Protection of aviation security through the establishment of prohibited airspace

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5 Airspace Restrictions in Times of War

1 Preliminary remarks

Previous chapters addressed the 'who,' 'when,' and 'how' of establishing prohibited airspace. This chapter continues the discussion with a special reference to wartime and aims to answer the third research question – how to improve the rules with respect to prohibited airspace to enhance aviation security? War and armed conflict can lead to exceptional circumstances which endanger public safety; these circumstances could justify a State's establishment of prohibited airspaces, subject to qualifications in Article 9 of the Chicago Convention, such as the requirement of non-discrimination.[1] Meanwhile, Article 89 of the Chicago Convention prescribes that a State resumes full *freedom of action* in times of war, so that to establish a prohibited area as such is not subject to any requirements. In juxtaposition of Articles 9 and 89 of the Chicago Convention, it seems difficult to understand how to establish prohibited airspaces in wartime. This chapter answers this research question.

2 The competence to establish prohibited areas in war

2.1 Introductory remarks

This section starts with a normative analysis of Article 89 of the Chicago Convention. This normative analysis aims to account for the competence divide between States, ICAO, and the UN for airspace restrictions.

2.2 The competence to establish prohibited areas in wartime

2.2.1 The 'war' clause in the Chicago Convention

Article 89 of the Chicago Convention specifically addresses the situation of war:

1 See Chapter II, Section 4.

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

Article 89 emphasizes that in the case of war and national emergency, no provision of the Chicago Convention shall affect a Contracting State's freedom of action. Accordingly, in case of war, the freedom of a Contracting State is not affected by any provision of the Chicago Convention. Therefore, a question arises: in times of war, is the competence of a State regarding prohibited airspace still regulated by Article 9 of the Chicago Convention, despite that the Convention has a special provision on war?

To answer this question, it is necessary to explain the temporal application scope of Article 9 of the Chicago Convention. Article 9 of the Chicago Convention pertains to normal peace conditions, because the Chicago Convention is a treaty for peacetime.[2] This temporal qualification is evidenced by the preparatory work of the Chicago Convention.[3] In 1944, negotiating States made it clear that they were discussing the exchange of air freedoms among friendly countries for the upcoming *peace* time following the end of WWII: the US emphasized that the drafting conference in Chicago was a great attempt to build enduring institutions of *peace*.[4] The UK Delegation said that, after engaging in air warfare, they were happy to have the opportunity to help build the aviation rules in *peace*.[5] The Canadian Delegation saw the settlement of the problem of international air transport as an opportunity to establish a lasting *peace* and a new order of security.[6] The French Delegation emphasized that the expansion of civil air transportation is the first proof of the common determination of the Allies to organize and to defend *peace*.[7] The Australian and the New Zealand Delegations argued for an international ownership and operation of air-transport for an orderly and *peaceful* world.[8]

2 See also Chapter II, Section 2.
3 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948).
4 Document 32, *Verbatim Minutes of Opening Plenary Session*, November 1, in *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p.43.
5 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 63.
6 *ibid.*, p. 74.
7 *ibid.*, p. 82.
8 *ibid.*, p. 79.

State representatives invited to the Chicago Conference[9] understood that the issue of peace and war shall be dealt by "an overriding peace treaty", later known as the Charter of the United Nations.[10] Under that assumption, the Chicago Conference was set to draft a *peace treaty*, dealing with *peaceful* relations among *friendly* countries in the field of aviation. The Chicago Convention belongs to the category of post-war treaties to establish a peaceful order.[11] The substantive provisions of the Chicago Convention, including Article 9, are to regulate air transport relations among *peaceful* States,[12] and in case of war, the Chicago Convention deals with it with a special separate provision:[13] that is Article 89 which specially deals with prohibited airspace in times of war and national emergency.

The very initial draft of the Chicago Convention had one comprehensive provision, draft Article 10,[14] for prohibited airspace in times of war and peace; but eventually the Chicago Conference adopted two provisions: Article 9 on prohibited airspace in peacetime and Article 89 on war and national emerg-

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9 List of governments and authorities to whom invitations were extended: Afghanistan, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, UK, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Ireland, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Saudi Arabia, Spain, Sweden, Switzerland, Syria, Turkey, Union of South Africa, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yugoslavia, Denmark, Thailand. See *ibid.*, p.13.

