R. et al., *Oppenheim's International Law: United Nations*, OUP 2017, p. 101. See also Pablo Mendes de Leon, *Cabotage in Air Transport Regulation,* Martinus Nijhoff Publishers 1992, 27.

91 Oppenheim observed that '[t]he importance of State territory lies in the fact that it is the space within which the State exercise its supreme authority.' Oppenheim, *International Law,* vol. 1 8th ed., p. 452.

92 *Brownlie,* p. 203. An area designated *res nullius* consists of an area legally susceptible to acquisition by States but not as yet placed under territorial sovereignty. Areas designated *res communis*, consisting of the high seas and exclusive economic zones, are not capable of being placed under sovereignty.

93 See Article 28 of the Chicago Convention.

94 For instance, Standard 2.1.1 of Annex 11, *Air Traffic Services,* prescribes that 'Contracting States shall determine, in accordance with the provisions of this Annex and for the territories over which they have *jurisdiction*, those portions of the airspace and those aerodromes where air traffic services will be provided.' (emphasis added).

competences. This study will further clarify the meanings of sovereignty and jurisdiction in the context of providing ATS.

2.3.3 *Jurisdiction*

Jurisdiction concerns the power of the state to affect people, property and circumstances and reflects the basic principles of respect for sovereignty, equality of states, and noninterference in domestic affairs.[95] 'Jurisdiction' is thus the term that describes the scope or extent of the legal competence of a State or other regulatory authority to make, apply and enforce rules of conduct upon persons.[96] It concerns essentially the extent of each State's right to regulate behaviors or the consequences of events.[97]

According to Professor Bin Cheng, jurisdiction is composed of two parts: 'jurisaction' and 'jurisfaction'.[98] Jurisaction represents the normative element; it entitles a State to make laws or take decisions.[99] Jurisfaction enables a State to carry out the functions of a State by establishing a mechanism to make laws, to take decisions, and to implement and to enforce its laws and decisions.[100] Based on this theory, there are three types of jurisdiction: prescriptive, adjudicatory and executive jurisdiction. Prescriptive/legislative jurisdiction, that is jurisfaction, is the right of a State to apply its laws to the activities, relations or status of persons or the interests of persons in things.[101] Adjudicative jurisdiction is the right of a State's courts to subject persons or things to their adjudicative processes and issue a ruling on a matter.[102] Often accompanying adjudicatory jurisdiction, executive/enforcement jurisdiction then refers to a State's jurisdiction to enforce or compel compliance or to punish non-compliance with its laws or regulations, that is jurisaction.[103]

Jurisdiction is underpinned by sovereignty or particular rights or competences. This study uses 'exercise' of jurisdiction for the dynamic process of

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95 M. Shaw, *International Law,* CUP 2003, p. 572. M. Akehurst, 'Jurisdiction in International Law', 46 British Yearbook of International Law 1972e3, 145; D. W. Bowett, 'Jurisdiction: Changing Problems of Authority over Activities and Resources', 53 British Yearbook of International Law 1982, p. 1; R. Y. Jennings, 'Extraterritorial Jurisdiction and the United States Antitrust Laws', 33 British Yearbook of International Law 1957, p. 146; *Oppenheim's International Law*, p. 456; I. Brownlie, Principles of Public International Law, 7th edn, OUP 2008, chapters 14 and 15; and R. Higgins, Problems and Process, OUP 1994, Chapter 4.

96 M.D. Evans, International Law, OUP 2014, p. 309.

97 *Oppenheim's International Law*, p. 456.

98 Bin Cheng, *Studies in International Space Law*, Clarendon 1997, p. 150.

99 *ibid*.

100 *ibid*.

101 C. Ryngaert, *Jurisdiction in International Law*, OUP 2008, p. 9.

102 *ibid.*

103 *ibid*, pp.9-10. The concept of 'jurisdiction' is also used in the context of an international tribunal's competence to deal with contentious cases. For example, on the jurisdiction of the International Court of Justice, see https://www.icj-cij.org/en/jurisdiction, last visited 19 September 2018.

realizing the right or competence. Chapter II of this thesis discusses the sovereignty of a State with respect to the airspace above its territory: a Contracting State is to exercise its jurisdiction[104] over all matters within its territory with no limit *ratione materiae* or *rationae personae*.[105] Chapters III and IV explore the jurisaction and jurisfaction of a delegated State in providing ATS, which is linked to the competence of the appropriate ATS authority thereby established.

2.3.4 Competence

2.3.4.1 Competence and capacity

The word 'competence' has the linguistic connotation of the ability to do something well.[106] When an entity, being a State defined by international law or an organ of the State, has a specific competence, this means that this entity is able to do something – *can* do something well. This competence is to be distinguished from a very similar concept of *capacity*. Professor Fairman said that capacity in international law means the aptitude of a person to the enjoyment and exercise of rights under that law; this is an attribute of the State as an international person.[107] Full *capacity*, that is the status of sovereignty, is the normal condition of a State, but a State is able to bind itself to special limitations.[108]

In contrast, competence is a question of what an organ or officer of a State is to transact a particular kind of governmental business.[109] Internal law determines the competence of an organ of a State and thereby confers the authority to that organ.[110] Therefore, competence is used to describe the ability of an organ or authority designated by a State; such competence is determined by internal laws. It is different from the description of the full capacity of a State – the sovereignty. A State cannot exercise sovereign powers without conferring competences to its governmental organs;[111] in this sense, the com-

104 In the context of international air transport, the concept of jurisdiction must be understood as the competence based on both national and international consensus and law, to decide on matters regarding civil aviation in policy, technical and economic terms. See Pablo Mendes de Leon. *Cabotage in Air Transport Regulation*. Nijhoff, 1992, pp. 30-31.

105 Yoshifumi Tanaka, 'Jurisdiction of states and the law of the sea', in *Research Handbook on Jurisdiction and Immunities in International Law.* Edward Elgar Publishing 2015, p. 114.

106 https://www.oxfordlearnersdictionaries.com/us/definition/english/competence, last accessed 2 February 2022.

107 Charles Fairman, 'Competence to Bind the State to an International Engagement', *The American journal of international law* 30 (1936), p. 440-441.

108 *ibid*.

109 *ibid*.

110 *ibid.*

111 On 'State organ/entity', see United Nations, Responsibility of States for Internationally Wrongful Acts 2001. The draft articles, which also contain commentaries, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two), pp. 40-42. Text

petence of an entity is determined by international law for the purpose of exercising *functional/technical* aspects of sovereignty.[112]

This usage echoes the analysis of Professor Brownlie, as mentioned in Section 2.3.2 of this chapter, the existence of consent demonstrates whether it is the full capacity, *i.e.*, sovereignty – or restricted capacity, *i.e.,* jurisdiction – is at issue. Both sovereignty and jurisdiction demotes a sense of capacity but jurisdiction is less complete than sovereignty.[113] For example, as will be mentioned in Chapter III on the ATS provision,[114] the *jurisdiction* of a providing State is less than that of a delegating State, because the delegating State, enjoying sovereignty, has the full capacity; the delegating State imposes restrictions to its capacity with its own consent – this consent is expressed in a bilateral agreement, or through regional agreements, exemplified by analyses in Chapter IV.[115]

2.3.4.2 The usage of competence in the context of EU law

Having clarified the meaning of competence in public international law, the author thinks it is necessary to discuss the meaning of 'competence' in EU law to see if EU law has developed or changed the meaning of competence in international law. In the context of EU studies, scholars delivered analysis on the division of competences between the European Community (EC), later the EU institutions, and the Member States of the EU.[116] The development in EU law challenged the perception of the power parameters of an organization

reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. See further Section 2.2 of Chapter III.

112 On "technical sovereignty", see further in Steven Truxal, *Economic and Environmental Regulation of International Aviation*, Routledge 2017, pp. 56-57.

113 Mendes de Leon, 'The Dynamics of Sovereignty and Jurisdiction in International Aviation Law' in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance*, OUP 2002, pp. 484 & 488.

114 See Sections 3.3.2 and 5.2 of Chapter III.

115 On regional agreements and ANPs, see chapter IV. Consent-based consultations and jurisdiction are necessary to find a solution of airspace that is subject to sovereignty disputes, see Section 3.3.3.2 of Chapter IV.

