Protection of aviation security through the establishment of prohibited airspace

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4 Airspace restrictions outside territorial limits

1 Preliminary remarks

This chapter explores airspace restrictions beyond territorial limits in order to answer the second research question – who has jurisdiction to establish prohibited airspace? The following sections examine the establishment of prohibited airspace, or more broadly, airspace restrictions, over the high seas, and in airspace of undetermined sovereignty. First of all, readers may wonder whether prohibited airspace exists outside the territory of a State. The answer is affirmative: as mentioned in the previous chapter, in 2017, Saudi Arabia, the United Arab Emirates, Bahrain, and Egypt cut off Qatar's air corridors to international traffic.[1] Second, readers may wonder who is legally entitled to establish prohibited areas, as well as how and when, outside a State's territory. This chapter focuses on the 'who', 'when' and 'how' of establishing prohibited airspace outside territorial limits.

2 Responsibility to provide ATS over the high seas

2.1 The Relationship between UNCLOS and the Chicago Convention

Having explored the provision of ATS over national airspace in Chapter III, including the delegation of ATS provision, this study turns to address the provision of ATS over the high seas. With respect to airspace(s) over the sea, international law has evolved into a sophisticated, yet fragmented,[2] structure, in which multiple legal instruments may be applicable. Within the mandate given by Article 28(b) of the Chicago Convention, ICAO adopted operational

1 See Section 5.3 of Chapter III.

2 On "fragmentation", among a volume of literature, see, in particular, International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification of International Law', Doc A/CN.4/L.682; M. Craven, 'Unity, Diversity and the Fragmentation of International Law' (2003) 14 Finnish Yearbook of International Law, p. 36; M. Koskenniemi, P. Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law, p.553; M. Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation' (2006) 17 Finnish Yearbook of International Law, p.1; S. Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 Leiden Journal of International Law, p. 23.

practices and rules, including Annex 2 and Annex 11 to the Chicago Convention, to regulate civil aviation over the high seas. In particular, Annex 2 to the Chicago Convention, ICAO's Rules of the Air over the high seas, deserve special attention because these rules are binding *ipso jure* upon all Member States.[3]

In addition to the Chicago Convention and ICAO regulations,[4] the United Nations Convention on the Law of the Sea (UNCLOS) prescribes rules for civil aircraft and airspace.[5] UNCLOS represents not only a comprehensive codification of the existing conventional and customary international law of the sea, but in numerous fields, it represents "progressive development" of international law, under Article 13(1)(a) of the Charter of the United Nations.[6]

The relationship between UNCLOS and the Chicago Convention is not clear: for example, one issue is whether in the context of the Chicago Convention, the word "territory" in Article 2 should be interpreted as encompassing "archipelagic waters" or not.[7] De Vries Lentsch opined that the archipelagic waters would come within the scope of Article 2 of the Chicago Convention as soon as the archipelagic state's sovereignty over these waters becomes part of customary international law.[8] However, Meijers pointed out that, in making the United Nations Convention on the Law of the Sea between 1973 and 1982,[9] States were not engaged in expressing their will to create *customary* law, but on the contrary, they expressed their will to make *treaty* law; a treaty rule is

3 See Section 2.2 of this chapter.

4 On the scope and meaning of 'ICAO regulations' as used in this study, see Section 3 of Chapter I.

5 See for instance, ships *and aircraft* enjoy the right of unimpeded transit passage in straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (UNCLOS, Articles 37 and 38). See more on international straits in Chapter IV.

6 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras. 2.2-2.3.

7 The ICAO Secretariat considers that the sovereignty of coastal States extends to the airspace over the archipelagic waters, See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87. Nonetheless, State practices significantly vary from one another in declaring the regime for archipelagic waters, see Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, pp. 231-233.

8 De Vries Lentsch, P. (1983). The right of overflight over strait states and archipelagic states: Developments and prospects. Netherlands Yearbook of International Law, vol. 14, p. 220.

9 In 1973, the General Assembly requested the Secretary-General to invite States to the Third United Nations Conference on the Law of the Sea, and decided that the mandate of the Conference was the adoption of a Convention dealing with all matters relating to the Law of the Sea (resolution 3067 (XXVIII) of 16 November 1973). https://legal.un.org/diplomaticconferences/1973_los/, last accessed April 16, 2022.

often circumscribed more precisely and placed in a more clearly defined context.[10] That being said, UNCLOS is comprised of treaty rules, instead of customary rules that would replace the Chicago Convention; the definition of "territory" under the Chicago Convention is not directly impacted by UNCLOS but it is more likely based on "interaction between custom and treaty".[11]

Regarding those progressive developments, as of August 2022, there is still no consensus among States as to the development of UNCLOS into international customary law.[12] Should UNCLOS be only a source of conventional international law, by virtue of the principle of *pacta tertiis nec nocent nec prosunt*,[13] the convention would not create either rights or obligations for a third State without its consent. Therefore, taking into account the treaty law status of UNCLOS, this section only discusses the rules for States that are parties to *both* UNCLOS and the Chicago Convention.

To clarify the relationship between the two specialized instruments, it is necessary to examine general principles, such as the maxim *lex specialis derogat legi generali*.[14] According to this principle, the normative distinction between general and special laws is important in maintaining a systematic reconciliation; the special secondary rules of the regime will prevail.[15]

However, a problem with the *lex specialis* principle is that this principle is based on a particular fiction of unified State conduct – that is, the presumption that States act with a unified legislative will when they conclude treaties or enact customary rules.[16] The *lex specialis* rule is grounded in the

10 See H. Meijers, "How is international law made? – The stages of growth of international law and the use of its customary rules", 9 NYIL (1978), pp. 3-26. See also De Vries Lentsch, P. (1983). The right of overflight over strait states and archipelagic states: Developments and prospects. Netherlands Yearbook of International Law, vol. 14, p. 188.

11 Carlos Jim nez Piernas, 'Archipelagic Waters', Max Planck Encyclopedia of Public International Law [MPEPIL] 2009, para. 29. See Chapter II, Section 2.3.4.

12 For example, the minutes of UN General Assembly deliberations on the resolution on the law of the sea, A/75/PV.48 (resumed), 31 December 2020 and A/76/PV.48, 9 December 2021.

13 See VCLT Art. 34.

14 Jenks, 'Conflict of Law-Making Treaties' (1953) 30 BYbIL 401, 405. Simma, 'Self-Contained Regimes' (1985) XVI Netherlands Ybk Intl L 111. Wilting, Vertragskonkurrenz im Volkerrecht (Carl Heymans Verlag 1996). See also the International Law Commission's treatment of the notion of lex specialis, M. Koskenniemi, 'Study on the Function and Scope of the lex specialis Rule and the Question of "Self-Contained Regimes"'(2004) Preliminary Report by the Chairman of the Study Group submitted for consideration during the 2004 session of the International Law Commission, Doc. ILC(LVI)SG/FIL/CRD.1 and Add. 1, available from the Codification Division of the UN Office of Legal Affairs.

15 Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL (3), p.483.

16 *ibid*.

presumption that a legislator, in regulating a specific case, wants to carve out an exception from the general rules existing for a set of matters.[17]

Yet the reality is far from reflecting the ideal presentation of unified legislative intent, treaty negotiations of air law and sea law fall within the competences of two different domestic ministries,[18] and the interaction between these two are limited. During the more than nine years of deliberations at the Third United Nations Conference on the Law of the Sea ('UNCLOS III Conference'), ICAO did not formulate or address to the Conference any specific policy for international civil aviation to be taken into account in the drafting of a new convention.[19] ICAO was represented by an observer at the UNCLOS III Conference, but the ICAO input for the Conference was confined to factual information on the Chicago Convention and its Annexes, as well as the organization of ICAO as such.[20]

The drafters of UNCLOS were different from those of the Chicago Convention; the two legal instruments, although referring to common terms such as aircraft and high seas, do not regulate the same issues. UNCLOS is the *lex specialis* for the sea,[21] while the Chicago Convention maintains the status of *lex specialis* for the air.[22] The UN Conference on the Law of the Sea did not discuss the update or combination of the Chicago Convention with the new convention of the law of sea.

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17 *Cf.* Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL (3), pp. 483 & 489.

18 See the recount of the historical process to adopt the UNCLOS, in ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, Section 3.

19 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, para. 2.4.

20 *ibid*. De Vries Lentsch, P., 'The right of overflight over strait states and archipelagic states: Developments and prospects' (1983) Netherlands Yearbook of International Law, vol. 14, pp. 165-225.

21 Ong, D. International Law of the Sea. In M. Bowman & D. Kritsiotis (Eds.), *Conceptual and Contextual Perspectives on the Modern Law of Treaties*, CUP 2018, pp. 710-712.

22 Dempsey argues that "[a]ny chronological review of the development of international aviation law must begin with the "Constitution" of international civil aviation, the Chicago Convention of 1944". Paul Stephen Dempsey, *Public International Air Law* (Montreal: McGill University, Institute and Center for Research in Air & Space Law, 2008), p.69. Article 82 reads: "The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings." Milde observed that Article 82 of the Chicago Convention underlines that Contracting States committed themselves to abrogate any inconsistent obligations and understandings. See Michael Milde, "International Air Law and ICAO" in Marietta Benkö, ed., *Essential Air and Space Law*, vol. 4, Eleven International Publishing, 2008, p.18.