10 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

11 See *Invitation of the United States of America to the Conference, Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 11. The Chicago Conference's invitation said: "The approaching defeat of Germany, and the consequent liberation of great parts of Europe and Africa from military interruption of traffic, sets up the urgent need for establishing an international civil air service pattern on a provisional basis at least, so that all important trade and population areas of the world may obtain the benefits of air transport as soon as possible, and so that restorative processes of prompt communication may be available to assist in returning great areas to processes of peace."

12 See Chapter II, Section 2.4.

13 Joint dissenting judgment of Judges Anzilotti and Huber in the *Wimbledon Case* (1923), PCIJ: A 1, pp. 36-37: "In this respect, it must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defense, it is entitled to do so even if no express reservations are made in the convention. This right possessed by all nations which is based on generally accepted usage, cannot lose its *raison d'être* simply because it may in some cases have been abused… The right of a State to adopt the course which it considers best suited to the exigencies of its security and the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulation cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation." See also, Bin Cheng, *Principles*, pp.55-56.

14 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), pp. 557-558.

ency.[15] The original draft Article 10 had three paragraphs; delegations took out the last paragraph which dealt with national emergency[16] and combined that paragraph with a new draft article on war;[17] thus an independent new provision came into being – the as-adopted Article 89.

In conclusion, Article 89 of the Chicago Convention was adopted to foreshadow a future arrangement regarding the use of airspace in times of war and national emergency, separate from other provisions of the Chicago Convention which deal with peacetime. Therefore, based on the context of the Chicago Convention and the evidence of its preparatory work, it can be concluded that the establishment of prohibited airspace in times of war and national emergency is regulated through Article 89, rather than Article 9 of the Chicago Convention.

2.2.2 *The relationship between Article 89 and Article 9 of the Chicago Convention*

As said, the provisions of the Chicago Convention shall not affect Contracting States' conduct in cases of war and national emergency.[18] The application of Article 89 was investigated by ICAO after the flight MH17 tragedy. The ICAO established the Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones (hereafter the "Special Group").[19]

At the Special Group's meeting, delegations observed that Article 89 was to bridge the two bodies of law: during World War II in 1944, two bodies of laws law existed – one which applied to *peacetime* and one which applied to *wartime*; States involved in war, the *belligerents*, were required to provide notice of such involvement to *neutral* States to enable them to exercise their rights and obligations.[20] Considering the law of war has developed into a separate system, it would not be possible for the Chicago Convention to include all the war rules on aviation; so that Article 89 was adopted to link to the bodies of air law applicable to war.[21]

In particular, Professor Bin Cheng commented that, the adoption of Article 89 provided the legal basis for a Contracting State to justify its self-preserving measures in times of war;[22] self-preserving measures, such as airspace restrictions in times of war, do not need to comply with the requirements in

15 See Chapter II, Section 2.4.
16 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), pp. 557-558.
17 *ibid.*, pp. 472 & 693.
18 See Article 89, the Chicago Convention.
19 See ICAO, The Council Decision relating to the Outcome of the Meeting of the Special Group to Review the Application of ICAO Treaties relating to Conflict Zones (SGRAIT-CZ), Legal Committee – 36th Session, LC/36-IP/1, 25/11/15.
20 *ibid.*
21 ICAO, Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones, Report, SGRIT-CZ/1, Montreal, 13-14 July 2015, paras 2.1-2.2.
22 Bin Cheng, *Principles*, pp. 29-31.

the Chicago Convention.[23] Hence, the establishment of prohibited airspace in times of *war* does not have to satisfy the conditions in Article 9, because Article 9 deals with times of *peace*.[24] Consequently, airspace restrictions in times of war are not subject to the qualifications in Article 9 of the Chicago Convention. It is legal for Contracting States to invoke Article 89 and take self-preserving measures which, for example, make a distinction among nationalities of aircraft, which would otherwise violate Article 9.[25]

Plainly, it cannot be stressed enough that the Chicago Convention, including Article 9, was designed to regulate civil aviation during peacetime. In peacetime, it was thought that however differently States may manage their airspaces, the territorial government could still control and guarantee the safety of their air routes.[26] However, in times of war, the right of a State to self-preservation has to be respected *over* qualifications in Article 9.[27] Article 89 allows discriminatory measures to be taken in establishing airspace restrictions. A Contracting State is entitled to justify its discriminatory measures in closing airspace, for example, targeting aircraft of certain nationalities, in times of war.