116 Mendes de Leon, Pablo. 'The Relationship Between Eurocontrol and the EC: Living Apart Together', *International Organizations Law Review* 4, no. 2 (2008), pp. 311-312. Contartese, Cristina, 'Competence-Based Approach, Normative Control, and the International Responsibility of the EU and Its Member States', *International Organizations Law Review* 16, no. 2 (2019), pp. 339–377. Tillotson, J., & Foster, N. G. *Text, cases, and materials on European Union law* (4th ed.), Cavendish Publisher 2003, p. 31.

vis-à-vis its Member States;[117] the debate over a competence-based approach is on-going.[118]

For the purpose of this study, the EU law development does not change the fundamental idea that 'competence' means the authority given by internal law to a certain organ to do something. The subsequent chapters of this study do not use the term 'competence' to describe the relationship or liability between an international organization and its member states, but aim to analyze the specific capacity of an 'internal' entity in delivering ATS for the establishment of prohibited airspace.[119] What is changed is the idea of 'internal' law - it is no longer about the domestic laws of EU Member States; the internal law can refer to the treaties concluded for the purpose of the EU,[120] because those fundamental treaties, such as the Treaty on the Functioning of the EU,[121] limit sovereignty through the transfer of powers from the States to the EU; these fundamental treaties underpin the competences of the EU.[122] 'Internal law' thus in this sense includes EU law and 'internal entity' includes the institutions of the EU.

Therefore, the advancement in EU law does not challenge the proposition that 'competence' means the authority to transact or manage certain governmental affairs and the competence is determined by internal law. A broader

117 See generally Azoulai, Loi¨c. *The Question of Competence in the European Union*. OUP 2014. J. Temple Lang, 'European Community Constitutional Law: The Division of Powers between the Community and the member States', *Northern Ireland Legal Quarterly* 39, no. 3 (1988), p. 209. The EU has also conducted treaty-concluding practices. Guillaume Van der Loo and Ramses A Wessel, 'The non-ratification of mixed agreements: Legal consequences and solutions' (2017) 54 Common Market Law Review, pp. 735-770, 754-758, point out that "a further indication on the delimitation of competences may be found in some Council decisions for signature and provisional application of mixed agreements that contain a list of provisions falling within Union competences (exclusive or shared) that shall provisionally apply". The Treaties Office Database of the European External Action Service provides a list of bilateral agreements and multilateral agreements concluded by the European Union (EU), the European Atomic Energy Community (EAEC) and the former European Communities (EC, EEC, ECSC), available at https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html.

118 See generally Delgado Casteleiro, A. (2016). *The international responsibility of the European Union: From competence to normative control*, CUP 2016.

119 See Sections 3.3.2 and 5.2 of Chapter III.

120 The EU has only the competences conferred on it by the Treaties (principle of conferral). Under this principle, the EU may only act within the limits of the competences conferred upon it by the EU countries in the Treaties to attain the objectives provided therein. Competences not conferred upon the EU in the Treaties remain with the EU countries. Articles 3, 4 and 5 of the TFEU (Treaty on the Functioning of the European Union) sets out the division of competences between the EU and EU countries.

121 European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012.

122 Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585. Steven Truxal, *Economic and Environmental Regulation of International Aviation*, Routledge 2017, pp. 53-54, noting the development of *functional* sovereignty in comparison with territorial sovereignty.

interpretation of 'internal law' enables the definition of competence to stand still.

2.3.5 *Interim conclusions*

The Chicago Convention recognizes 'territory' as land areas and territorial waters under State sovereignty, as prescribed in Articles 1 and 2 of the Chicago Convention. This section puts an emphasis on competence and jurisdiction because the traditional construction of territory may cause difficulties in explaining cases where a Contracting State does not actually manage its sovereignty airspace; or cases where the jurisdiction of a Contracting State to provide air traffic services exceeds the scope of its sovereign airspace. To clarify the usage of terminologies, for the purpose of this study, the usage of sovereignty is reserved exclusively for the territoriality context, in line with the 'black-letter' Chicago Convention. This study uses 'competence' for the exercise of particular functional or technical sovereign powers; the scope of a particular 'competence' is thus referred as 'jurisdiction'. Internal law determines the competence of a State organ, or that of an EU institution in the context of EU law, and thereby confers authority to that organ or institution.

2.4 Responsibility and obligation

2.4.1 *Responsibility*

In international law, responsibility may denote a competence, as Article 24 of the UN Charter provides that the UN Security Council has "primary responsibility for the maintenance of international peace and security."[123] UNCLOS also establishes a direct relationship between competence and responsibility,[124] where each party bears responsibility in its specific field of competence as indicated in the declaration of competence.[125] These treaty-making

123 See Security Council, Presidential Statement, SCOR 61st Session, 6389th Meeting, Doc. S/PRST/2010/18 of 23 September 2010.

124 UNCLOS Annex IX art 6 [1]: "Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention". On Annex IX of UNCLOS, see Erik Franckx et al, 'Annex IX. Participation by International Organizations', in A Proelß (ed), *The United Nations Convention on the Law of the Sea: A Commentary*, C H Beck, Hart, and Nomos, 2017, pp.2513-2014.

125 A declaration of competence is an instrument that allows the division of competence between the EU and its Member States to be reflected in the scope of the agreement. See Liesbeth Lijnzaad, 'Declarations of Competence in the Law of the Sea, a Very European Affair', in Lodge and Nordquist et al (eds), *Peaceful Order in the World's Oceans*: Essays in Honor of Satya N Nandan, Martinus Nijhoff 2014, p. 186; Joni Heliskoski, 'EU Declarations of Competence and International Responsibility' in Malcolm Evans and Panos Koutrakos (eds), *The international responsibility of the European Union: European and international perspect-*

practices make it easy to understand that 'responsibility' encompasses a right, competence or authority to do something.

Meanwhile, in international law, responsibility is used in the sense of State's *obligation* in respect of another State's human rights situations as in "the responsibility to protect"[126] and combating international terrorism.[127] International tribunals may also use responsibility to denote individual criminal liability.[128] To make it more complicated, in the theory of administrative law,[129] responsibility sometimes is treated as a term for accountability.[130]

Albeit all these different connotations exist, responsibility necessarily implies an obligation or a duty to act. Often, assigning actors with responsibility leads to the establishment of primary obligations for them. According to the customary law of state responsibility, as codified by ILC, 'responsibility' is used in a way concerned the violation of a State's international obligations.[131] Responsibility in this sense denotes an underlying obligation.[132] This study thus uses responsibility as a concept with two dimensions: 1) competence, *can* do something; and 2) obligation, *should* do something. This study adopts this two-fold construction of the concept of responsibility. Notably, 'responsibility' is still different from the concept of liability, which will be explained in the following section.

2.4.2 Obligation

In international law, an obligation, whether treaty-based or not, means an actor must do something; otherwise, the breach of an obligation incurs responsibil-

ives, Hart, 2013, p. 189; Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17 European Foreign Affairs Review p. 491.

126 See for example, M. hakimi, "State Bystander Responsiblity", EJIL 21 (2010), p. 341.

127 See T. Reinold, 'State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11', AJIL 105 (2011), p. 244 *et seq.*

128 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991, arts 1, 7 and S/RES/827 (1993) of 25 May 1993.

129 See R. Steward, "Administrative law for the 21st century", NYU Law Review 78 (2003), p. 437; Y. Papadopoulos, "Problems of Democratic Accountability in Network and Multilevel Governance", ELJ 13 (2007), p. 477 *et seq.*

130 Volker Roeben, 'Responsibility in Internatioanl Law', in Bogdandy and Wlfrum eds., Max Plank Yearbook of United Nations law, vol. 16, 2012, p. 104.

131 See Article 28 ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to A/RES/56/83 OF 12 December 2001, in: Report of the ILC, 53rd Session, Doc. A/56/10.

132 Volker Roeben, "Responsibility in International Law", in Bogdandy and Wolfrum eds., *Max Plank Yearbook of United Nations law*, vol. 16, 2012, p. 109.

ity.[133] In its judgment on jurisdiction in the *Factory at Chorzów* case, the PCIJ used the words "breach of an engagement";[134] these words were later used by the International Court of Justice (ICJ) in the *Reparation for Injuries* case.[135] In practice, terms such as "non-execution of international obligations", "acts incompatible with international obligations", "violation of an international obligation"[136] or "breach of an engagement" are also used.[137] The phrase preferred in this study is "breach of an international obligation" corresponding as it does to the language of Article 36, paragraph 2 (c), of the ICJ Statute.[138]

In early international arbitral decisions, 'duty' and 'obligation' were both used in the context of international responsibility, but later with the progressing of the ILC's work State Responsibility, 'obligation' has been adopted as the terminology for the context of international responsibility. 'Obligation' appears 61 times in the text of Articles on State Responsibility, whereas the 'duty' appears only once, in Article 29.[139] The term 'obligation', no matter if its provenance is civil or criminal, is more often associated with the discourse

133 See Aforementioned Section 2.4 on competence, responsibility and liability. Also, Article 2 of the Articles of State Responsibility says: "There is an international wrongful act of a State when conduct consisting of an action or omission:
(a) is attributable to the State under international law; and
(b) constitutes a breach of an international obligation of the State."
See UN General Assembly, Responsibility of States for internationally wrongful acts: resolution / adopted by the General Assembly, 8 January 2008, A/RES/62/61.