Thus, it is difficult to conclude that UNCLOS, a treaty, has updated the scope of "territory" for the Chicago Convention; it is equally difficult to argue that UNCLOS is *les specialis* that can replace the Chicago Convention in the sense of *legi generali.* A similar reasoning holds that UNCLOS is a *lex posterior.* Both *lex specialis* and *lex posterior* are presumptions as to the intent of the lawmaker or legislator on the same issue in question.[23] The argument based on *lex posterior* or *lex specialis* seems less powerful with regard to treaties in different regimes.[24]

As mentioned in Chapter I,[25] the Chicago Convention is the 'Constitution' of international civil aviation, supported by its Article 82;[26] treaty provisions adopted after the Chicago Convention, such as UNCLOS, must be aligned with principles and provisions laid down in the Chicago Convention such as the provisions on the high seas.[27] UNCLOS also confirms in its Article 311 that the treaty does not alter the rights and obligations of States Parties which arise from other agreements, and do not affect the enjoyment by other States Parties of their rights or performance of their obligations under the Chicago Convention.[28] Treaties prior to UNCLOS, such as the Chicago Convention, are not to be replaced by UNCLOS.

Therefore, *in abstracto*, UNCLOS is not to supersede the Chicago Convention due to its specialized aspects on the ocean or its adoption being later than the Chicago Convention.[29] The rights and obligations in the Chicago Convention are not to be replaced by UNCLOS. Regarding airspace restrictions over the seas, UNCLOS does not alter the rights and obligations of States Parties that arise from the Chicago Convention.

2.2 The supremacy of ICAO Rules of the Air over the high seas

According to Article 87 of UNCLOS, the high seas are open to all States; the freedoms of the high seas include freedom of navigation and overflight; no State can validly purport to subject any part of the high seas to its sover-

23 Joost Pauwelyn, *Conflicts of Norms in Public International Law*, CUP 2003, pp. 367-80.

24 ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law. Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi' UN Doc A/CN.4/L.682 (13 April 2006), para. 255, p. 130.

25 See Chapter I, Section 1.2.

26 See Section 2.2 of this chapter.

27 See Chicago Convention, Article 12.

28 UNCLOS, Article 311.

29 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras 5.4 & 5.5.

eignty.[30] UNCLOS provides for freedom of overflight, but does not directly regulate it beyond cases of piracy, the hot pursuit of foreign ships and the right of visit in limited instances.[31] In interpreting the freedom of overflight, in juxtaposition with airspace restrictions over the high seas, it is necessary to take into account the balance achieved by *State practices* between the freedoms of the high seas and sovereign jurisdiction.[32]

Regarding the *State practices* on airspace regulation over the high seas, ICAO is entrusted by its Member States to regulate flights over the high seas;[33] ICAO Rules of the Air, embodied in Annex 2 to the Chicago Convention, are made mandatory by a specific cross-reference in Article 39, paragraph 3 of UNCLOS.[34] The adoption and amendment of the Rules of the Air is and remains a "constitutional prerogative" of the ICAO Council under Articles 37, 54(l) and 90 of the Chicago Convention.[35] ICAO Rules of the Air over the high seas are binding *ipso jure* upon all Member States, as clarified by the ICAO Council:[36]

> Flight over the high seas – It should be noted that the Council resolved, in adopting Annex 2 in April 1948 and Amendment ... that the Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention.[37] Over the high seas, therefore, these rules apply without exception.[38]

30 See UNCLOS, Part VII.

31 Nicholas Grief, *Public International Law in the Airspace of the High Seas*, Springer 1994, p. 3. Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, p.84.

32 DP O'Connell, *The International Law of the Sea – Vol II,* OUP 1982, p. 796.

33 See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras. 9.6-9.7.

34 UNCLOS, Art. 39, para.3 reads: "Aircraft in transit passage shall: (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; state aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation; (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency."

35 See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras. 9.6-9.7.

36 See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87. See also Benilde Correia e Silva, *Some Legal Aspects of Flight Information Regions*, Master's Thesis, Institute of Air and Space Law, McGill University, 1990, p. 7.

37 Article 12 of the Chicago Convention reads that "over the high seas, the rules in force shall be those established under this Convention."

38 Annex 2, Rules of the Air, 10th ed., July 2005, p (v).

No State can file a notification of difference to Annex 2 – Rules of the Air for the flight over the high seas.[39] This consideration can be taken a step further: Member States are under an obligation to comply with ICAO regulations with respect to civil flights over the high seas, and reasons related to technical or economic ability cannot be submitted to justify non-compliance.[40] This combination of majority rule and binding force upon all Member States makes ICAO an international legislature for the Rules of the Air for civil aviation over the high seas.[41] The high seas is not under the sovereignty of any State, and the ICAO Council adopts the mandatory rules for flights over the high seas; thus, ICAO must be considered as the "ultimate legislator"[42] with respect to the Rules of the Air over the high seas.

2.3 The meaning of 'high seas' in ICAO regulations

In light of ICAO's significant role, by way of Article 12 of the Chicago Convention, in establishing the rules for all flights over the high seas, it is necessary to clarify the meaning of "high seas" in ICAO regulations. The Chicago Convention and ICAO regulations,[43] do frequently refer to high seas; references as such were not built on UNCLOS, because the sea treaty came into being decades later; the concept of high seas in air law come from general international law,

39 See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras. 9.6-9.7.

40 Benilde Correia e Silva, *Some Legal Aspects of Flight Information Regions*, Master's Thesis, Institute of Air and Space Law, McGill University, 1990, p. 20.

41 See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, paras. 9.6-9.7. Jochen Erler, "The Regulatory Functions of ICAN and ICAO: A Comparative Study," Master's Thesis, Institute of Air and Space Law, McGill University, 1964, p. 14. In contrast with Annex 2 'Rules of the Air', Annex 11 of the Chicago Convention, 'Air Traffic Services', allows Member States to file differences to the SAPRs therein, see the Foreword of Annex 11. Nonetheless, Schubert questions the legal basis of deviation from SAPRs in Annex 11 on the ground that the Foreword of Annex 11 does not carry legal status. See Francis Schubert, 'State Responsibilities for Air Navigation Facilities and Standards – Understanding its Scope, Nature and Extent' (2010) Journal of Aviation Management 21, p. 29. Jean Carroz, 'International Legislation on Air Navigation over the High Seas' (1959) 26 J Air L & Comm 158, p. 162.

42 On the use of "ultimate legislator", see ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, para. 9.7.

43 The definition of 'ICAO regulation' is presented in Section 3 of Chapter I.

meaning sea zones outside every State's jurisdiction.[44] The Chicago Convention, in Article 12 and its Annexes, refers to "the high seas" without references to contiguous zones or exclusive economic zones (EEZ),[45] leaving the question of whether the high seas encompasses only the high seas in the sense of Article 86 of UNCLOS, or whether the term also applies to the EEZ and contiguous zones as defined by UNCLOS.

First of all, a contiguous zone is next to the territorial sea and may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[46] UNCLOS emphasizes that a coastal State is entitled to exercise *control*, but not jurisdiction or sovereign authority, with regard to the water areas in contiguous zones.[47] Since coastal States have no jurisdiction in contiguous zones, such zones arguably, fall into the scope of high seas as defined by the Chicago Convention, and ICAO has the final say for the regulations of airspace over contiguous zones. The ICAO Secretariat Study supported the view that the provision of ATS over contiguous zones must be regulated by ICAO.[48]

Second, the EEZ is more complicated than contiguous zones. The EEZ is an area of the sea donned with a specific legal regime by the UNCLOS. In the EEZ, a coastal State has *sovereign rights*,[49] not sovereignty,[50] for the purpose

44 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, Section 13.

45 *ibid.*

46 Article 33 of the UNCLOS reads: "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."

47 Regarding the airspace over the contiguous zones, the UNCLOS provision on contiguous zones *per se* would not rule out an action against a foreign aircraft on the surface of the waters within the contiguous zone, or even interception of such an aircraft in flight in that zone. See ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87.

48 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87.

49 It is a type of 'functional sovereignty' which has to be connected to particular grounds permitted by international law, see R Higgins, *Problems & Process, International Law and How We Use It,* Oxford University Press, 1994, 131.*The M/V "Virginia G" Case (Panama/Guinea-Bissau),* Judgment, 14 April 2014, paras. 211 and 215.

of exploring, exploiting, conserving, and managing the natural resources. A coastal State also has sovereign rights concerning *other activities* for the economic exploitation and exploration of the zone,[51] and has jurisdiction with regard to the protection and preservation of the marine environment;[52] and arguably, has no jurisdiction to interfere with peaceful military activities in EEZ.[53]

A question thus arises: would the Rules of the Air adopted by the ICAO Council apply over the EEZ? The ICAO Secretariat Study adopted a broad interpretation for the term "high seas" in the Chicago Convention and its Annexes:

> The coastal States are granted in the EEZ sovereign rights with respect to natural resources and jurisdiction over installations; in all other respects the traditional freedoms of the high seas are preserved for other States. More particularly, the coastal States are not granted by the UNCLOS *any rights or jurisdiction* over the airspace above the EEZ and no regulatory power with respect to flights over the EEZ. For all practical and legal purposes, the status of the airspace above the EEZ and the regime over the EEZ is the same over the high seas and the coastal States are not granted any precedence or priority. Consequently, for the purpose of the Chicago Convention, its Annexes and other air law instruments, the EEZ should be deemed to have the same legal status and the high seas and any reference in these instruments to the high seas should be deemed to *encompass* the EEZ.[54]

ICAO recognizes EEZs as part of the high seas in the sense of the Chicago Convention. Since UNCLOS does not confer any jurisdiction over the airspace above contiguous zones or the EEZ to its Contracting States, the ATS over contiguous zones and the EEZ is to be regulated by the ICAO.[55]

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50 Sovereign rights do not have implication to sovereignty or more appropriately, territorial sovereignty. Having sovereign rights over resources in an exclusive economic zone is not to be confused with having sovereignty over that same area. Sovereignty rights are a collective but limited set of rights and power. See Tanaka, Y. The international law of the sea (2nd ed.). CUP 2015, pp. 6-7.