In conclusion, Article 89 of the Chicago Convention supports the right of a Contracting State to take extraordinary measures for self-preservation. If a prohibited area is established in wartime, a State is entitled to claim that its right for self-preservation overrides qualifications in Article 9 of the Chicago Convention. By invoking war and national emergency, Contracting States are entitled to suspend the application of Article 9: for example, it is justifiable to establish prohibited areas against civil aircraft of particular nationalities.

2.3 The determination of 'war'

2.3.1 Preliminary remarks

Having explained that the right of a State to establish prohibited airspace is not qualified by Article 9 of the Chicago Convention, it is necessary to clarify the meaning of "war";[28] that is, to elaborate on the legal definition of the term war for the purpose of understanding when Article 89 is applicable. Therefore, the question is when a war starts: this question has been raised by States before the ICAO Council and the International Court of Justice (ICJ).

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23 See the following Section 2.3 of this chapter on the India-Pakistan disputes in front of the ICAO Council in 1970s.

24 See Chapter II, Section 4.

25 On distinction among nationalities of aircraft, see Chapter II, Section 2.5.

26 *ibid.*

27 Bin Cheng, *Principles*, pp. 29-31.

28 The starting of national emergency vis-à-vis emergency is explained in Chapter II, Section 2.4.4. On national emergency, see below Section 2.4 of this chapter.

2.3.2 *The interpretation of war by ICAO and the ICJ*

In 1971, ICAO meetings discussed the meaning of war as codified in Article 89 of the Chicago Convention. In February 1971, following a hijacking incident of Indian aircraft by pro-Pakistan Kashmiri, India suspended overflights of its territory by Pakistani – and only Pakistani – civil aircraft.[29] In March 1971, Pakistan presented complaints to the ICAO as to the application of Article 84 of the Chicago Convention and Article II of the Transit Agreement.[30] India then filed a preliminary objection questioning the jurisdiction of the ICAO Council to handle the matter.[31]

India's main argument was that the operation of the Chicago Convention and Transit Agreement had been suspended because of the 1965 Indo-Pakistani War. India relied on the provision of Article 89 of the Chicago Convention that would grant it "freedom of action" in case of war or emergency.[32]

To justify the establishment of prohibited areas in airspace against Pakistan, India elaborated on Article 89 at length. The key point of the discussion for the legality of India's prohibited area was the interpretation of "war" in Article 89. It was the Indian intention to invoke Article 89 to suspend the application of the Chicago Convention. India interpreted "war" in Article 89 broadly, not just as the duration of the actual fighting but extending to even after the war is terminated if the essential security of a State requires some freedom of action.[33] India argued that "war" in Article 89 covers military tensions that did not yet amount to war under international law.[34] The ICAO Council eventually rejected India's preliminary objection in July 1971.[35] The decision is reflected only in the minutes of the Council meeting, not in a special document

29 ICJ, Appeal relating to the Jurisdiction of the ICAO Council, *India v. Pakistan*, Memorial submitted by the Government of India, 22 December 1971, para.28.

30 *Milde,* p.190.

31 *ibid*.

32 The intervention of Mr. Palkhivala, Chief Counsel of India, in the second meeting of ICAO Council's 74th Session. See ICAO, Council – seventy-fourth session, Minutes of the Second meeting, ICAO Doc. 8956-c/1001, C-Min. LXXIV/s (closed), p. 159 paras. 59-60. This document was reproduced as Annex E to the Memorial submitted by the Government of India to the International Court of Justice in an Appeal Relating to the Jurisdiction of the ICAO Council, 22 December 1971, https://www.icj-cij.org/en/case/54/written-proceedings, last accessed 30 December 2018.

33 The intervention of Mr. Palkhivala, Chief Counsel of India, in the second meeting of ICAO Council's 74th Session. See ICAO, Council – seventy-fourth session, Minutes of the Second meeting, ICAO Doc. 8956-c/1001, C-Min. LXXIV/s (closed), p. 159 paras. 59-60. This document was reproduced as Annex E to the Memorial submitted by the Government of India to the International Court of Justice in an Appeal Relating to the Jurisdiction of the ICAO Council, 22 December 1971, https://www.icj-cij.org/en/case/54/written-proceedings, last accessed 31 December 2018.