134 PCIJ, *Case Concerning the Factory at Chorzów (Claim for Indemnity), Germany v. Poland*, Jurisdiction, para. 55.

135 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion,* ICJ Report, p. 184.

136 France-New Zealand Arbitration Tribunal, *Rainbow Warrior, New Zealand v. France,* 82 I.L.R. 500 (1990). p. 251, para. 75. *('Rainbow Warrior)*

137 At the Conference for the Codification of International Law, held at The Hague in 1930, the term "any failure ... to carry out the international obligations of the State" was adopted (see Yearbook ... 1956, vol. II, p. 225, document A/CN.4/96, annex 3, article 1).

138 Article 36, ICJ Statute reads: "The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation ; d. the nature or extent of the reparation to be made for the breach of an international obligation."

139 Article 29 of the Articles on State Responsibility prescribes that a State has a continued 'duty' of performance, even if the other party committed some wrongful act(s). Indeed, in some situations, a material breach of a bilateral treaty may give an injured State the right to terminate or suspend the treaty in whole or in part, as prescribed in Art. 60 of VCLT. However, as the VCLT makes clear, the mere fact of a breach of a treaty does not automatically terminate the treaty. See the *Gabèíkovo–Nagymaros Project* case, p. 68, para. 114. See ILC, "Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p. 88.

of international responsibility,[140] 'duty' is more for describing more general and moral situations, as it derives from the 'Moral Law' as put by Kant.[141] Likewise, in *Black's Law Dictionary*, the word "duty" is the equivalent of "moral obligation", as distinguished from a "legal obligation".[142]

2.4.3 Interim conclusions

The concept 'responsibility' is used in different contexts to emphasize its various aspects. Responsibility expresses a hierarchy relationship – an actor supervises and exercises competence towards another actor. In this sense, the term 'responsibility' denotes that the responsible actor both *can* and *should* do something, so that it can involve both competences and obligations.

2.6 Aviation safety, security, and risk

The third research question of this thesis is how to establish prohibited airspace to enhance aviation security. To answer this question, one needs to understand how prohibited airspace can protect civil flights from risks arising from conflict zones. For this purpose, this next section clarifies the meanings of risk, safety, and security used in this study.

2.6.1 Aviation safety and security

Aviation safety has different meanings and each meaning depends on the context in which it is used. According to ICAO, 'safety' is the following:

> The state in which risks associated with aviation activities, related to, or in direct support of the operation of aircraft, are reduced and controlled to an acceptable level.[143]

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140 "Obligation" appears 61 times in the text of Articles on State Responsibility, whereas "duty" appears once.

141 "A good will is a will whose decisions are wholly determined by moral demands or, as he often refers to this, by the Moral Law. Human beings inevitably feel this Law as a constraint on their natural desires, which is why such Laws, as applied to human beings, are imperatives and duties. A human will in which the Moral Law is decisive is motivated by the thought of duty." See Johnson, Robert and Adam Cureton, "Kant's Moral Philosophy", The Stanford Encyclopedia of Philosophy (Spring 2022 Edition), Edward N. Zalta (ed.), forthcoming URL = <https://plato.stanford.edu/archives/spr2022/entries/kant-moral/>.

142 See *Black's Law Dictionary Free Online Legal Dictionary 2nd ed.* https://thelawdictionary.org/duty/, last accessed Jan 10, 2018.

143 ICAO Doc 10084. Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones, 2nd ed., 2018, p. xiii.

Safety is interpreted as the result of efficient review and management of organizational processes, with the target of controlling safety risks and hazards in the operational environment.[144] The scope of review and management may range from routine suspension of a license of an unqualified pilot to the temporary grounding of all civil aircraft at the time of a crisis.[145] Safety does not mean zero risk; it means that the risk associated with aviation activities is reduced to an acceptable level.

Furthermore, aviation safety generally relates to the *internal* operation of an aircraft, such as personnel licensing and airworthiness, whereas security means "safeguarding civil aviation against acts of unlawful interference."[146] Aviation security, in contrast, is focused on *external* interferences to civil flight.[147] The operation of an airworthy aircraft with competent crew members may become unsafe if it is subject to missile attacks, which are external to the operation of aircraft.

This study focuses on prohibited airspace due to an armed conflict on the ground. A missile launched from a conflict zone is external to aircraft operations; thus, this study more specifically addresses aviation security.

2.6.2 *Defining risk*

The word 'risk' originally referred to chance in a neutral way,[148] however, this word now is used to mean the chance of undesirable results,[149] and "the danger or hazard of a loss" as shown in *Black's Law Dictionary*.[150] Similarly, aviation risk is defined as the potential for an unwanted or calculated outcome resulting from an occurrence.[151]

When conducting a risk assessment, ICAO uses a matrix that considers the category of probability or likelihood against the category of consequent severity.[152] The risk of downing an aircraft over a conflict zone is assessed in terms of the probability against the severity of losses. This risk assessment process requires timely and accurate flight information;[153] in case the risk is higher

144 Mu¨ller, Roland, Christopher Drax, and Andreas Wittmer. *Aviation Risk and Safety Management: Methods and Applications in Aviation Organizations*, Springer International Publishing 2014, p. 14.
145 Huang, Jiefang. *Aviation Safety Through the Rule of Law ICAO's Mechanisms and Practices*. Wolters Kluwer law & business 2009, p. 4. ('*Huang*')
146 Annex 17, p. 1-2.
147 *Huang*, p. 5.
148 G Leloudas, *Risk and liability in air law*, Informa Law 2009, p. 9.
149 *ibid.*
150 https://thelawdictionary.org/risk/, last accessed Jan 11, 2018.
151 ICAO Doc 10084. Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones, 2nd ed., 2018, p. xiii.
152 *ibid.*
153 Further discussion on information service is in Chapter III of this study.

than an acceptable level, the authorities are advised by Annex 11 to take contingency measures.[154]

2.6.3 Interim conclusions

This section explains the terminologies of aviation safety and security. Aviation security is used for the discussions of external interferences, including missiles from conflict zones. In assessing the risk of a missile strike to civil aircraft, timely and accurate information from the conflict zones is of utmost importance.

3 THE LEGAL FORCE OF ICAO REGULATIONS

3.1 Introduction of ICAO regulations

Building on the Chicago Convention, ICAO has been working on the 'who, how, and when' of establishing prohibited airspace.[155] ICAO, a specialized organization of the United Nations,[156] is tasked to promulgate and harmonize Standards and Recommended Practices (SARPs);[157] accompanied by technical procedures, manuals, and circulars designed to contribute to the uniform application of the regulations for air transport.[158] The said norms will collectively be referred to as 'ICAO regulations'.

Specific ICAO regulations on prohibited airspace will be analyzed in chapters II, III, and IV. This present chapter explores the legal force of ICAO regulations, more precisely, the extent of their legal enforceability. This is a preliminary question governing all the discussions about ICAO regulations.

3.2 Standards and Recommended Practices (SARPs)

3.2.1 Introduction

The Chicago Convention requires ICAO to establish certain benchmarks against which to measure Contracting States' performance of their obligations under

154 *ibid.* See Annex 11, Attachment C.

155 See further Chapters II and III of this study.

156 https://www.icao.int/about-icao/History/Pages/icao-and-the-united-nations.aspx, last visited 2 November 2018.

157 See The Chicago Convention, Art. 37: "… the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with…"

158 ICAO, AHWG – SFS of Air Navigation Commission, *Guide to the Drafting of SARPS and PANS*, November 2015, para. 4.2.3.

the Chicago Convention.[159] SARPs are the primary mechanism used by ICAO for this purpose.[160] The ICAO Council adopts SARPS pursuant to Article 37 of the Chicago Convention, subject to the full procedures outlined in Articles 54 and 90.[161] The adoption of SARPs requires the vote of two thirds of the ICAO Council at a meeting called for that purpose.[162]

The Chicago Convention does not provide a definition of Standards or Recommended Practices. Definitions are set forth in ICAO Assembly resolutions:

a) Standard – any specification for physical characteristics, configuration, materiel, performance, personnel or procedure, the uniform application of which is recognized as *necessary* for the safety or regularity of air navigation and to which contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention; and
b) Recommended Practices – any specification for physical characteristics, configuration, materiel, performance, personnel or procedure, 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 endeavor to conform in accordance with the Convention.[163]

SARPs are designated as Annexes to the Chicago Convention "for convenience".[164] Arguably, they are not an integral part of the Chicago Convention and do not have the same legal force as a treaty.[165] The general international law of treaties does not apply to SARPs, but the customary interpreta-

159 The Chicago Convention, Art. 26: States must fulfill their various responsibilities "in accordance with the procedure which may be recommended" by ICAO), Art. 28 States must manage national airspace "in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention") and Art. 34 ("in such form as may be prescribed from time to time pursuant to this convention"). *Huang*, pp. 43-44.