51 UNCLOS, Article 56, para. 1.

52 UNCLOS Article 60, para. 3.

53 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, p. 210. Bernard H Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24 Virginia Journal of International Law 809, p. 838; Umberto Leanza and Maria Cristina Caracciolo, 'The Exclusive Economic Zone' in David J Attard, Malgosia Fitzmaurice and Norman A Martínez Gutiérrez (eds), *The IMLI Manual on International Maritime Law: Volume 1 – The Law of the Sea*, OUP 2014, pp.192-93.

54 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'," LC/26-WP/5-1, 4/2/87, para. 11&12.

55 *ibid*. See also Kay Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea' (1983) 77 Am J Int'l L 490, p. 491.

Therefore, the term "high seas" in the Chicago Convention and ICAO regulations is quite broad: the term is interpreted by ICAO as international waters, including the UNCLOS' contiguous zones, EEZ, and high seas. The following figure helps illustrate the relationship between these concepts.

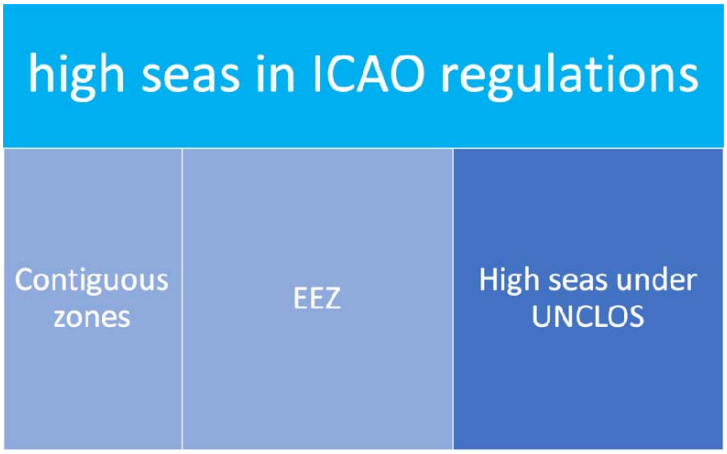

Figure 12: High seas[56]

2.3.1 *The significance of regional agreements under the auspice of ICAO*

Having explained the meaning of 'high seas' in ICAO regulations,[57] this section discusses how ICAO Member States coordinate for the provision of ATS over the high seas. In this regard, Standard 2.1.2 of Annex 11 to the Chicago Convention highlights the critical role of regional agreements under the auspices of ICAO.

> Those portions of the airspace over the high seas … where air traffic services will be provided shall be determined on the basis of regional air navigation agreements. A Contracting State having accepted the responsibility to provide air traffic services in such portions of airspace shall thereafter arrange for the services to be established and provided in accordance with the provisions of this Annex.[58]

According to Standard 2.1.2 of Annex 11, ICAO delegates the provision of ATS to its Member States through regional air navigation agreements and thereby

56 Source: created by the author.
57 On ICAO regulations, see Chapter I, Section 3.
58 Standard 2.1.2 of Annex 11.

established air navigation plans (ANPs).[59] The competence of an appropriate ATS authority to provide ATS over the high seas is subject to regional agreements under the auspice of ICAO.[60] ANPs thereby set forth the facilities, services, and regional supplementary procedures to be provided or employed by the Contracting States pursuant to Article 28 of the Chicago Convention.

It is somehow disconcerting that neither the legal status of the regional ANP or agreement, nor its definition is clear.[61] With respect to the legal force of regional ANPs *vis-à-vis* all ICAO Member States,[62] Buergenthal offers an explanation saying that ICAO Annexes, Plans, SUPPS[63] and Regional ANPs constitute an integral body of aviation legislation comparable both in structure and content to comprehensive domestic air navigation codes.[64] Notwithstanding another view that the ANPs are technical and operational documents with no entailed consequences,[65] this present study supports the arguments from Buergenthal, because as illustrated in the next section, a regional ANP limits the discretion of coastal States and Contracting States cannot amend it without the approval from ICAO.

Finally, in terms of sovereignty, it is worth emphasizing that the approval by the ICAO Council of regional air navigation agreements over the high seas does not imply recognition of sovereignty of that State over the airspace concerned.[66] Paragraph 1.3.3 of Part I, Section 2, Chapter 1 of the Air Traffic

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59 See ANP Documents: Asia/Pacific Region (Doc 9673), Africa-Indian Ocean Region (Doc 7474), European Region (Doc 7754), Caribbean and South American Regions (Doc 8733), Middle East Region (Doc 9708), and North Atlantic Region (Doc 9634/9635).

60 "Consolidated statement of continuing policies and associated practices related specifically to air navigation", ICAO Assembly Res. 27-10, (1989) Appendix K. Buergenthal, T., *Law Making in the International Civil Aviation Organization*, University of Virginia Press1969, p. 118. The development of these regional plans is undertaken by the ICAO's six planning and implementation regional groups (PIRGs) in coordination with States and supported by the ICAO's Regional Offices and the Air Navigation Bureau.

61 Abeyratne Ruwantissa. *Air navigation law*. Springer 2012, p. 24. The author refers to an example that in November 1996, at the 38th meeting of the European Air Navigation Planning Group, it was recorded that an Air Navigation Plan consisted of an authoritative internationally agreed reference document, which corresponded to a contract between States covered by the Plan regarding air navigation facilities to be provided, to be approved by the ICAO Council in accordance with the provisions of the Chicago Convention. ICAO Doc. EANPG COG/2-WP/6, 12/03/1996 at 3.

62 *ibid*. Once a regional ANP is approved by the ICAO Council, the Council, in any given instance, is to act on behalf of all Member States of ICAO, including those not covered by the regional ANP.

63 See Sections 3.2 and 3.3 of Chapter I.

64 Thomas Buergenthal, *Law Making in the International Civil Aviation Organization*, Syracuse University Press 1969, p. 121.

65 M. Milde, "Legal Aspects of Airports Constructed in the Sea," in M. Milde and H. Khadjavi ed., *Public International Air Law*, Vol. Two, McGill University Press 2002, p.192.

66 Assembly Resolution A38-12: Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, APPENDIX G – Delimitation of air traffic services (ATS) airspaces, states more particularly in resolving declaring clause 7.

Services Planning Manual (Doc 9426) specifies the following regarding such competence over the high seas:

> [I]t should be noted that the assumption of such delegated responsibility by a State, by virtue of a regional air navigation agreement, does not imply that this State is then entitled to impose its specific rules and provisions in such airspace at its own discretion. In fact, conditions of operation therein will be governed by applicable ICAO provisions of a worldwide and supplementary regional nature and specific national provisions may only be applied to the extent that these are essential to permit the State the efficient discharge of the responsibilities it has assumed under the terms of the regional air navigation agreement.

This paragraph confirms that the delegation of ATS over the high seas does not mean that the delegated State can apply its own domestic rules to air navigation above the high seas.[67] Annex 11 indicates that a Contracting State accepting the responsibility for providing ATS over the high seas may apply SARPs in a manner consistent with that adopted for airspace under its jurisdiction,[68] meaning that coastal States may register differences with Annex 11; however, the discretion of coastal States is not without limitation: ICAO also stated that specific national provisions may only be applied to the extent that these are essential to allow for the efficient discharge of the responsibilities.[69] Responsibilities of the appropriate ATS authorities for monitoring traffic and taking flow management measures, including airspace restrictions, are further limited by regional agreements and ANPs.[70] Through adherence to air navigation agreements and ANPs, Member States agree to provide ATS over the high seas.

67 Francis Schubert, 'Limits in the Sky: Sovereignty and Air Navigation Services' in Pablo Mendes de Leon and Niall Buissing (eds), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*, Wolters Kluwer 2019, pp. 148-150; Niels van Antwerpen, Cross- Border Provision of Air Navigation Services with Specific Reference to Europe: Safeguarding Transparent Lines of Responsibility and Liability, Kluwer Law International 2008, pp.151-152.

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

69 ICAO Air Traffic Services Planning Manual, 1.3.3. As referred to in, ICAO WP/02, ICAO Provisions, Policy and Guidance Material on the Delegation of Airspace over the High Seas, Presented by the Secretariat at the First Unassigned High Seas Airspace Special Coordination Meeting, Lima (22 June 2019), 2.6. See Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, p. 89.