34 *ibid*.

35 ICAO, C-Min. 74/6.

as a "decision" under Article 84 of the Convention.[36] The Minutes indicated the result of the vote but do not explain any arguments or reasons for the decision.

At the ICJ, the status of war was also the subject matter of the deliberations in the Appeal Relating to the Jurisdiction of the ICAO Council *(India v. Pakistan)*.[37] In the appeal, India argued that Article 89 is permissive in nature such that during war and emergency conditions, Contracting States have the "freedom of action";[38] therefore, if a Contracting State is questioned about not allowing its enemies to overfly while war is going on, it can say that it does not have to declare the Convention terminated, because the Convention itself gives it complete freedom of action. However, the ICJ did not comment on the exact legal position.

Unfortunately, neither ICAO nor the ICJ have clarified the meaning of 'war' in Article 89 of the Chicago Convention. ICAO seems to avoid deliberating on activities during times of conflict,[39] the organisation instead addressed procedural issues such as information sharing over conflict zones.[40] Perhaps in the 1970s, Member States of ICAO thought it was more political than legal to determine whether the hostile acts between two sovereign States constitute 'war' in Article 89 of the Chicago Convention. Difficult as it is to define 'war', considering the development of the law of war since 1970s,[41] the following sections propose an interpretation of 'war', using the interpretation methods in Articles 31 and 32 of the VCLT.[42]

36 ICAO, Council – seventy-fourth session, Minutes of the Second Meeting, ICAO Doc. 8956-c/1001, C-Min. LXXIV/s (closed). This document was reproduced as Annex E to the Memorial submitted by the Government of India to the International Court of Justice in an Appeal Relating to the Jurisdiction of the ICAO Council, 22 December 1971, https://www.icj-cij.org/en/case/54/written-proceedings, last accessed 31 December 2018.

37 *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan),* 1972, Written Proceedings, Memorial submitted by the Government of India, last accessed 31 December 2018.

38 *ibid.*, p. 5.

39 For instance, Article 6(2) of 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation reads: "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention."

40 ICAO, "Procedure to Disseminate Information on Risks to Civil Aviation Arising from Conflict Zones," C-WP/14498, Appendix, 2/5/16. ICAO, "Civil Aircraft Operations Over Conflict Zones," November 2016 (restricted).

41 On the 'law of war', see the following Section 3.3 of this chapter.

42 Article 31 of the VCLT.

2.3.3 *Preparatory work of the Chicago Convention*

The Chicago Convention does not define 'war'.[43] Based on the analysis of the preparatory work of the Chicago Convention, which provides a supplementary means of interpretation,[44] in 1944, delegations were discussing the ending of war between States and peaceful relationships among States.[45] The word *war* was introduced by a UK motion;[46] there was no record of defining the concept of war during the Chicago Conference. From a historical perspective, public international law was only dealing with the relationship between sovereign States.[47] The traditional law of war would only be applied between two or more sovereign States.[48] Therefore, the word war refers to armed conflicts among States: this is the ordinary meaning taking into account the context of the Chicago Convention being a treaty of peace.

2.3.4 *Subsequent agreement between the parties regarding the meaning of 'war'*

2.3.4.1 *Evolutive interpretation of 'war'*

As explained in Section 2.2 of this chapter, the adoption of Article 89 is to bridge the divide between air law and the law of war; this rationale is supported by intergovernmental processes at ICAO.[49] ICAO convened a special meeting to review the application of ICAO treaties relating to conflict zones in Montreal from 13 to 15 July 2015.[50] At the meeting, Member States recog-