160 *Huang*, *ibid*., p. 44.

161 Article 90 of the Chicago Convention: "*Adoption and amendment of Annexes* in Article 54, subparagraph I), shall require the vote of two thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State. Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.
b) The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto."

162 Chicago Convention, Article 90. See further "Making an ICAO Standard", at https://www.icao.int/safety/airnavigation/Pages/standard.aspx#5, last accessed November 2019.

163 ICAO Assembly Resolution A36-13, Appendix A.

164 *Milde*, p. 172. See also Cheng, Bin. *The Law of International Air Transport*. Stevens 1962. Print. The Library of World Affairs, 64.

165 *Milde*, p. 172.

tion rules in the VCLT should be, *mutatis mutandis*, applicable to the interpretation of the Annexes.[166]

3.2.2 Legal force of ICAO Standards

3.2.2.1 General statements

ICAO clarified that Standards are to be understood to have a normative sense, as indicated by the use of the word "shall."[167] Still, the meaning of "normative sense" requires further explication.

> Article 37 addresses the adoption of international Standards:
>
> *Adoption of international standards and procedures*
>
> Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.
> To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures…

The first paragraph of Article 37 of the Chicago Convention highlights that Contracting States "undertake" to collaborate by implementing ICAO Standards; arguably, "to undertake" something means to commit oneself to do a particular thing, thereby creating binding legal obligations.[168] This invites questions as to the legal force of ICAO Standards – to what extent can a Standard be legally enforced?

According to Article 37 of the Chicago Convention, Contracting States undertake to collaborate in securing the highest practicable degree of uniformity in Standards. The legal force of Standards is understood to be less than that of the Chicago Convention itself. First, the word "practicable" allows for some degree of discretion for each state to account for the feasibility of domestic application. Second, as Milde argued, this sentence was phrased as

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166 *ibid.*

167 ICAO, AHWG – SFS of Air Navigation Commission, *Guide to the Drafting of SARPS and PANS*, November 2015, para. 4.1.1.4: "If an obligation only applies under specified conditions, the relevant Standard shall contain supplementary provisions that precisely specify such conditions; in such a case, verbs such as "may" and "need not" are used."

168 ICJ, "[t]he ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties… It is not merely hortatory or purposive". See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, p. 111, para. 162 (Feb. 26).

"to collaborate in securing the highest practicable [adherence]" rather than "to comply with."[169] It seems a Standard's legal force can be understood as more permissive than mandatory.

Although the framing is somewhat permissive, insofar as Contracting States are to "collaborate in securing the highest *practicable* degree of uniformity in standards" in relation to aviation,[170] the uniform application by Contracting States of the specifications contained in ICAO Standards is recognized as necessary to ensure the safety, regularity, and efficiency of international air navigation;[171] thus, Contracting States are obligated to conform with Standards, unless they fulfill the requirements under Article 38 of the Chicago Convention.

3.2.2.2 Filing of differences from ICAO Standards

To explore the legal enforceability of ICAO Standards, one has to examine whether and when a Contracting State can deviate from an ICAO Standard. The Chicago Convention requires a Contracting State to file a notification of difference if a Contracting State finds itself "impracticable to comply" with an ICAO Standard. Article 38 reads as follows:

> *Departures from international standards and procedures*
> Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard.

This notification mechanism in Article 38 of the Chicago Convention is designed to publish differences between ICAO Standards and particular national regulations and/or practices. The international community can be made aware of potential safety and security incongruities and adopt corresponding measures; for instance, civil aircraft whose certificates and licenses do not meet ICAO Standards may be rejected by another State.[172] The international community's knowledge of these differences is essential to the safety and regularity of international air navigation.[173] ICAO Standards are the *minimum* rules

169 *Milde,* pp. 173-174.
170 Chicago Convention, Art. 37 para. 1.
171 ICAO Doc. 7670, *Resolutions and Recommendations of the Assembly 1st to 9th Sessions (1947-1955),* Montreal, Canada, 1956, Assembly Resolution A1-31 'Definition of International Standards and Recommended Practices', consolidated into Resolution A 36-13: *Consolidated Statement of ICAO Policies and Associated Practices Related Specifically to Air Navigation,* in Doc. 9902, *Assembly Resolutions in Force, II03.*
172 See the following Section 3.2.2.3 of this chapter.
173 *Huang,* pp. 66-68. *Milde,* p. 175.

designed to be accepted as such by all countries of the world.[174] In this sense, ICAO Standard is necessary and binding, at least in the absence of a notification to the ICAO Council of a Member State's inability to comply with it.[175]

Nonetheless, the term "impracticable" in Article 38 is problematic insofar as it does not have an internationally agreed upon legal definition.[176] In practice, each Contracting State is left to its own discretion to determine the practicability of a Standard.[177] Thus, this could result in inconsistent regulations, standards, and procedures in relation to aviation.

Specifically, for the interpretation of the term "impracticable to comply" in Article 38, a term which also appears in Articles 9(c), 22, 23, 25, 28, and 37, Buergenthal contended that ICAO Member States have an obligation to act in good faith in determining what is "practicable"; however, realistically speaking, this does not constitute an obligation at all because a Member State can always find a "practical" reason to justify non-compliance with, or deviation from, an international Standard.[178] Similarly, Professor Cheng concluded that the ICAO Standards are not binding on Member States.[179] However, to be presented in the following sections, practices testify the legal enforceability of ICAO Standards.

The legal enforceability of ICAO Standards depends on one question: to what extent is a Contracting State free to interpret the Chicago Convention as it chooses? This question is linked to a phenomenon called "auto-interpretative international law."[180] The auto-interpretation means that Contracting States of a treaty have the final say about a particular provisions of the treaty in question. Suppose the auto-interpretation of a term such as "practicable" is allowed. In that case, it is difficult to say there is a binding obligation upon

174 See ICAO Assembly Resolutions, such as A39-21: Addressing the low response rate by Member States to ICAO State letters, in ICAO Doc 10075, Assembly Resolutions in Force (as of 6 October 2016).

175 Cheng, Bin. *The Law of International Air Transport*. Stevens 1962. Print. The Library of World Affairs, p. 70.

176 *Milde*, p. 174; Thomas Buergenthal, *Law-making in the International Civil Aviation Organization*, Syracuse University Press 1969, p. 76; Ruwantissa Abeyratne, *Convention in International Civil Aviation: A Commentary,* Springer International Publishing 2014, p. 421; Brian F. Havel & Gabriel S. Sanchez, *The Principles and Practice of International Aviation Law,* CUP 2014, p. 72; *Huang*, p. 60; Paul Stephen Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C.J. Int'l L. & Com. Reg. 1, 2 (2004-2005); Pablo Mendes de Leon, *The Legal Force of ICAO SARPs in a Multilevel Jurisdiction Context,* 12: 2-3 J. LuchtRecht, 11 (2013).

177 Milde viewed that States must comply with SARPs in good faith and the duty to notify is unconditional while Buergenthal interpreted that good faith offers States broad discretion on when to notify. *See Milde*, pp. 174 &179; *Buergenthal*, *ibid.,* p. 78; *Huang*, p. 60.

178 *Buergenthal*, *ibid,* p. 78.

179 Cheng, Bin. *The Law of International Air Transport*. London: Stevens & Sons Ltd, 1962. The Library of World Affairs, p. 64.

180 See Cheng, Bin, "On the Nature and Sources of International Law" in *International Law: Teaching and Practice,* Stevens 1982, pp. 203-213, as noted by *Huang*, at 61.

the Contracting States to implement or to comply with an ICAO Standard. If the Contracting States retain freedom in determining what is "practicable", this would lead to unconstrained activities driven by national interests.

The Contracting States of the Chicago Convention may not freely interpret "practicable". Referring to ICAO Assembly Resolution A36-13,[181] Huang argued that the burden may have shifted onto those States failing to comply with ICAO Standards to provide some justification for such failings.[182] Huang proposed that some ICAO Standards, such as those involving safety and security, are so fundamental that they may not be deviated from.[183] That is to say, a State's interpretation of "practicable" is subject to ICAO's supervision and, as per bilateral air service agreements, be securitized by other States.[184] ICAO audit practices to be presented in the next section demonstrate that the term "practicable" is not subject to an individual State's discretion.