70 See Section 4 of Chapter III on the responsibility of the appropriate ATS authorities.

2.3.2 *Case study of the re-delegation of ATS provision over the high seas*

In 2013, Saudi Arabia agreed with Bahrain to conclude an agreement for the delegation of the responsibility for the provision of ATS in a portion of the northeast of Saudi Arabia's airspace.[71] The competent authorities, charged with the responsibility for ANS in the two countries, intend to establish a Joint Air Navigation Committee to amend the ICAO MID ANP to re-align the two FIR boundaries.[72]

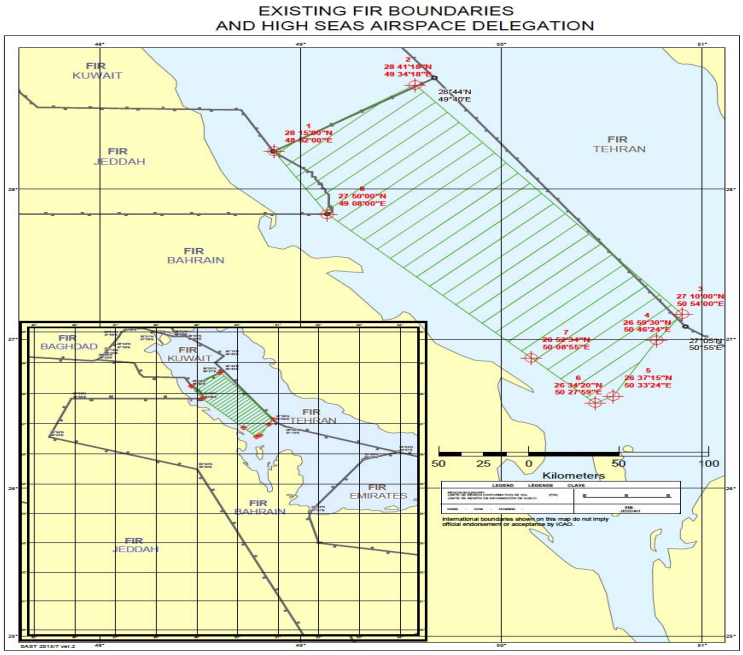

Figure 13: ATS in the northeast of the Kingdom of Saudi Arabia's airspace[73]

For this purpose, Bahrain and Saudi Arabia approached the ICAO MID (Middle East) Regional Office in 2013 with a joint updated proposal;[74] the proposal

71 Agreement between the Kingdom of Saudi Arabia and the Kingdom of Bahrain on the Delegation of Air Traffic Services provision in portion of the North East Saudi Arabia Airspace, Signed at Jeddah, on 26 Safar 1434 H Corresponding to 8 January 2013.

72 Letter to Secretary General of International Civil Aviation Organization, jointly signed by H. E. Kamal bin Ahmed Mohammed, Minister, Ministry of Transportation, Kingdom of Bahrain, and H. H. Prince Fahad Bin Abdullah M. A1 Saud, President, General Authority of Civil Aviation, Kingdom of Saudi Arabia, 8 January 2013.

73 Source: *ibid*.

74 8 January 2013, reference 256/2/4216, transmitting for registration with ICAO the Agreement on the Delegation of the Responsibility for Providing Air Traffic Services in Portion of the North East Saudi Arabia Airspace, signed at Jeddah on 8 January 2013

was discussed and coordinated between the ICAO-MID Office, ICAO-HQ, and all concerned States; accordingly, a proposal for amendment to the MID ANP was processed.[75]

After reviewing the ATS delegation agreement between Bahrain and Saudi Arabia,[76] ICAO determined that the Saudi delegation to Bahrain of the responsibility for the provision of ATS prescribed requires the amendment of the regional ANP – Middle East Region (Doc 9708).[77] In approving Doc 9708, the ICAO Council had determined that ATS in the *high seas* airspace at issue were the responsibility of Bahrain.[78] Bahrain and Saudi Arabia are competent to make arrangements for their sovereign airspace(s), but the Bahrain-Saudi joint proposal is at odds with the authority of the ICAO Council, insofar as the proposal purported to delegate responsibility for the provision of ATS in an area that is above the high seas.[79] That is to say, Bahrain and Saudi Arabia can well decide among themselves for the ATS provision over their territorial airspace(s), but when it comes to the high seas, the two States' proposal to re-align the FIRs boundary over the high seas is subject to the ICAO Council's authority.[80] The two States' proposal concerning ATS over the high seas will not legally take effect until ICAO approves it.

This case testifies that ICAO Member States cannot change the existing provision of ATS in contravention of ANPs, without being approved by the ICAO Council. A providing State cannot act at odds with the authority of ICAO over the high seas. Responsibilities of the appropriate ATS authorities over the high seas are limited by air navigation agreements and ANPs which are established on the basis of the Chicago Convention and Annex 11. The provision of ATS and the proper functioning of ANPs over the high seas built on Member States' commitments laid down under ICAO's auspices.

75 See ICAO working paper ATM/AIM/SAR SG/13-WP/22, "Realignment of the Bahrain/Jeddah FIRs Boundary," presented by Bahrain, 26/09/2013, at the Thirteenth Meeting (ATM/AIM/SAR SG/13), in Cairo, Egypt, 30 September–3 October 2013.

76 Agreement between the Kingdom of Saudi Arabia and the Kingdom of Bahrain on the Delegation of Air Traffic Services provision in portion of the North East Saudi Arabia Airspace, Signed at Jeddah, on 26 Safar 1434 H Corresponding to 8 January, 2013.

77 See ICAO working paper ATM/AIM/SAR SG/13-WP/22, "Realignment of the Bahrain/Jeddah FIRs Boundary," presented by Bahrain, 26/09/2013, at the Thirteenth Meeting (ATM/AIM/SAR SG/13), in Cairo, Egypt, 30 September–3 October 2013.

78 See ICAO Doc 9708.

79 See Annex A to the Agreement between the Kingdom of Saudi Arabia and the Kingdom of Bahrain on the Delegation of Air Traffic Services provision in portion of the North East Saudi Arabia Airspace, Signed at Jeddah, on 26 Safar 1434 H Corresponding to 8 January 2013.

80 See ICAO working paper ATM/AIM/SAR SG/13-WP/22, "Realignment of the Bahrain/Jeddah FIRs Boundary," presented by Bahrain, 26/09/2013, at the Thirteenth Meeting (ATM/AIM/SAR SG/13), in Cairo, Egypt, 30 September–3 October 2013.

2.4 Interim conclusions

ICAO recognizes contiguous zones and EEZ as part of the high seas in the sense of the Chicago Convention. Over the high seas, through regional air navigation agreements and regional ANPs, ICAO delegates the responsibility to provide ATS to coastal States. These ANPs produced under the auspices of ICAO shall be respected by providing States, because ICAO is the ultimate legislator with respect to the Rules of the Air over high seas. Regional agreements and ANPs limit the competence of ATS authorities over the high seas to ensure the consistency with the Chicago Convention and Annex 11.

In juxtaposing jurisdiction and sovereignty, Annex 11 confirms that it applies to airspace under the *jurisdiction* of a Contracting State, that is the 'ATS jurisdiction'. FIRs under the jurisdiction of ATS authorities may encompass sovereign airspace, airspace over the high seas, and airspace of undetermined sovereignty. The relationship between territory, sovereignty, and FIRs is illustrated as follows.

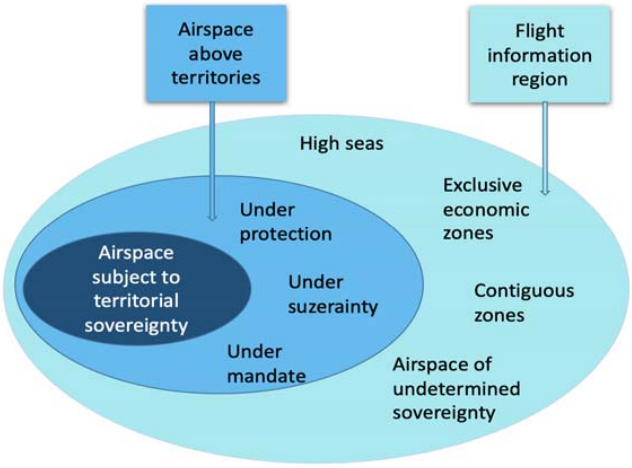

Figure 14: Relationship territory, sovereignty and FIRs[81]

3 AIRSPACE RESTRICTIONS OVER THE HIGH SEAS AND IN AIRSPACE OF UNDETERMINED SOVEREIGNTY

3.1 Introductory remarks

As set out in Chapter III, the appropriate ATS authorities are competent and obliged to deploy contingency responses, including setting up prohibited

81 Source: created by the author.

airspace by announcing that certain portions of airspace(s) are not available/secured/safe.[82] Notably, the establishment of prohibited airspace needs to take care of traffic flow management in coordination with neighboring FIRs: the imposition of airspace restrictions as such depend on cooperation from regional ATS authorities on flight level allocation and flow management. Under the auspices of ICAO, the Air Navigation Planning and Implementation Regional Group (ANPIRG) coordinates the planning, coordination, and implementation of a regional ATM contingency plan.[83] Neighboring FIRs collaborate in providing contingency routes and flight level structure.[84] In light of ICAO technical regulations, the announcement of an air route being not available/safe usually rely on collective efforts.[85]

Nonetheless, the rights and obligations of stakeholders for this coordination process are not clearly defined. It is "advisable"[86] that affected States and ATS authorities agree to collaborate on implementing contingency measures. The signature of the contingency agreements with Area Control Centers (ACCs) of the States at the interfaces with the ICAO Region be considered as "recommended" and not mandatory.[87] States may choose not to enter agreements about contingency measures. As of February 2021, for example, in MID region, 80% of States developed ATS Contingency Plan; 73% Area Control Centres had signed a bilateral contingency agreement.[88]

In the coordination process to establish prohibited airspace, cooperation from neighboring FIRs is encouraged by ICAO but not mandatory; it is optional for a State to sign contingency agreements and to coordinate with other authorities. The regional contingency planning may work well through diplomatic channels; but in case of political sensitive situations,[89] several legal questions may arise: what are the rules for establishing prohibited airspace as a con-

82 See Chapter III, Section 2.

83 For example, the 47th Conference of Directors General of the Asia/Pacific Region (Macao, China, October 2010) requested the ICAO Regional Office to consider the establishment of a task force for planning, coordination and implementation of a regional ATM Contingency Plan (Action Item 47/1). Subsequently, the 22nd Meeting of the Asia/Pacific Air Navigation Planning and Implementation Regional Group (APANPIRG/22, Bangkok, Thailand, June 2011) formed a Regional ATM Contingency Planning Task Force (RACP/TF) for planning, coordination and implementation of a regional ATM contingency plan. See ICAO, Asia/Pacific Region ATM Contingency Plan, version 2.0, Approved by ATM/SG/5 and published by the ICAO Asia and Pacific Office, Bangkok, September 2017, paras. 5.1-5.4. See also ICAO ATM Contingency Plan (AFI) Africa and Indian Ocean, version 1, July 2019, paras. 3.1.