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43 The ordinary meaning of war, as used in the 2020s, is often associated with hostilities and armed conflict. See Karen DeYoung, "Is it a 'war'? An 'armed conflict'? Why words matter in the U.S. fight vs. the Islamic State", https://www.washingtonpost.com/world/national-security/is-it-a-war-an-armed-conflict-why-words-matter-in-the-us-fight-vs-the-islamic-state/2014/10/06/f4528a6c-49a1-11e4-891d-713f052086a0_story.html, last accessed 20 January 2021. The aviation insurance industry has defined war as acts or operations of hostilities committed by belligerents as agents of sovereign powers. See *Atlantic Mutual Insurance Co. v. King*, [1919] 1 KB 307 at 310. This case is about a claim under a marine cargo reinsurance policy; the vessel Tennyson carrying hides and skins from Brazil to New York had an explosion on 18 February 1916; primary insurers thereby bring the action to recover from the defendang reinsurers the proportion of the loss. See also Michel, K. (2013). *War, Terror and Carriage by Sea*. Routledge 2013, pp. 54-56. See also Margo R D., Aviation Insurance, 3rd., ed., Butterworths, LexisNexis 2000, p. 338.

44 VCLT, Art. 32. See Chapter I, Section 1.2 on treaty interpretation methods.

45 See also Chapter II, Section 2.4.1.

46 See *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), United Kingdom Proposal of Amendment of Document 16 – Document 350; United Kingdom Proposal of a Substitute for Article 10 (c) of Document 16 – Document 353, pp. 472 & 693.

47 R Heinsch et al, *An Introduction to Public International Law*, CUP 2022, p. 235 (*'Heinsch'*).

48 *ibid*, see also Leslie C *Green, The Contemporary Law of Armed Conflict* 2nd ed., Juris 2000, p. 54.

49 ICAO, "Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones" (18 September 2015) SGRIT-CZ/1 Draft Report, paras. 7.13-7.14.

50 *ibid.*

nized that the recourse to relevant rules of international law for the purpose of treaty interpretation is necessary:[51] Article 89 represents, in fact, two Articles consolidated into one.

> In 1944 (during the Second World War) there existed two bodies of laws: those that applied to peace and those that applied to war. States involved in war, the 'belligerents', would notify the fact to the 'neutral' States so that they could exercise their rights and obligations, including those associated with aviation. However, today the division between the two bodies of law is completely different, having evolved into the law applied to armed conflicts. Given that Article 89 does not provide an answer to the very diverse scenarios of armed conflicts, this delegation posited that the legal answer may have to be sought in other bodies dealing with international law as applied to armed conflicts.[52]

In interpreting the word *war* in Article 89 of the Chicago Convention, it is thus necessary to rely on the relevant rules of the law of war, encompassing customary international law rules[53] applicable in the relations between ICAO Member States.

This evolutive interpretation method to bring in other rules of international law is permissible under the rules of Article 31 of the VCLT.[54] The ILC also argues that international law is a dynamic legal system, and subsequent developments in customary law and general principles of law allow for interpretations in a non-static manner when the concept used is open or evolving.[55] Because the concept of war is constantly evolving with the development of the law of war, it is necessary to break away from the peace-aligned legislation and go beyond the Chicago Convention. Considering that the law of war has evolved into a separate legal regime since the end of World War II, it is necessary to look up to the law of war for the interpretation of war. The term "war" in Article 89, associated with a Contracting State's self-preserving measures, is to be interpreted in light of the developments in the law of war.

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51 *ibid.*

52 *ibid.*

53 See below Section 3 of this chapter on customary international humanitarian law.

54 VCLT, Articles 31.

55 International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission. A/CN.4/L.702 (18 July 2006) para. 22; International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006) para. 478 (a). See also Christian Djeffal, Static and Evolutive Treaty Interpretation: A Functional Reconstruction, CUP 2016, pp. 15-16.

2.3.4.2 The meaning of war in IHL

With respect to the law of war, there are rules which regulate the "means and methods of warfare", the so-called 'Hague Law';[56] there are also rules dealing with the "protection of persons and objects" *hors de combat*, which are referred to as 'Geneva Law.[57] The Hague Law and Geneva Law together constitute the law of armed conflict, also commonly known as international humanitarian law (IHL), or *jus in bello*.[58]

The reference to 'war' went through major changes in 1949: with the revision of the Geneva Conventions, the term armed conflict was introduced to replace the term of war.[59] The reason was that 'armed conflict' focuses more on the facts on the ground, while the war was mainly connected with a declaration of war.[60] Furthermore, the concept of 'armed conflict' is divided into international and non-international armed conflicts (IAC and NIAC): IAC takes place between sovereign powers and NIAC involves domestic rebels but excludes mobs or rioters.[61] IACs and NIACs are subject to different rules.[62]

To further interpret "war" in the Chicago Convention, it is necessary to refer to the definition of an international armed conflict (IAC) contained in Common Article 2 of the Geneva Conventions, which has been well accepted as customary international law.[63]

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war *or of any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

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56 *Heinsch*, p. 231.