3.2.2.3 The impact of enforcement of ICAO Standards

ICAO conducts audit programs to identify safety and security concerns and facilitates compliance with the Standards with an individual Member State's consent.[185] The audit programs check the implementation of Standards, and an audit team composes a correction plan after audits.[186] ICAO fully respects a sovereign State's responsibility and authority for safety oversight, including its decision-making powers for implementing corrective actions related to identified deficiencies.[187]

Even though the correction plan is not as binding as a treaty provision, it details the inconsistency with ICAO Standards. Inconsistency with ICAO Standards can impact the permission to exercise traffic rights exchanged through bilateral air services agreements (ASAs), if one takes Article 33 of the Chicago Convention into account.

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181 "If a Contracting State finds itself unable to comply with any SARPs, it should inform ICAO of the reason for non-implementation, including any applicable national regulations and practices which are different in character or in principle."

182 *Huang*, p. 61.

183 *Huang*, p. 61-62.

184 See Section 3.2.2.3 of this chapter.

185 In 2010 the ICAO Assembly adopted Resolution "Universal Safety Oversight Audit Programme (USOAP) – continuous monitoring approach (CMA)" that directs the ICAO Secretary General to ensure that CMA continues to maintain as core elements in key safety provisions contained in Annex 1 (Personnel Licensing), Annex 6 (Operation of Aircraft), Annex 8 (Airworthiness of Aircraft), Annex 11 (Air Traffic Services), Annex 13 (Aircraft Accident and Incident Investigation) and Annex 14 (Aerodromes). See ICAO Doc A37-5. See also United Nations Security Council 7775th Meeting coverage, "Adopting Resolution 2309 (2016), Security Council Calls for Closer Collaboration to Ensure Safety of Global Air Services, Prevent Terrorist Attacks," SC/12529, 22 September 2016.

186 See ICAO Doc 9735, AN/960, *Universal Safety Oversight Audit Programme Continuous Monitoring Manual,* 4th ed., 2014.

187 ICAO Doc 9735, AN/960, *Universal Safety Oversight Audit Programme Continuous Monitoring Manual,* 4th ed., 2014, 2.3.1.

> Article 33 Recognition of certificates and licenses
> Certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the contracting State in which the aircraft is registered, shall be recognized as valid by the other contracting States, provided that the requirements under which such certificates or licenses were issued or rendered valid are equal to or above the minimum standards which may be established from time to time pursuant to this Convention.

Article 33 of the Chicago Convention prescribes that certificates of airworthiness, certificates of competency, and licenses issued by one country shall be recognized as valid if these certificates and licenses are issued according to requirements no less than ICAO Standards. That is to say, certificates of airworthiness and licenses which do not meet ICAO Standards can be recognized as invalid. Therefore, another State can reject the entry of flights bearing such certificates or licenses. In practice, it can be viewed that ICAO Standards are enforced through the implementation of bilateral ASAs.

Bilateral ASAs form the basis for the admission of operators of foreign aircraft to sovereign airspace,[188] though this is different in sovereign airspace which are also governed by regional regulations such as those of the EU, African Union and ASEAN.[189] These bilateral air service agreements[190] or regional regulations[191] may contain clauses granting a State party to the

188 *Milde*, pp. 115-117.

189 See Brendan Lord, 'The Future of Sovereignty in International Civil Aviation', in Pablo Mendes de, & Buissing, Niall. (2019). *Behind and beyond the Chicago Convention: The evolution of aerial sovereignty*, Wolters Kluwer 2019, Chapter 29.

190 Bilateral agreements typically contain the following clause: "Either Party may request consultations concerning the safety standards maintained by the other Party relating to aeronautical facilities, aircrews, aircraft, and operation of the designated airlines. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety standards and requirements in these areas that at least equal the minimum standards that may be established pursuant to the [Chicago] Convention, the other Party shall be notified of such findings and the steps considered necessary to conform with these minimum standards, and the other Party shall take appropriate corrective action. Each Party reserves the right to withhold, revoke, suspend, limit, or impose conditions on the operating authorization or technical permission of an airline or airlines designated by the other Party in the event the other Party does not take such appropriate corrective action within a reasonable time and to take immediate action, prior to consultations, as to such airline or airlines if the other Party is not maintaining and administering the aforementioned standards and immediate action is essential to prevent further noncompliance." See for instance, *Protocol of Amendment to the Air Transport Services Agreement Between the U.S. and Argentina*, https://www.state.gov/protocol-of-amendment-to-the-air-transport-services-agreement-between-the-u-s-and-argentina/, last accessed 10 December 2019. See also U.S.-The Bahamas Air Transport Agreement of 27 January 2020, https://www.state.gov/u-s-the-bahamas-air-transport-agreement-of-january-27-2020/, last accessed 10 April 2020.

191 See further 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

bilateral agreement or subject to regional regulations to require compliance by the designated airlines of the other State with the minimum norms drawn up by ICAO; and to refuse access to its sovereign airspace if the foreign operator fails to comply with some ICAO Standards.

Even though ICAO does not have enforcement powers, the power of publicity, embarrassment and loss of credibility cannot be underestimated. A State's carriers can be eliminated from international operations for inconsistency with ICAO Standards.[192] For instance, ICAO's 2015 audit revealed numerous safety concerns against Thai airlines. Shortly thereafter, the Federal Aviation Administration (FAA) of the United States downgraded Thailand's status to Category 2, meaning that Thai airlines cannot fly to US.[193] Another example is that Malaysia Airlines was facing an investigation from the British government because up to 10 of its jets had landed into London, on 11 May 1999, with insufficient levels of fuel on board.[194] On the whole, the actions of naming and sharing with the international community can be very powerful enforcement measures.

3.2.2.4 Interim conclusions

ICAO Standards are the minimum regulations designed to be respected by all ICAO Member States. Article 37 of the Chicago Convention requires ICAO Member States to collaborate in securing the highest practicable degree of uniformity in Standards. When impracticable to comply in all respects with Standards, a Member State is obliged under Article 38 of the Chicago Convention to file the differences; the term "practicable" is not to be auto-interpreted as freely by States. ICAO audit results, even though not mandatory, can be invoked to suspend or change bilateral air service arrangements, if the bilateral agreements so prescribe.

3.2.3 Legal force of Recommended Practices

3.2.3.1 General statements

ICAO Recommended Practices are regarded as being desirable in the interest of safety, regularity, or efficiency of international air navigation and to which ICAO Member States will endeavor to conform under the Chicago Conven-

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.

192 *Milde*, p. 184.

193 See https://simpleflying.com/thailand-faa-rating-failure/, last accessed 24 March 2019.

194 https://www.flightglobal.com/malaysia-airlines-low-fuel-danger-spans-two-years/26291.article, last accessed 22 March 2019.

tion.[195] ICAO Recommended Practices do not have legally binding status as traditionally understood: first, Member States have no legal obligation to notify the ICAO of inconsistency with Recommended Practices under Article 38 of the Chicago Convention.[196] Second, although ICAO safety audit programs may examine the compliance with Recommended Practices and the ICAO Council is under a duty to monitor the implementation of the correction plans.[197]

3.2.3.2 Filing differences from Recommended Practices

With respect to ICAO Recommended Practices, Member States are not obliged under Article 38 of the Chicago Convention to file or publish a statement of differences but are encouraged to do so. ICAO General Assembly resolutions have 'urged' States to file reports of differences from Recommended Practices.[198] Despite the use of 'urge' in ICAO resolutions, according to Huang, such resolutions can only be considered recommendations, lacking the binding force of Article 38 of the Chicago Convention.[199]

Nonetheless, it is not accurate either to conclude that Member States can freely determine whether or not to file differences from Recommended Practices. In 2018, ICAO published a *Manual on Notification and Publication of Differences*. This manual is a specific guidance document on the notification of differences from Recommended Practices.[200] The manual provides that

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195 ICAO Doc. 7670, *Resolutions and Recommendations of the Assembly 1st to 9th Sessions (1947-1955)*, Montreal, Canada, 1956, Assembly Resolution A1-31 'Definition of International Standards and Recommended Practices', consolidated into Resolution A 36-13: *Consolidated Statement of ICAO Policies and Associated Practices Related Specifically to Air Navigation*, in Doc. 9902, *Assembly Resolutions in Force, II03.*

196 *Huang*, pp. 62 & 191.

197 *ibid*, p. 192.