84 *ibid.*

85 *ibid.*

86 ICAO, MIDANPIRG/17 & RASG-MID/7-REPORT, para. 6.2.65.

87 ICAO, MIDANPIRG/17 & RASG-MID/7-REPORT, para. 6.2.43.

88 ICAO working paper, "Review of the Action Taken by The ANC and the Council on the Report of MIDANPIRG/17 and the RASG-MID/7 Report", MIDANPIRG/18 & RASG-MID/8-WP/2 25/01/2021.

89 See case study of the *Qatar 'blockade' case (2017-2021)* in Chapter III, Section 5.3.

tingency measure over the high seas? Does an ATS authority of a FIR has the competence to close airspace of undetermined sovereignty? The section below will answer these questions.

3.2 Category I: The regulations of prohibited airspace above the high seas

3.2.1 Freedom of overflight above the high seas

This section discusses the establishment of prohibited areas over the high seas since Article 87 of the UNCLOS prescribes the freedom of overflight above the high seas.[90] Indeed, the freedom of flight over the high seas is a fundamental principle accepted by almost all countries,[91] although there have been discussions as to the right of a coastal State to impose a safety zone[92] around a maritime construction or to establish an ADIZ (Air Defence Identification Zones).[93]

Of particular relevance to this study's research questions is the jurisdiction of coastal States to carry out the responsibility for providing ATS in international airspace within their FIRs. To fulfill this responsibility, the Chicago Convention and Annex 11 provide measures to be done to mitigate risks arising from hazards over the high seas.[94] Annex 11 prescribes airspace closure or re-route arrangements which have to be taken as contingency measures.[95]

As argued in Section 2.2 of this chapter, UNCLOS does not replace the Chicago Convention to regulate flights over the high seas;[96] the evaluation of legality under UNCLOS, therefore, is separate from the compliance with the Chicago Convention and Annex 11. Some military activities blocking air routes

90 As explained in Chapter II, over international straits, a coastal State's jurisdiction to regulate navigation is limited by the right of transit passage and ICAO Rules of the Air. See Chapter II, Section 2.3.

91 See Article 87 of the UNCLOS, which has been ratified by 168 parties, which includes 167 states (164 United Nations member states plus the UN Observer state Palestine, as well as the Cook Islands and Niue) and the European Union, see https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en, last accessed 20 September 2020.

92 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, pp. 94-100.

93 *ibid*, pp.183-198.

94 Annex 11, Standard 2.19.2. Hazard is defined by ICAO as 'a condition or an object with the potential to cause or contribute to an aircraft incident or accident'. See ICAO Doc 10084, Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones (2nd edn., 2018) xiii. See further Section 3.2.2 of this chapter.

95 See Attachment C to Annex 11, Section 6.

96 See Sections 2.1 & 2.2 of this chapter.

over the high seas may violate the freedom of overflight under UNCLOS;[97] nonetheless, that assessment under UNCLOS is outside of the scope of this study.[98] Rather, the following section deals with the protection of civil aircraft from dangerous activities which have taken place over the high seas, no matter such dangerous activities are consistent with UNCLOS or not.[99] The focus is on the jurisdiction and methods pertaining to the establishment of airspace restrictions over the high seas.

3.2.2 Danger areas over the high seas

3.2.2.1 Preliminary remarks

Over the high seas, in terms of airspace restrictions, only danger areas can be established; prohibited and restricted airspace cannot be established over the high seas.[100] Danger areas are often mentioned in ICAO documents and regulations.[101] As set out in the Definition section of Annex 11, a danger area is an airspace of defined dimensions within which activities are dangerous for the operation of aircraft may exist at a specified time.[102] A danger area implies the least degree of restriction compared to the prohibited area.[103] It is the flight crew's responsibility to make a final judgment,[104] but danger areas traditionally are absolutely avoided by aircraft in accordance with an appropriate Safety Risk Assessment (SRA).[105]

Above the high seas, it is possible to establish danger areas over the high seas where the reservation of airspace becomes unavoidable;[106] all States have the right to use international airspace in a manner that requires the establishment of a danger area, regardless of which State is responsible for the FIR,[107] but the said danger areas should be of a temporary nature and States should apply several principles to make sure the danger area is temporary and

97 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, pp. 128-131.
98 See Introduction and Chapter I of this thesis.
99 On the meaning of 'high seas', see Section 2.3 of this chapter.
100 ICAO Doc 9426, Air Traffic Services Planning Manual (1992), Chapter 3, para. 3.3.2.4.
101 For instance, ICAO, Doc 8900/2, 'Repertory – Guide to the Convention on International Civil Aviation', 2nd ed., 1977, Part I, Chapter II, 'Article 9'. Annex 2, Chapter I, 'Definitions'. Annex 11, p.1-6.
102 Annex 11, Definition.
103 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, pp. 68-70.
104 *ibid*. ICAO, ATM Contingency Plan: Africa and Indian Ocean Region (July 2019) p. 71.
105 *ibid*.
106 ICAO ASIA/PAC/3, Rec. 5/14. Based on ICAO LIM MID (COM/MET/RAC) RAN Meeting 1996, Recommendation 2/9, 2/10 and 2/13 (reprinted in ICAO, Report of the Special Civil/Military Coordination Meeting (SCMCM), Sana'a Yemen 18–19 June 2006).
107 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace,* Wolters Kluwer 2021, pp. 68-70.

minimal.[108] Focusing on establishing danger areas as a contingency measure, this section discusses the danger areas established by the appropriate ATS authority in charge of the FIR encompassing airspace(s) over the high seas.

3.2.2.2 Conditions to establish a danger area over the high seas

As Section 4 of Chapter III states, the appropriate ATS authorities are responsible for taking contingency measures, including airspace restrictions. Over the high seas, as the responsibility of a coastal State to provide ATS is prescribed by ANPs and Annex 11.[109] The ANP of the Asia/Pacific Region, for example, specifies that "States should refrain, to the extent possible, from establishing prohibited, restricted or danger areas."[110] ANPs as such can prescribe when

108 ICAO ASIA/PAC/3, Rec. 5/14. Based on ICAO LIM MID (COM/MET/RAC) RAN Meeting 1996, Recommendation 2/9, 2/10 and 2/13 (reprinted in ICAO, Report of the Special Civil/Military Coordination Meeting (SCMCM), Sana'a Yemen 18-19 June 2006), in comparable Table para. 26: "When reservation of airspace outside territorial limits becomes unavoidable, it should be of a temporary nature and States should apply the following principles:
a) prior to requesting the establishment of a temporary airspace reservation, the requesting authority shall obtain full information on the likely effect of such a reservation on air traffic. Such information shall include areas of high traffic density which may exist in the vicinity or at the planned location of the airspace reservation, as well as information on peak periods of traffic operating through such areas. In the light of that information, the requesting authority should, to the extent possible, select the site of the airspace reservation, and the time and duration so that this will have the least effect on normal flight operations conducted in the area in question;
b) in specifying the extent of a requested temporary airspace reservation and its duration, the requesting authority shall limit the size of the area to the absolute minimum required to contain the activities intended to be conducted within that area, taking due account of: 1) ATS route structure and associated airspace arrangement; 2) operational requirements of civil aircraft; 3) the navigation capability of aircraft or other vehicles within the airspace reservation; 4) the means available to monitor those activities so as to guarantee that they will be confined within the airspace reservation; 5) the ability to interrupt or terminate activities;
c) the duration of the airspace reservation shall be limited, taking a realistic account of preparation of the activities and the time required to vacate the reservation after the completion of the activities; and
d) the actual use of the temporary airspace reservation shall be based on appropriate arrangements made between the ATS unit normally responsible for the airspace and the requesting authority. Such arrangements shall be based on the general agreement reached previously between the competent ATS authority or ATS authorities and the requesting authority. They should, inter alia, cover: 1) the start of the use of the temporary airspace reservation; 2) the termination of its use; 3) emergency provisions in case of unforeseen events affecting the activities to be conducted within the temporary airspace reservation.

109 See Sections 2.3.1 of this chapter.

110 ICAO ASIA/PAC/3, Rec. 5/14. Based on ICAO LIM MID (COM/MET/RAC) RAN Meeting 1996, Recommendation 2/9, 2/10 and 2/13 (reprinted in ICAO, Report of the Special Civil/Military Coordination Meeting (SCMCM), Sana'a Yemen 18-19 June 2006). Asia/Pacific Region' ANP says that States should refrain, to the extent possible, from establishing prohibited, restricted or danger areas; when the establishment of prohibited, restricted or danger areas becomes unavoidable: a) give due regard to the need not to prejudice the safe and economical operation of civil aircraft; b) provide adequate buffer, in terms of time

and how a State in charge of an FIR, the providing State, is to establish danger areas in airspace(s) under its ATS jurisdiction.