57 *ibid.*

58 *ibid.* In the last 150 years, States have made international rules to limit the effects of armed conflict for humanitarian reasons. The Geneva Conventions and the Hague Conventions are the main examples. Usually called international humanitarian law (IHL), this is also known as the law of war or the law of armed conflict. See https://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm, last accessed 29 February 2020.

59 *ibid,* pp. 234-235. See also Dinstein, Y. *War, Aggression and Self-Defence*. CUP 2005, pp. 5-7.

60 *Heinsch*, p. 235.

61 See S. Vité, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, 91 International Review of the Red Cross, no. 873, March 2009, pp.69-75. Heinsch R.W. (2015), Conflict Classification in Ukraine: The Return of the "Proxy War"?, International Law Studies 91, pp. 339-340.

62 See Heinsch R.W. (2015), Conflict Classification in Ukraine: The Return of the "Proxy War"?, *International Law Studies* 91, pp. 339-340. Compared to the full-fledged rules governing international armed conflicts, Common Article 3 provide only a very minimal set of rules regulating non-international armed conflicts, especially with regard to the means and methods of warfare. In addition, the 1977 Second Additional Protocol (AP II) to the Geneva Conventions was the first international treaty which only contained rules for non-international armed conflicts.

63 *Heinsch ibid.*

> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Common Article 2 of Geneva Conventions clarifies that a formal declaration of war is not necessary, and that instead, the factual circumstances determine the situation of IAC, thereby triggering the application of IHL.[64] An international armed conflict consists of "the use of force in a warlike manner between states".[65] That is to say, the key in the identification of war is the engagement in violence, not the declaration of war or other formalities.[66] There needs to be an "intervention of members of armed forces".[67] The ICTY and other tribunals have affirmed two main components of an international armed conflict: (a) the initiation of armed conflicts,[68] and (b) the involvement of two States.[69] Furthermore, the 2016 ICRC Commentary on Common Article 2 clarifies that "an armed conflict can arise when one State unilaterally

64 *ibid.*

65 K. J. Partch, Armed Conflict, in R. Bernhardt, *Encyclopedia of Public International Law*, Vol. I., Elsevier, 1990, p. 251.

66 Dinstein, Y. *War, Aggression and Self-Defence*. CUP 2005, pp. 5-7.As Dinstein argued, there are two sorts of war: war in the technical sense and war in the material sense. War in the technical sense emphasizes the formalities – a declaration of war. Whether the countries did fire at each other is not important. For example, Germany and Latin America did not engage in a de facto armed clash in either war. However, due to the declaration of war, Germany and Latin America were de jure at war. Another example is the driehonderdvijfendertigjarige oorlog. The Netherlands, in 1651 allied with Cromwell, declared war against the Scilly Isles, where the British Royalist fleets were based. No shots were fired between the Dutch and the Scilly Islanders, and a peace treaty was not concluded between the Netherlands and the British Scilly Islands until 1986. During the time between a declaration of war and the conclusion of peace treaty, 335 years (!), the Netherlands and the Scilly Isles were in a state of war in the technical sense until 1986. See also L. Oppenheim, International Law, II, 202 (H. Lauterpacht ed., 7th ed., 1952.

67 Heinsch R.W. (2015), Conflict Classification in Ukraine: The Return of the "Proxy War"?, International Law Studies 91, pp. 331-333. International Committee of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* 1 (Opinion Paper, 2008), *available at* https://www .icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

68 ICTY, *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72 (RP D6413-D6491),* para. 70.

69 *ibid.* Pictet defined international armed conflict as 'any opposition between two states involving the intervention of their armed forces and the existence of victims', see Jean S. Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, p. 52 and Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, 1958, pp. 20-21.

uses armed force against another State even if the latter does not or cannot respond by military means."[70]