198 ICAO Assembly Resolution A36-13, Appendix D, para. 3: "The Council should urge Contracting States to notify the Organization of any differences that exist between their national regulations and practices and the provisions of SARPs as well as the date or dates by which they will comply with the SARPs. If a Contracting State finds itself unable to comply with any SARPs, it should inform ICAO of the reason for non-implementation, including any applicable national regulations and practices which are different in character or in principle. The notifications of differences from SARPs received should be promptly issued in supplements to the relevant Annexes. Contracting States should also be requested to publish in their AIPs any significant differences from the SARPs and PANS."

199 *Huang*, pp. 191-192. See also A38-WP/48 and the resulted Resolution A38-11 entitled *Formulation and implementation of Standards and Recommended Practices (SARPs) and Procedures for Air Navigation Services (PANS) and notification of differences*. A38-11 was subsequently superseded by A39-22, with the same title, at the 39th Session of the Assembly.

200 ICAO Doc 10055, AN/581, "Manual on Notification and Publication of Differences", 2018. Despite ICAO's past efforts, more than 70 per cent of Member States audited under the Universal Safety Oversight Audit Programme (USOAP) had been found to be not satisfactory in fulfilling the requirements relating to the notification and publication of differences. ICAO Secretary General had established a Task Force in 2011 to identify the main issues that caused the low level of compliance with the requirements of Article 38. The

> [W]hile Article 38 sets out obligations for the notification of differences against Standards, it is recognized that knowledge of differences from Recommended Practices may also be important for the safety, regularity and efficiency of navigation.[201]

This statement recognizes the importance of filing notice of differences to Recommended Practices. This manual, as a guiding guidance document, can be considered as without formal legal status and lacking mandatory effect.[202] however, the legal force of this the *Manual on Notification and Publication of Differences* is not so straightforward because it made a cross-reference to Standard 4.1.2 in Annex 15 to the Chicago Convention.[203]

The *Manual on Notification and Publication of Differences* refers to Standard 4.1.2 of Annex 15. Standard 4.1.2 requires a Member State to notify ICAO of any *significant* differences to "ICAO Standards, Recommended Practices and Procedures in Aeronautical Information Publication (AIP)."[204] A State deviating from Standard 4.1.2 should notify the ICAO Council under Article 38 of the Chicago Convention.

Task Force came out with a number of *recommendations* and actions to be taken by the Secretariat, including developing a new guidance material dedicated to the notification of differences - *Manual on Notification and Publication of Differences* in 2018. See ICAO General Assembly Resolution, A35-6, A36-4, and A37-5. ICAO Doc 9735, AN/960, *Universal Safety Oversight Audit Programme Continuous Monitoring Manual*, 4th ed., 2014, 'Forward'. C-Min 198/6, 104. The outcomes of the study were also reported to the 38th Session of the Assembly (A38-WP/48) and resulted in the adoption of Resolution A38-11 entitled Formulation and implementation of Standards and Recommended Practices (SARPs) and Procedures for Air Navigation Services (PANS) and notification of differences. A38-11 was subsequently superseded by A39-22, with the same title, at the 39th Session of the Assembly. ICAO, "Progress Report on Comprehensive Study on Known Issues in Respect of the Notification and Publication of Differences," C-WP/13954, Appendix A, 11/02/13.

201 ICAO Doc 10055, AN/581, *Manual on Notification and Publication of Differences*, 2018.

202 See *Huang*, p. 64; also further below, Section 4.4 of this Chapter on ICAO guidance documents.

203 1.4 REQUIREMENTS OF ANNEX 15
1.4.1 Annex 15, Aeronautical Information Services, 16th ed., July 2018, ('Annex 15'), Standard 4.1.2 states:
4.1.2 Aeronautical Information Publications (AIP) shall include in Part 1 – General (GEN):
...
c) a list of significant differences between the national regulations and practices of the State and the related ICAO Standards, Recommended Practices and Procedures, given in a form that would enable a user to differentiate readily between the requirements of the State and the related ICAO provisions;
d) the choice made by a State in each significant case where an alternative course of action is provided for in ICAO Standards, Recommended Practices and Procedures.
1.4.2 The purpose of the publication of significant differences in the AIP is, primarily, to provide flight crews, and other stakeholders, with information which is essential to international operations, and which is not readily available. More guidance on significant differences can be found in Aeronautical Information Services Manual (Doc 8126). See ICAO Doc 10055, AN/581, *Manual on Notification and Publication of Differences*, 2018, 1-3.

204 *ibid.*

Regarding the meaning of 'significant differences' to ICAO Recommended Practices, Annex 15 does not specify the indicators of significance. Another ICAO guidance document writes down the indicators of significance, the *Aeronautical Information Services Manual* (Doc 8126).[205] According to Doc 8126, *any* difference to any ICAO Standard is significant; for Recommended Practices, only the difference to those that are critical for air safety and security is significant.[206] That is to say, in cases of Recommended Practices, the indicator of significance is their importance for the safety of air navigation. Significant difference to Recommended Practices are those important for safety or air navigation.

As argued by Huang,[207] unless a Member State registers differences to that Standard, it should abide by a Standard; an ICAO Member State should abide by this Standard, unless the State files a difference. Standard 4.1.2 in Annex 15 mentions the filing of *significant* differences to Recommended Practices. Therefore, Member States should report differences to Recommended Practices that are "important for the safety of air navigation or, in the case of facilitation, to the speedy handling and clearance through customs, immigration, etc of aircraft and their loads."

Standard 4.1.2 in Annex 15, in itself, regulates the filing of significant differences from *Recommended Practices*; When a Member State files differences from Standard 4.1.2, the State would actually be registering significant differences to Recommended Practices. That is to say, in filing a difference to Standard 4.1.2, a State will be notifying how and why it is deviating from Recommended Practices that are important for the safety of air navigation.

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205 Its para. 5.8.3 says that: "All significant differences notified to ICAO must also be included in the AIP in a form that will enable a user to differentiate easily between the national rules and practices of a State and the related ICAO provisions. They comprise differences from:
a) *any* of the International Standards;
b) Recommended Practices *that are important for the safety of air navigation* or, in the case of facilitation, for the speedy handling and clearance through customs, immigration, etc. of aircraft and the loads they carry;
c) Procedures for Air Navigation Services (PANS) that are important for the safety of air navigation; and
d) Regional Supplementary Procedures (SUPPS) that are important for the safety of air navigation.
5.8.4 It therefore follows that all the provisions in ICAO Annexes that are Standards are significant, and that any differences between the national regulations or practices of a State and the related ICAO Standards are differences which must be notified. This is an obligation which originates from Article 38 of the Convention. In the matter of Recommended Practices, PANS and SUPPS, only those differences that are important for the safety of air navigation or, in the case of facilitation, to the speedy handling and clearance through customs, immigration, etc. of aircraft and their loads are significant. Because of their nature, most of the Recommended Practices in ICAO Annexes contribute to the safety of air navigation." (emphasis added).

206 *ibid.*

207 *Huang*, pp. 64-65.

3.2.3.3 ICAO audit of compliance with Recommended Practices

The ICAO audits are conducted only with the audited State's consent out of the respect for sovereignty.[208] The consent of a State does not mean the State in question can decide the scope of the audit, for instance, to decide whether to audit Recommended Practices or not. All the bilateral memoranda of understanding for ICAO audits have been based on a single model approved by the ICAO Council, without substantive deviation.[209] A Member State may not be able to negotiate the scope of an audit, so it is unclear how voluntary the State's consent is to the scope of the ICAO regulations to be audited.

A safety audit is comprised of reviews of a State's legislative and regulatory provisions, documentation, facilities, equipment and tools, and ICAO conducts interviews for "all functionally connected safety- and security-related provisions, SARPs … produced by ICAO should be audited."[210] That is to say, Recommended Practices, as long as they are safety-related, can be audited. Furthermore, as noted in the previous section, Standard 4.1.2 of Annex 15 requires a State to notify ICAO of any significant differences to "ICAO Standards, Recommended Practices and Procedures in Aeronautical Information Publication (AIP)". Therefore, ICAO has the legal basis for auditing significant differences to safety- and security- related Recommended Practices.

The audit teams can propose correction plans that include Recommended Practices. In the follow-up of audit recommendations, the ICAO Council secure website posts charts indicating the status of outstanding and long-overdue audit recommendations.[211] However, correction plans are not binding *per se*, as explained in the previous section on Standards.

To understand the legal force of Recommended Practices better, perhaps it is necessary to compare its enforceability with that of Standards. As explained in Section 3.2.2 of this chapter on Standards, bilateral cooperation and regional pressure facilitate the implementation of ICAO Standards. In reference to the inconsistency with ICAO Standards, a State Party to a bilateral air service agreement may withhold, revoke, suspend, limit, or impose conditions on the operating authorization or technical permission of an airline or airlines designated by the other Party.[212] In comparison, bilateral air service agreements may contain clauses requiring a State party to the bilateral agreement to "*act in conformity* with appropriate Recommended Practice."[213]

208 *Huang*, pp. 75-76, citing ICAO Resolution A32-11.