The appropriate ATS authorities of a providing State are obliged to meet conditions in an ANP in order to impose airspace restrictions. In principle, contingency measures which are not consistent with regional ANPs must be approved by the President of the ICAO Council; nonetheless, some ANPs may prescribe that deviations due to emergency situations or natural disasters do not need to be approved by ICAO. For instance, the ANP for Asia/Pacific recognizes that in some cases of natural disasters, the required approval of a contingency plan is unnecessary;[111] in such cases, the ICAO approval for deviations from an ANP can be waivered. Thus, in case of 'emergency situations' such as natural disasters, State(s) responsible for providing ATS over the high seas may decide to establish danger areas as contingency actions, and the ICAO does *not* need to approve this action in advance.[112]

In the execution of setting up a danger area, the provision of the ATS is not subject to an implied principle of non-discrimination, meaning the danger area may be targeted against specific aircraft;[113] but the State responsible for the FIR has such narrowly defined ATS jurisdiction in the airspace that any discrimination must be justifiable in accordance with safety and efficiency considerations.[114]

The Third Middle East Regional Air Navigation Meeting further sets forth conditions for such "danger areas outside a State's territory".[115] Concerning

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and size, within the designated area, appropriate to the activities to be conducted; c) use standard ICAO terminology in designation of the areas; d) promulgate information regarding the establishment and day-to-day use of the areas well in advance of the effective date(s); e) arrange for the closest possible coordination between civil ATS units and relevant units responsible for activities within the restricted or danger areas so as to enable the ATS units to authorize civil aircraft to traverse the areas in emergencies, to avoid adverse weather and to indicate whenever the restrictions do not apply or the areas are not active; and f) review the continuing need for the prohibited, restricted or danger areas at regular intervals.

111 ICAO ASIA/PAC/3, Rec. 5/13.

112 *ibid*.

113 Merinda E. Stewart, *Freedom of Overflight: A Study of Coastal State Jurisdiction in International Airspace*, Wolters Kluwer 2021, p. 244.

114 *ibid*.

115 ICAO, Third Middle East Regional Air Navigation Meeting, "Report of ATS Working Group A to the ATS Committee on Agenda Item 2 f), MID/3-WP/96, 3/4/84, para. 2.6.5: … d) refrain, to the extent possible, from establishing prohibited, restricted or danger areas, bearing in mind that prohibited areas or restricted areas may only be established over the territories of a State and not over *international waters*; …

f) should the establishment of danger areas outside territorial limits become unavoidable they should be of a temporary nature and the following principles should apply:

1. prior to requesting the establishment of a temporary airspace reservation, the requesting authority shall obtain full information on the likely effect of such a reservation on air traffic. Such information shall include areas of high traffic density which may exist in the vicinity or at the planned location of the airspace reservation, as well as information on peak periods

the scope, a danger area outside of a State's territorial limits shall be limited to the "absolute minimum", as opposed to "reasonable extent and location" in Article 9 of the Chicago Convention.[116] This requirement reflects that ICAO has been cautious with the establishment of danger areas over the high seas.

It could also happen that an ANP does not mention or prescribe any rules for danger areas; that being so, in accordance with Attachment C of Annex 11, a danger area can still be set up as part of the execution of a contingency plan.[117] In case that a State established danger areas as a contingency measure whereas the regional ANP said nothing of danger areas, such airspace restrictions should be approved, as necessary, by the President of the ICAO Council on behalf of the ICAO Council.[118]

Hypothetically, States or the appropriate ATS authorities may interpret 'emergency situations' so broadly that they encompass a wide range of security threats. The appropriate ATS authorities may claim the competence to establish danger areas over the high seas beyond natural disasters. In this regard, it is necessary to supervise the execution of contingency plans so that the competence will not be abused.

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of traffic operating through such areas. In the light of that information, the requesting authority should, to the extent possible, select the site of the airspace reservation, and the time and duration so that this will have the least effect on normal flight operations conducted in the area in question;

2. in specifying the extent of a requested temporary airspace reservation and its duration, the requesting authority shall limit the size of the area to the absolute minimum required to contain the activities intended to be conducted within that area, taking due account of:

a. the navigation capability of aircraft or other vehicles within the airspace reservation;

b. the means available to monitor those activities so as to guarantee that they will be confined within the airspace reservation; and

c. the ability to interrupt or terminate activities;

3. the duration of the airspace reservation shall be limited, taking a realistic account of preparation of the activities and the time required to vacate the reservation after the completion of the activities;

4. the actual use of the temporary airspace reservation shall be based on appropriate arrangements made between the ATS unit normally responsible for the airspace and the requesting authority. Such arrangements shall be based on general agreement reached previously between the competent authority or ATS authorities and the requesting authority. They should, inter alia, cover:

a. the start of the use of the temporary airspace reservation;

b. the termination of its use and

emergency provisions in case of unforeseen events affecting the activities, to be conducted within the temporary airspace reservation;

116 See Section 2.6 of Chapter II.

117 Annex 11, Attachment C, Material Relating to Contingency Planning, para. 2. See also ICAO ASIA/PAC/3, Rec. 5/13.

118 Annex 11, Attachment C, Material Relating to Contingency Planning, para. 2. See also ICAO ASIA/PAC/3, Rec. 5/13.

3.2.2.3 The supervision of contingency responses over the high seas

The supervision of contingency responses is more complex than it seems to be. Annex 11 Attachment C states that ICAO is available for monitoring developments and will, *as necessary*, assist in the development of arrangements such as prohibited, restricted, and danger areas;[119] meanwhile, ICAO will not initiate and coordinate appropriate contingency action until the FIR authorities cannot adequately discharge the responsibility.[120]

ICAO only 'monitors and assists with' contingency responses when the appropriate ATS authorities cannot discharge their responsibility. It is not clear when ICAO *shall* interfere with the decisions of an appropriate ATS authority. For example, NATO allies and the Russian Federation conduct operations in the Arctic and impose airspace restrictions over the high seas.[121] ICAO did not specify the right moments for the organization to intervene. There is no authoritative interpretation of "as necessary".

3.2.3 Summary: Danger areas over the high seas

The establishment of danger areas over the high seas do not expressly prohibit the operation of the aircraft of another State: safety management practices might allow the operation of certain aircraft; nonetheless, the underlying safety concerns can in practice lead to the closure of airspace to all civil aircraft.

Regional ANPs usually do not encourage imposing restrictions over the high seas; nonetheless an ANP can specify conditions for establishing danger areas, such as the area must be of defined dimensions and for a specified time. Considering that unilaterally established airspace restrictions will probably affect the freedom of overflight over the high seas, a providing State cannot unilaterally establish prohibited airspace in contravention of an ANP. A regional ANP may allow establishing danger areas under certain circumstances, such as natural disasters, without any prior approval from ICAO. In addition, a regional ANP may specify that, *as necessary*, ICAO supervises the execution ANPs; it is open to interpretations when ICAO is obliged to monitor and assist with the development of danger areas in airspace(s) over the high seas.

119 Annex 11, Attachment C, para. 4.3.
120 Annex 11, Attachment C, para. 3.4.
121 https://thebarentsobserver.com/en/security/2020/09/experts-warn-potentially-deadly-great-power-games-arctic, last accessed Oct 1, 2020.

3.3 Category II: The regulations of prohibited airspace over areas of undetermined sovereignty

3.3.1 Airspace of undetermined sovereignty

The territory or boundaries of a State may be the subject of a dispute with other States, because a State does not need to have defined boundaries for it to be considered to exist.[122] ICAO documents often refer to the airspace of undetermined sovereignty,[123] but have not defined the concept of "undetermined sovereignty". Literally speaking, the word "undetermined" means "not authoritatively decided or settled".[124]

At the risk of over-simplification and purely in terms of fact, those territories of 'undetermined sovereignty' can be identified through the United Nations proceedings, including the General Debates of the General Assembly and the working sessions of General Assembly's Special Committees on Decolonization (C-24).[125] The reason is that "undetermined territory" may give rise to contentions among sovereign States and the United Nations is mandated to maintain international peace and security.[126] Therefore, heads of States often argue entitlements to territories at the UN General Assembly: for example, Cyprus deplores the territorial division for more than four decades;[127] Armenia and Azerbaijan sparred over the region of Nagorno-Karabakh.[128]

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122 James Crawford, *The Creation of States in International Law,* 2nd, Oxford University Press 2006, pp. 46-47.

123 For example, in Annex 11, Standards 2.1.2, 2.1.3 and 3.4.1.

124 See for instance Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/undetermined, last accessed April 17, 2021.

125 The Special Committee on the Situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples is also known as the Special Committee on Decolonization, or C-24. The C-24 was established in 1961 by the General Assembly (GA), as its subsidiary organ devoted to the issue of decolonization, pursuant to GA resolution 1654 (XVI) of 27 November 1961. https://www.un.org/dppa/decolonization/en/c24/about, last accessed 1 February 2021.

126 See the UN Charter, Preamble.

127 https://news.un.org/en/story/2020/09/1073512, last accessed Sep 11, 2021. See further in Section 3.3 of Chapter IV about the disputes over Northern Cyprus.