An IAC, which involves more than one Sovereign State, is equivalent to the concept of "war" in the Chicago Convention, because in 1944, the drafters of the Chicago Convention by and large had inter-state conflicts, *e.g.* the Second World War, in mind.[71] Having said that Contracting States recognize that Article 89 is to bridge the law of peace and the law of war,[72] IHL's developments in the connotation of 'war', since the 1940s, shall be taken into consideration in interpreting Article 89 of the Chicago Convention.[73] The criteria crystalized in IHL law and jurisprudence reflect the international community's evolutive understanding of the concept of 'war'. As of the 2020s, States have accepted the aforementioned criteria of IACs developed by IHL as customary international law, thereby replacing the usage of the term "war" with IAC.[74]

2.4 Triggers of the application of Article 89

2.4.1 The temporal dimension of war

The previous section examined the ordinary meaning of 'war' in the context of the Chicago Convention, together with the historical documents[75] and evolutive development in IHL.[76] It is now necessary to explore the application scope of Article 89 in light of past and current IHL developments. According to Article 89 of the Chicago Convention, the triggers of its application are two scenarios: war and national emergency. As said, in 1944, the term "war" probably referred only to hostilities between sovereign States – that is, inter-

70 See ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 2nd edition, 2016*, para. 223: "The unilateral use of armed force presupposes a plurality of actors and still reflects an armed confrontation involving two or more States, the attacking State and the State(s) subject to the attack, therefore satisfying the requirement of Article 2(1). The fact that a State resorts to armed force against another suffices to qualify the situation as an armed conflict within the meaning of the Geneva Conventions.", and its para. 193: "Article 2(1) broadens the Geneva Conventions' scope of application by introducing the notion of 'armed conflict', thereby making their application less dependent on the formalism attached to the notion of 'declared war." However, the question remains whether this progressive development is generally accepted.

71 See Section 2.2.2 of this chapter.

72 See Section 2.2 of this chapter. ICAO, "Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones" (18 September 2015) SGRIT-CZ/1 Draft Report, paras. 7.13-7.14.

73 *ibid.*

74 This section focuses on the concept of war. The other trigger of Article 89, national emergency, is discussed in the following Section 2.4.2 of this chapter.

75 See Section 2.3.3 of this chapter.

76 See Section 2.3.4 of this chapter.

national armed conflict (IAC).[77] More specifically, the critical point in identifying an international armed conflict is the intervention of members of armed forces.[78]

Applying these criteria to the dispute between India and Pakistan in 1971, one has to say that although there was a certain tension between the two countries, there were no firings between national armed forces. The UN Security Council had secured a cease-fire in September 1965,[79] and there was no *de facto* armed fire or use of force from February to July 1971. All in all, the decisive factor in defining a war is deeds – that is, the recourse to armed forces.[80] Since there was no actual use of force between the two countries, India was not at war with Pakistan in the first half of 1971. Therefore, Article 89 was not activated automatically on the grounds of war.

2.4.2 National emergency and non-international armed conflict (NIAC)

With respect to the term "national emergency" mentioned in Article 89, one can say that it covers broad situations.[81] In this context, it is safe to say that NIAC may also give rise to a 'national emergency',[82] although commentators may have different interpretation as to the intensity and level of organization.[83] Common Article 3 of Geneva Conventions is a starting point for interpreting the meaning of NIACs,[84] because that article has developed into the

77 Non-international armed conflict drew attention in 1970s, see ICRC, Protection of Victims of Non-International Armed Conflicts, Document presented at the Conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts, Vol. V, Geneva, 24 May–12 June 1971, p. 79. M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff 1982, pp. 45–52.

78 ICTY, Prosecutor v. Dusko Tadic, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995, para. 70.

79 UN Security Council Resolution 211 (1965).

80 ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

81 See Chapter II, Section 2.4.4 of this study on emergency.

82 See Section 2.4.2 of this chapter.

83 See for instance, the situation in Ukraine, Heinsch R.W. (2015), Conflict Classification in Ukraine: The Return of the "Proxy War"?, International Law Studies 91, p. 335.