209 *Huang*, pp. 75-76.

210 ICAO, Air Navigation Commission, 163rd Session, Minutes of the Third Meeting, AN Min. 163-3, 28/04/03.

211 ICAO Council-204 Session, Summary Minutes of the Third Session, C-Min 204/3, 4/6/15, para. 7.

212 See Section 3.2.2.3 of this chapter.

213 A clause as such reads: "The Parties shall, in their mutual relations, *act in conformity* with the aviation security standards and appropriate recommended practices established by the International Civil Aviation Organization and designated as Annexes to the Convention;

Arguably, in bilateral air service agreements, the requirement to "act in conformity with appropriate Recommended Practices," is weaker, in terms of legal consequences, than the requirements to conform with Standards; because, for Standards, a State can explicitly emphasize its right to impose negative consequences such as the revocation, suspension, and limitation of the operating authorization or technical permission.[214] A bilateral air service agreement may encourage parties to "act in conformity with appropriate Recommended Practices," but does not include the non-compliance of Recommended Practices as one of the grounds leading to the limitation on operating authorization or the rejection of entry.[215]

The phrase "act in conformity" may denote a sense of flexibility, meaning no negative consequences will follow in case of non-compliance. Based on the bilateral agreements reviewed by this section,[216] the non-compliance of ICAO Recommended Practices probably will not trigger the suspension of operating authorization. In contrast, the inconsistency with ICAO Standards can trigger the suspension of flights. In this sense, the enforceability of ICAO Recommended Practices is less than that of ICAO Standards.

3.2.3.4 Interim conclusions

Implementing ICAO Recommended Practices is not entirely subject to a Member State's discretion. Standard 4.1.2 of Annex 15 emphasizes the filing of differences to Recommended Practices that are important for the safety of air navigation. Not filing such significant differences to Recommended Practices deviate from Standard 4.1.2, and such deviations from a Standard should be filed in accordance with Article 38 of the Chicago Convention. In addition, through

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they shall require that operators of aircraft of their registry, operators of aircraft that have their principal place of business or permanent residence in their territory, and the operators of airports in their territory act in conformity with such aviation security provisions." U.S.-The Bahamas Air Transport Agreement of January 27, 2020, https://www.state.gov/u-s-the-bahamas-air-transport-agreement-of-january-27-2020/, last accessed 10 April 2020. (emphasis added)

214 See Section 3.2.2.3 of this Chapter.

215 See for example, U.S.-The Bahamas Air Transport Agreement of January 27, 2020, https://www.state.gov/u-s-the-bahamas-air-transport-agreement-of-january-27-2020/, last accessed 10 April 2020. The U.S.-Bangladesh Air Transport Agreement of 30 September 2020, last accessed 1 January 2021. The Article 6 of both agreements reads: "… Either Party may request consultations concerning the safety *standards (emphasis added)* maintained by the other Party relating to aeronautical facilities, aircrews, aircraft, and operation of airlines of that other Party. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety *standards* and requirements in these areas that at least equal the minimum standards that may be established pursuant to the Convention, the other Party shall be notified of such findings and the steps considered necessary to conform with these minimum standards, and the other Party shall take appropriate corrective action."

216 *ibid.*

air services bilateral or regional regulations, a State may be required to act in conformity with Recommended Practices.

3.3 Procedures for Air Navigation Services (PANS)

3.3.1 Introduction

Procedures for Air Navigation Services (PANS) comprise operating procedures regarded as having yet to attain a sufficient degree of maturity for adoption as SARPs and are susceptible to frequent amendment.[217] PANS are more concrete in substance than SARPs.[218] PANS and SUPPS[219] require the approval of, instead of adoption by, the ICAO Council.[220] This typically means that only an affirmative vote of a simple majority of the Council,[221] giving a formal seal of recognition.[222]

3.3.2 Legal force of PANS

PANS do not have the same legal force as ICAO Standards or Recommended Practices (SARPs). PANS documents use "should" and "shall" language; whereas in PANS, the modal verb "shall" is used where the uniform application is essential, and the modal verb "should" is used where variation in detail would not impede a successful application.[223] Critically, the use of "should" and "shall" in PANS does not denote a sense of legal obligation as used in a legally binding treaty.[224]

It is not easy to draw a clear conclusion on PANS' legal force, because ICAO Assembly resolutions tended to blur the distinctions between SARPs and PANS.[225] As aforementioned, similar to Recommended Practices, Standard 4.1.2 in Annex 15 requests Member States to file *significant* differences to PANS.

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217 ICAO, AHWG – SFS of Air Navigation Commission, *Guide to the Drafting of SARPS and PANS*, November 2015, para. 4.2.3. See also *Milde*, p. 178.

218 See "Making an ICAO Standard", at https://www.icao.int/safety/airnavigation/Pages/standard.aspx#5, last accessed 9 November 2019.

219 ICAO Regional Supplementary Procedures (SUPPs) are applicable only for specific regions. See ICAO Doc. 7030. However, with the advent of long-range aircraft the regional specificities are further to diminish. See *Milde*, p. 178.

220 *Huang*, p. 58. Chicago Convention, Article 90. See "Making an ICAO Standard", at https://www.icao.int/safety/airnavigation/Pages/standard.aspx#5, last accessed November 2019.

221 *ibid*.

222 *Milde*, p. 179.

223 ICAO, AHWG – SFS of Air Navigation Commission, *Guide to the Drafting of SARPS and PANS*, November 2015, para. 4.2.3.

224 The meanings of auxiliary words, such as may, should, shall, must, that used in a treaty are discussed in Chapter II.

225 *Huang*, p. 63.

In addition, ICAO audits also assess the implementation of PANS. The ICAO Air Navigation Commission (ANC) has stated, "all functionally connected safety- and security-related provisions, SARPs and PANS, and related guidance materials produced by ICAO should be audited."[226] According to the ANC, an ICAO rule's legal force is not dependent on its name or form, but rather depends on the substance – denoting a 'functional' approach.

ANC's functional approach means that an ICAO regulation's substance affects its enforceability irrespective of the regulation's name. If an ICAO regulation's substance is functionally connected with aviation safety and security, be it called SARPs, PANS or guidance materials, it can be audited by ICAO. Such audit recommendations are noted by the ICAO Council.[227] As aforementioned, bilateral air service agreements are conducive to the implementation of ICAO audit results. However, for PANS, it is not often to see bilateral air service agreements allowing a State party to require compliance by the designated airlines of the other State with the PANS drawn up by ICAO.

3.4 ICAO guidance documents

3.4.1 Introduction

ICAO guidance materials provide detailed advice to States concerning the implementation of SARPs.[228] These guidance documents are updated progressively. They are published in the form of *attachments* to ICAO Annexes or in other formats,[229] such as technical manuals, circulars, and air navigation plans. Technical manuals are designed to facilitate the implementation of SARPs and PANS, and provide guidance and information that amplifies the provisions

226 ICAO, Air Navigation Commission, 163rd Session, Minutes of the Third Meeting, AN Min. 163-3, 28/04/03.

227 ICAO. C-Min 204/3, para. 7.

228 ICAO Council Working Paper C-WP/11526 "Updating the Annexes to the Convention International Civil Aviation (Doc 7300)", 6 March 2001.

229 Attachments to, and the forewords and notes in Annexes to the Chicago Convention are of normative value, although commentators offer different opinions. See *Huang*, p. 63. Prof. Schubert argued that the Foreword to Annex 11 and a note following an ICAO Standard do not carry any legal status. Francis Schubert, 'State Responsibilities for Air Navigation Facilities and Standards - Understanding its Scope, Nature and Extent' (2010) Journal of Aviation Management 21, 29. Attachments to, and the notes and forewords to Annexes, although they are developed in the same manner as Standards and Recommended Practices, are approved by the ICAO Council rather than adopted. See "Making an ICAO Standard", at https://www.icao.int/safety/airnavigation/Pages/standard.aspx#5, last accessed November 2019. See ICAO, Air Navigation Commission Procedures and Practices, 8th ed., May 2014, B-4. Summary of Statement, approved by the Council on 22 November 1955 (26/12; Doc 7633-12, C/877-12), of matters on which the ANC is authorized to take action on behalf of the Council (C-WP/2040, Appendix A, as amended by the ICAO Council.

in SARPs and PANS.[230] ICAO circulars are used to disseminate specialized information of interest to ICAO Member States and include studies on technical subjects.[231]

Air navigation plans, amended periodically, set forth details on facilities and services for international air navigation in various ICAO air navigation regions.[232] Air navigation plans are prepared on the authority of the ICAO Secretary General on the basis of recommendations from regional air navigation meetings and ICAO Council's decisions.[233]

3.4.2 Legal force of guidance documents

ICAO guidance materials lack mandatory force, but many States voluntarily follow guidance materials on the basis of their professionally persuasive value.[234] Nonetheless, guidance materials that are cross-referenced in an ICAO Standard may not be completely optional.[235] Some Member States believe that unless a State registers a difference to a Standard, it is obliged to respect it by complying with the detailed provisions contained in a guidance document concerning the same topic.[236] That is, if the ICAO Council has incorporated a guidance document into a Standard, this guidance material is lifted to the same status as a Standard. However, some Member States do not agree on this way of elevating a guidance material's legal force - there has been no consensus.[237]

With respect to the legal force of an instrument, in the *North Sea Continental Shelf*, the ICJ held that only a "very definite, very consistent course of conduct … [showing] a real intention to manifest acceptance or recognition of the applicability of the conventional regime … could justify the Court in upholding [the view that Germany was bound by the conventional regime without ratifying it or acceding]".[238] The ICJ raised that an intention accompanied by conducts manifest the legal force of an instrument.