128 https://www.un.org/french/docs/cs/repertoire/93-95/CHAPTER%208/EUROPE/item_9_ArmeniaAzerbaijan.pdf last accessed 1 February 2021. On 23 September 2021, His Excellency Ilham Heydar oglu Aliyev, President, Republic of Azerbaijan, spoke at the General Debate: "There is no administrative territorial unit called Nagorno-Karabakh in Azerbaijan. We have created Karabakh and Eastern Zangazur economic zones by the Presidential decree signed on 7 July this 2021. …I would like to call on all the UN Member States and the UN Secretariat to avoid using legally non-existing, politically biased and manipulative names." see https://un.mfa.gov.az/en/news/3361/statement-by-he-mr-ilham-aliyev-president-of-the-republic-of-azerbaijan-at-the-general-debate-of-the-76th-session-of-the-united-nations-general-assembly, last accessed 24 September 2021.

After the annual General Debate closes,[129] special committee's sessions, for example, the C-24 considers the questions of 17 Non-Self-Governing Territories and Puerto Rico:[130] in 2019, the UN Special Committee on Decolonization discussed the sovereign dispute between Argentina and the United Kingdom over the Falkland Islands (Malvinas) and adopted a resolution.[131] In addition to disputed territories where more than one country claims sovereignty, the airspace of undetermined sovereignty also covers Antarctica,[132] where existing sovereignty claims are put into a state of suspense in accordance with particular legal arrangements.[133]

Although this study is not to give a definition of 'undetermined sovereignty', it is worth mentioning that the determination of territorial sovereignty is a political issue; due to its mandate, the United Nations records territories of undetermined sovereignty.[134] ICAO, as a technical agency of the United Nations, is not mandated to resolve territorial disputes,[135] but to help States achieve the highest possible degree of uniformity in civil aviation regulations, standards, procedures, even if there are disputes as to territories.[136] That is why ICAO consistently uses the reference to the airspace of 'undetermined

129 The annual General Debate closes before the end of September, see the schedule of General Assembly Meetings, https://www.un.org/en/ga/info/meetings/76schedule.shtml, last accessed 24 September 2021.

130 Under Chapter XI of the Charter of the United Nations, the Non-Self-Governing Territories are defined as "territories whose people have not yet attained a full measure of self-government". The General Assembly, by its resolution 66 (I) of 14 December 1946, noted a list of 72 Territories to which Chapter XI of the Charter applied. In 1963, the Special Committee on Decolonization or known as the "C-24"approved a preliminary list of Territories to which the Declaration applied (A/5446/Rev.1, annex I). As of the year 2021, 17 Non-Self-Governing Territories remain on the agenda of the C-24. https://www.un.org/dppa/decolonization/en/nsgt, last accessed 12 September 2021.

131 See https://www.un.org/press/en/2019/gacol3339.doc.htm, last accessed 1 February 2021. Member States which have or assume responsibilities for the administration of such Territories are called administering Powers, rather than sovereign powers. The UN General Assembly and the ICJ determined that the people of the territory are entitled to form an independent State, see UNGA Resolution 34/37 of 21 Nov. 1979 and *Western Sahara*, Advisory Opinion, I.C.J. Rep. 1975 (Oct. 16), p. 12, p. 68, para. 162.

132 Antwerpen, N. van (2008). *Cross-border provision of air navigation services with specific reference to Europe* : *Safeguarding transparent lines of responsibility and liability*, Kluwer Law International 2008, Chapter 4.2.

133 R. Jennings and A. Watts (eds.), Oppenheim's International Law (1992), Volume I, at 694-695.

134 In collaboration with the General Assembly, the United Nations Security Council establishes peacekeeping operations as well as advance or observer missions to resolve disputes peacefully under Chapter VI, such as promoting reconciliation, assisting with the implementation of a peace agreement, or performing mediation and good offices, and execute more forceful action as authorized under Chapter VII of the UN Chapter. See https://www.un.org/securitycouncil/content/repertoire/peacekeeping-missions, last accessed 12 September 2021. See more about UN Security Council measures in Chapter IV.

135 https://www.icao.int/about-icao/History/Pages/default.aspx, last accessed 11 September 2021.

136 See Standard 2.1.2 of Annex 11 and the immediate next section.

sovereignty' but did not define it; and this does not prevent discussions as to the provision of ATS in those airspace(s) of 'undetermined sovereignty'. This study acknowledges the existence of disputes, but the entitlements over particular territories are not to be examined in this chapter.

3.3.2 Prohibited airspace over territories of undetermined sovereignty

3.3.2.1 The right to establish prohibited airspace over territories of undetermined sovereignty

Having clarified the concept of territories of undetermined sovereignty, this section now looks into the question: does a State still have the right to establish prohibited areas in the airspace of undermined sovereignty? This question concerns whether the loss of effective control[137] leads to the loss of territorial sovereignty.

Of relevance to this point is a customary rule that the jurisdiction of a State is curtailed by territory loss and it can only close *seaports* under its control.[138] It may be argued, in analogy to seaport closure, that a State is no longer competent to declare closed sea or airspace that is out of its control.[139] However, the English High Court held that this rule from customary sea law may not be simply applied to airspace, in *R* (*on the application of Kibris Turk Hava Yollari & CTA Holidays*) *v. Secretary of State for Transport* (*Republic of Cyprus, interested party*).[140]

The claimants, a Turkish airline and a travel company, had sought an operating permit under the Air Navigation Order 2005 to allow them to operate direct flights between the United Kingdom and the northern part of Cyprus. The northern part of Cyprus has been administered by Turkish Cypriots since 1974 and proclaimed itself the "Turkish Republic of Northern Cyprus" in 1983 ('the TRNC').[141] The legal status of northern Cyprus is not unanimously recog-

137 The effective exercise of sovereign authority, the notion of *effectivités*, is a vital element for occupation of *terra nullius* and prescription as modes of acquisition of territory. Malcolm Shaw, "Territory in International Law", Netherlands Yearbook of International Law 13 (1982), pp. 61–91, 82–83. See also *Island of Palmas* case, 840.

138 [2010] EWCA Civ 1093, 12/10/2010, para. 63.

139 The authorities cited for that proposition include the passage from Oppenheim's International Law: "The rights of insurgents in territorial waters depend on the extent of their effective territorial control within the state. They would seem in principle to have the right to close ports under their control merely by an order to that effect without the need to impose a blockade; contrariwise, the parent government is not entitled to close by decree ports which insurgents control (as it is entitled to do in respect of ports under its own control) but must establish an effective blockade in order to do so…"

140 *R (on the application of Kibris Turk Hava Yollari & CTA Holidays) v. Secretary of State for Transport (Republic of Cyprus, interested party)*, [2009] EWHC 1918 (Admin), 28/07/2009, paras 38-41.

141 See https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/cyprus/area-administered-by-turkish-cypriots/, last accessed 6 September 2022.

nized by all Member States of the United Nations.[142] ICAO recognizes the Greek Cypriot (southern) portion of the island and its Nicosia ACC as responsible for air traffic services throughout the entire FIR.[143]

Figure 15: The airspace over Cyprus[144]

The claimant submitted that a State does not enjoy sovereignty over an area of land and the airspace above it, unless it exercises effective control over the area in question.[145] The Republic of Cyprus' entitlement to exercise its jurisdiction has been suspended in respect of Northern Cyprus as a result of its loss of effective control over that territory.[146]

The English High Court held that the Republic of Cyprus continued to retain the title of sovereignty with regard to the northern part of Cyprus that is currently removed from its control; the customary rule about seaport closure

142 The United Nations Peacekeeping Force in Cyprus (UNFICYP) was originally set up by the Security Council in 1964 to prevent further fighting between the Greek Cypriot and Turkish Cypriot communities. In the absence of a political settlement to the Cyprus problem, UNFICYP has remained on the island to supervise ceasefire lines, maintain a buffer zone, undertake humanitarian activities and support the good offices mission of the Secretary-General. More information: https://peacekeeping.un.org/en/mission/unficyp, last accessed 8 August 2021.

143 See Mark Franklin and Sarah Porter, 'Sovereignty over Airspace and the Chicago Convention: Northern Cyprus' (2010) 35(1) A&SL 63; Alexis Heraclides, Greek-Turkish Conflict in the Aegean (Palgrave MacMillan Limited 2010) pp. 193-98; Nicholas Grief, 'The Legal Principles Governing the Control of National Airspace and Flight Information Regions and their Application to the Eastern Mediterranean' (European Rim Policy and Investment Council, 2009).

144 Source: https://ops.group/blog/cyprus-risks-in-the-nicosia-fir/, last accessed 10 March 2021.

145 *R (on the application of Kibris Turk Hava Yollari & CTA Holidays) v. Secretary for Transport (Republic of Cyprus, interested party)*, [2009] All ER (D) 295 (Jul). [2009] EWHC 1918 (Admin), 28 July 2009, para. 40.