Applying this criterion, the intention to accept the applicability of an ICAO guidance material can be manifested at the proceedings before the ICAO Coun-

230 ICAO Council Working Paper C-WP/11526 "Updating the Annexes to the Convention International Civil Aviation (Doc 7300)", 6 March 2001.
231 *ibid.*
232 ICAO Council Working Paper C-WP/11526 "Updating the Annexes to the Convention International Civil Aviation (Doc 7300)", 6 March 2001.
233 *ibid.*
234 *Huang*, p. 64.
235 *ibid.*
236 See *Huang*, pp. 64-65. US thus filed a difference with respect to Standard 2.2.1 of Annex 18.
237 The Representative of France felt that this type of legal form should not have the validity of setting a precedent. *Huang*, pp. 64-65.
238 *North Sea Continental Shelf cases* (*Federal Republic of Germany v. Denmark and The Netherlands*), judgment of 20 February 1969, *ICJ Reports* (1969), p. 25, para. §28.

cil. For example, Qatar invoked Attachment C of Annex 11 to request that the ICAO Council urgently provide contingency measures for the disruption of ATS;[239] furthermore, the United Arab Emirates (UAE) and its allies presented contingency routes in the Gulf Region "pursuant to" and "in accordance with" Attachment C of Annex 11.[240] "Pursuant to" and "in accordance with" are used mainly to invoke something with legal force.[241] Qatar and the neighboring Stats have consistently referred to and acted in accordance with Attachment C of Annex 11.[242] The States at issue voluntarily follow guidance materials. It can be inferred that the parties to the Qatar blockade case consented to be bound by the guidance in Attachment C of Annex 11.

State consent, according to the ICJ, refer both to the 'free will' of states and to their 'acceptance' of international law.[243] Lauterpacht emphasized that the decisive criterion was the parties' intent, irrespective of the form or the designation employed, if only "intention to assume an obligation was reasonably clear".[244] The parties to the Qatar blockade case invoked Attachment C of Annex 11 and argued how they have complied with the guidance therein during formal ICAO proceedings.[245] The parties did acquiesce to follow and intended to be bound by the guidelines in Attachment C to Annex 11. Attachment C of Annex 11 was considered applicable to deal with the disputes by the parties. To the parties at issue, as the parties consented, their activities are to be regulated by the guidelines in Annex 11 Attachment C.

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239 Request of The State of Qatar For Consideration by the ICAO Council Under Article 54 (n) of The Chicago Convention, (Supplement to the letter reference no. 2017/15995, dated 15 June 2017), submitted by H.E. Abdulla Nasser Turki Al-Subaey, Chairman, Civil Aviation Authority of the State of Qatar.

240 ICAO Doc 10092-C/1186, Council – Extraordinary Session on 31 July 2017 (Closed), Summary Minutes, 22/8/17, paras 37 and 86.

241 Oxford Dictionary. See also Chicago Convention, for instance in Article 28: "… pursuant to this [Chicago] Convention".

242 ICAO Doc 10092-C/1186, Council – Extraordinary Session on 31 July 2017 (Closed), Summary Minutes, 22/8/17, paras 37 and 86.

243 See Klabbers, J., 'Clinching the Concept of Sovereignty: Wimbledon Redux', (1998) 3 Austrian Review of International and European Law 345. Since the early twentieth century, and esp. PCIJ, *S.S. Lotus Case (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Rep Series A No 10, para. 35: 'The rules of law binding upon states . . . emanate from their own free will'; ICJ, , *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986, [1986] ICJ Rep.* para. 135: 'In international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise' ('*Nicaragua*'); ICJ, *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3, para. 47: 'Here, as elsewhere, a body of rules could only have developed with the consent of those concerned.' para. 35: 'The rules of law binding upon states . . . emanate from their own free will.

244 Document A/CN.4J63: Report by Mr. H. Lauterpacht, Special Rapporteur. ILC Yearbook (1953), vol. II, 90 et 101-102.

245 See Chapter III, Sections 4.4 & 5.3.

3.5 Interim conclusions

The presentation of ICAO regulations aims to establish the context for a study of air law rules on prohibited airspace. The effective implementation of SARPs and PANS promotes safe, secure, and sustainable development of international civil aviation. The following chart summarizes the hierarchy of ICAO regulations.

For ICAO Standards, when impracticable to comply with, a Member State is obliged under Article 38 of the Chicago Convention to immediately notify the differences between its practice and that established by the ICAO standard. ICAO audit results about Standards can be invoked to suspend or change bilateral air service arrangements if the bilateral agreements so prescribe. Standard 4.1.2 of Annex 15 asks to file differences to Recommended Practices that are important for the safety of air navigation. Not filing a statement of differences to Recommended Practices can therefore constitute a deviation from Standard 4.1.2 of Annex 15, and such a deviation should be filed in accordance with Article 38 of the Chicago Convention. PANS or guidance materials that are functionally connected to safety and security have normative value and can be audited by ICAO.

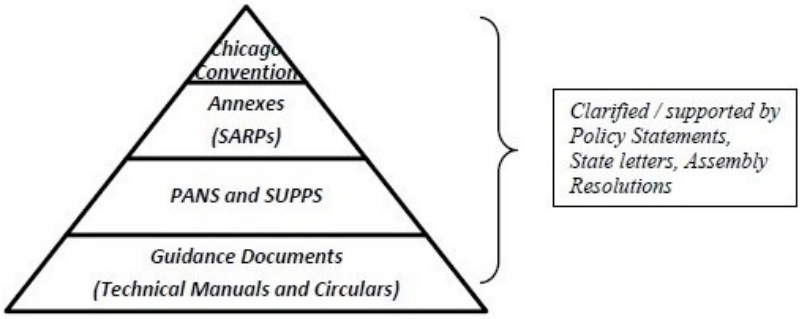

Figure 1: Hierarchy of air laws and regulations[246]

4 Chapter summary and conclusions

This study conducts a normative analysis of air law rules pertinent to prohibited airspace. The primary source of rules is the Chicago Convention. ICAO regulations are also relevant to the law and practices about prohibited airspace.

246 Source: ICAO, AHWG – SFS of Air Navigation Commission, *Guide to the Drafting of SARPS and PANS*, November 2015. Appendix to Air Navigation Commission, 'Report on Progress of the Ad-hoc Working Group on Standards for Standards and Proposed Guide to the Drafting of SARPS and PANS', AN-WP/8992, 05/11/15.

This chapter has shown that the interpretation of the Chicago Convention follows customary interpretation methods in the VCLT. This study seeks and explores the ordinary meaning, context, object, preparatory work and subsequent practices on prohibited airspace. The normative analysis sheds light onto the reconciliation between State sovereignty and the development of civil aviation in a safe and orderly manner.

ICAO regulations are not binding in the same way as the provisions of the Chicago Convention, but their normative value helps elucidate the technical aspects of prohibited airspace. The technical aspects feed into the normative analysis and lay the foundation for the improvement of law. Member States *undertake* to collaborate by implementing ICAO Standards and are obliged to file the differences between domestic practices and Standards. Furthermore, ICAO audits all functionally connected safety- and security-related regulations and publishes its results; this power of publicity and credibility promotes Member States' adherence to ICAO regulations. It is thus necessary to examine ICAO regulations next to the Chicago Convention to understand the rules for prohibited airspace. Building on the methodology, key terms, and the legal force of relevant rules, the next chapter focuses on examining the rules relevant to airspace restrictions, aiming to clarify the 'who', 'how' and 'when' to establish prohibited airspace.