146 *ibid*, [2010] EWCA Civ 1093, 12/10/2010, para. 63.

does not displace a State's rights under the Chicago Convention;[147] the Court therefore rejected the argument and held that a State may retain sovereignty over territory even if it does not control that territory effectively.[148]

> [S]overeignty is defined by reference to the independence, authority and rights of the state under consideration. While territorial integrity of the state is a key facet of sovereignty, sovereignty as a concept does not require that territorial integrity has been maintained and its does not require that the state is in a position to exercise all of the rights that form part of statehood.[149]

Hence, notwithstanding the loss of control over detached territories, a State retains its sovereignty over that territory.[150] The State is still competent to provide ATS prescribed in Article 28(a) of the Chicago Convention, unless the State has delegated this responsibility of ATS provision to another State, or the State has invoked the argument of 'impossibility to perform.'[151] The English High Court held that the competence to provide ATS and regulate traffic under the Chicago Convention was not to be replaced by customary rules on effective control.[152]

The reasoning is two-fold: pursuant to Article 28 of the Chicago Convention, the competence to provide ATS can derive from sovereignty; pursuant to public international law, an existing title of sovereignty[153] is not defeated by competing control status by another entity: international law does not require a State to be in effective control over the whole of the territory over

147 *ibid*.
148 [2009] EWHC 1918 (Admin), 28/07/2009, para. 41.
149 *ibid.*
150*ibid.*
151 See further in Chapter V, Section 3.4.
152 [2009] EWHC 1918 (Admin), 28/07/2009, paras. 38-41. On 'effective control', the notion is often used in scholarships and judgments, but has never been defined, see Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law,* Oxford University Press 2008, pp.137-138: "Effective control of a territory is purely a question of fact and depends on the ascertainment of the fact as to who is in control, and correlation of different physical presences in the area." See ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* para. 118: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States." In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, ICJ Reports 2005, para. 177, the ICJ further notes that, although Uganda recognized that as of 1 September 1998 it exercised "administrative control" at Kisangani Airport, there is no evidence in the case file which could allow the Court to characterize the presence of Ugandan troops stationed at Kisangani Airport as occupation in the sense of Article 42 of the Hague Regulations of 1907.
153 See ICJ, Frontier Dispute (Burkina Faso/Mali), Judgment, 1986 ICJ Reports, p. 586, para. 64. Kohen, M. G. (2018). "Titles and effectivités in territorial disputes". In *Research Handbook on Territorial Disputes in International Law*. Edward Elgar Publishing, pp. 164-165.

which it enjoys sovereignty;[154] and the loss of effective control of a territory does not affect the sovereignty over that territory. The territory of a State cannot be lost or disappear as a result of its total or partial occupation during a conflict.[155]

The value of effective control or occupation, or activities *à titre de souverain*, always depends on the nature of the territory and the nature of the competing State claims:[156] effective control can only create a territorial title if a sovereign power does not already exist; whereas if a sovereign title already exists, it takes precedence over contradictory effective control of another State.[157] Moreover, the existing sovereign power can also "fight back" against the factual control status, by issuing decrees, enacting legislation or engaging in any other relevant sovereign conduct, so that the sovereign power can keep its intention to be "sovereign alive" and thus deprive those *effectivités* of the capacity to divest it of its title.[158]

Therefore, a State is entitled to announce prohibited airspace over the territory of which it has lost effective control. Depending upon the circumstances,[159] the appropriate ATS authorities are still competent to execute contingency plans that includes the suspension of use of certain portions of airspace;[160] such conduct can show the intention to be sovereign alive. Since the responsibility to provide ATS does is not linked with effective control of the territory, this section emphasizes that technical cooperation, including the establishment of prohibited airspace is to be decoupled from the status of control over a territory.[161] The competence of the appropriate ATS authorities is not to be eclipsed by the loss of effective control of a territory.

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154 See also *Lighthouses in Crete and Samos (Fr. v. Greece),* 1937 P.C.I.J. (ser. A/B) No. 62 (Oct. 8), para. 38.

155 UN General Assembly, International Law Commission, Seventy-third session, Sea-level rise in relation to international law, Second issues paper by Co-Chairs of the Study Group on sea-leel rise in relation to international law, A/CN.4/752, 19 April 2022, para. 90.

156 Malcolm Shaw, "Introduction: The International Law of Territory: An Overview", in *Title to Territory*, ed. Malcolm Shaw (Aldershot, Hants, England: Ashgate/Dartmouth, 2005), 24. Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, Eritrea/Ethiopia Boundary Commission, Award of April 13, 2002, RIAA vol. 25 (2002) 83, para. 3.29: "It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing State."

157 Shaw, "Introduction", xxiv; Kohen and Hébié, "Territory, Acquisition", para. 36. The ICJ consistently applied the same formula as to the relationship between effectivités and sovereignty to territory in cases such as *Frontier Dispute (Burkina Faso/Mali),* ICJ Reports 1986, para. 63. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, paras. 61–62; *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),* ICJ Reports 2007, paras. 151–158.

158 Marcelo Kohen and Mamadou Hébié, "Territory, Acquisition", in Max Planck Encyclopedia of Public International Law, ed., Rüdiger Wolfrum, para. 39.

159 On technical impossibility, see Chapter V Section 3.4.

160 Annex 11, Attachment C, Material Relating to Contingency Planning, para. 6.1.

161 See Standard 2.1.2 of Annex 11 and the immediate next section.

3.3.3.2 Regional contingency plan over disputed territories

Acknowledging that the competence to impose airspace restrictions is decoupled from the control status of a territory, this section focuses on technical arrangements for airspace restrictions. Due to the potential overlapping territorial claims, ICAO initiates and coordinates appropriate contingency action in the event of disruption of ATS affecting international civil aviation operations or at the request of States.[162] Under such circumstances, ICAO works in coordination with States responsible for airspace adjacent to that affected by the disruption and in close consultation with international organizations concerned.[163] Pursuant to Standard 2.1.2 of Annex 11, Contracting States relevant to the airspace of undetermined sovereignty should be engaged in regional agreement negotiations on the provision of ATS.[164]

As explained in the previous section on the high seas,[165] ICAO may interfere *as necessary*. For instance, in 2015, the Agency for Air Navigation Safety in Africa and Madagascar (ASECNA), on behalf of Benin and Togo, published an AIP notifying their intent to provide ATS within a portion of the Accra FIR which is under the responsibility of Ghana.[166] Considering that more than one ATS provide may be controlling flights following this AIP, ICAO convened coordination meetings with relevant parties and reminds Member States to assist in the accommodation of the re-routed traffic and possible airspace restrictions.[167] In the end, the States concerned agreed to make arrangements to avoid the provision of ATS by more than two authorities: the ATS over the territories of Ghana and over the high seas within the Accra FIR is provided by the Ghana Civil Aviation Authority; ATS over the territories of Benin and Togo is provided by ASECNA on behalf of Benin and Togo.[168] Albeit the border issues between the three countries,[169] regional political consultations under the auspices of ICAO determined the execution of regional contingency arrange-

162 Annex 11, Attachment C, Material Relating to Contingency Planning, para. 3.4.

163 *ibid*. See ICAO Working Paper, 'ATM Aspects and Safety Issues in the Simferopol FIR', Presented by Ukraine, A40-WP/17, TE/69, 8/8/19. ICAO Working Paper, "ATM Aspects within SIMFEROPOL and DNIPROPETROVS'K FIRs" (Presented by Ukraine), AN-Conf/13-WP/245.

164 Standard 2.1.2 reads "Those portions of the airspace over the high seas or in airspace of undetermined sovereignty where air traffic services will be provided shall be determined on the basis of regional air navigation agreements."

165 See Section 3.2 of this chapter.

166 See ICAO, Letter of the Secretary General on 3 July 2015, entitled "Safety of civil aircraft operating in the Accra FIR".

167 See ICAO, Letter of the Secretary General on 16 July 2015, entitled "Update on safety of civil aircraft operating in the Accra FIR".

168 *ibid.*

169 Lentz, Carola. "'This Is Ghanaian Territory!': Land Conflicts on a West African Border." American Ethnologist 30, no. 2 (2003), pp. 273–89. See also https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Tackle-Ghana-Togo-land-boundary-disputes-Kan-Dapaah-to-Ghana-Boundary-Commission-1296595, last accessed 8 August 2021.

ments. All in all, the success of a coordination process depends on technical consultations in the region.

3.3.3 *Summary: Prohibited airspace over territories of undetermined sovereignty*

From a legal perspective, the sovereignty of a State does not require that territorial integrity be maintained; the effective control of territories does not take precedence over an existing title of sovereignty. In other words, the right to establish prohibited airspace is not affected by the change of control status but only by the acquisition and loss of territorial sovereignty. A sovereign power is entitled to announce the establishment of prohibited airspace over its territories, including those removed from its control.

Taking note of the political sensitivity in association with sovereignty disputes, Standard 2.1.1 of Annex 11 to the Chicago Convention emphasizes that in the airspace of undetermined sovereignty, contingent airspace restrictions can derive their legality from regional air navigation agreements without commenting on the territorial disputes. In this process, ICAO initiates and coordinates appropriate contingency action in the event of disruption of ATS, as exemplified by the change of Accra FIR in 2015. These ICAO-led consultations are subject to regional political processes.

4 Chapter summary and conclusions

Once a Contracting State has accepted the *responsibility* to provide ATS, the appropriate ATS authorities have the competence to regulate the airspace under their *jurisdiction*. Over the high seas, ICAO is the ultimate legislator for civil flights; the competence of an appropriate ATS authority over the high seas is limited to operational and technical matters written in ANPs.

It is inconsistent with the Chicago Convention for Contracting States to expand national and regional legislation over the high seas in a way that deviates from approved ANPs. Airspace restrictions over the high seas may constitute deviations from ANPs; and the deviations as such need to be approved by the President of the ICAO Council. An ANP can prescribe a caveat that, in natural disasters or other emergency situations, a providing State is competent and obliged to establish danger areas without advanced approval from ICAO.

In the airspace of undetermined sovereignty, more than one power may claim to establish prohibited areas on the basis of national sovereignty. Arguably, losing control over a territory does not deprive the *de jure* State from establishing prohibited airspace over its detached territory. Meanwhile, States may argue for sovereignty as the only basis for closing airspace, whereas the appropriate ATS authorities may announce that certain portions of airspace are not available/secured/safe based on Annex 11 to the Chicago Convention.

In this context, ICAO with its convening power can facilitate regional negotiations for the provision of safe ATS where technical consultations can discuss on airspace restrictions on the basis of ATS jurisdiction rather than sovereignty.