84 Common Article 3 reads:
"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

absolute minimum standard applicable to non-international armed conflicts.[85] Common Article 3 seems to set forth only two required criteria when determining the existence of a non-international armed conflict: (a) the existence of a conflict "not of an international character," which has to (b) "occur on the territory of one of the High Contracting Parties."[86] On the basis of Common Article 3, international tribunals have further clarified the elements necessary to establish a NIAC.[87]

Regarding the relationship between NIAC and national emergency, it is up to a State to consider whether hostilities which reached the thresholds of NIAC may constitute a national emergency.[88] As explained in Section 2.4.4 of Chapter II, although the Chicago Convention does not specify criteria for a national emergency, a Contracting State is able to declare a national emergency for a State when the situation threats the life of the nation or the national interest is in peril.[89] The Chicago Convention does prescribe an obligation for a Contracting State declaring national emergency: the said State should notify the situation to the ICAO Council in order to suspend the application of the Chicago Convention.[90]

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

85 *ICJ, , Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986,* ICJ Reports 1986, para. 218.

86 Heinsch R.W. (2015), Conflict Classification in Ukraine: The Return of the "Proxy War"?, International Law Studies 91, p. 335.

87 The Appeals Chamber of the ICTY in the previously 1995 Tadiæ Jurisdiction Decision affirmed the following: Common Article 3 is only applicable to NIACs "whenever there is […] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." The ICTY 2008 Haradinaj Trial Chamber judgment further stressed two factors which need to be fulfilled: (1) the armed violence needs to amount to a certain intensity and (2) armed groups need to have a special level of organisation.

88 See Chapter II, Section 2.4.4.

89 *ibid.*

90 There have been some cases where States have notified ICAO of a state of emergency in their countries. In these situations, States have proclaimed that under Article 89 of the Chicago Convention, they were not able to comply with their obligations under the Chicago Convention. These cases include Honduras in 1957, India in 1962, Pakistan in 1965, Pakistan

This interpretation of war and national emergencies accounts for the ICAO Council's decision that from February to July 1971, there was no war or national emergency between India and Pakistan in the sense of Article 89 of the Chicago Convention.[91] First of all, there was no actual fighting to constitute 'war'; second, to invoke an emergency under Article 89, a State must notify the ICAO of the situation, but India had not filed a situation of national emergency with the ICAO.[92] Therefore, Article 89 was not triggered and Article 9 still applied to the case. In establishing a prohibited area, India had to observe the requirements, such as non-discrimination[93] as prescribed in Article 9 of the Chicago Convention.

In contrast to the 1970s, sadly in 2020s, an international armed conflict broke out after Russia declared a "special military operation" and Russian armed forces attacked Ukraine since 24 February 2022.[94] It is a war between two sovereign States,[95] condemned by the UN General Assembly as "the aggression against Ukraine in violation of Article 2(4) of the UN Charter."[96] The European Union Aviation Safety Agency updated their safety bulletin recommending air operators exercise caution due to heightened military activity.[97] Furthermore, European nations shut their airspace against Russian aircraft on 27 February 2022.[98] Commentators may question whether the pre-

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and India in 1971, and Iraq in 1973. See ICAO, 'Special Group to Review the Application of ICAO Treaties Relating to Conflict Zones' (26 June 2015) SGRIT-CZ/1-WP/1, para. 2.7.

91 See ICAO, Council – seventy-fourth session, Minutes of the Second meeting, ICAO Doc. 8956-c/1001, C-Min. LXXIV/s (closed), p. 275. This document was reproduced as Annex E to the Memorial submitted by the Government of India to the International Court of Justice in an Appeal Relating to the Jurisdiction of the ICAO Council, 22 December 1971, https://www.icj-cij.org/en/case/54/written-proceedings, last accessed 31 December 2018.

92 *ibid.*

93 See further Chapter II of this study on the limitations to the establishment of a prohibited airspace.

94 See the plead of UN Secretary General Mr. Guterres https://news.un.org/en/story/2022/02/1112592, last accessed 28 February 2022. "Russia declares war, launches attack in Ukraine; explosions reported", https://www.usatoday.com/story/news/politics/2022/02/23/russia-ukraine-invasion-crisis-update/6906567001/, last accessed 28 February 2022.

95 See UN General Assembly: Eleventh Emergency Special Session (Ukraine), convened on 28 February 2022. https://journal.un.org/classic/viewdetails/en/officials/d298e6e4-a436-4ae7-c171-08d9fa2de937/statements, last accessed 28 February 2022. See also «La guerre revient en Europe», https://www.leparisien.fr/politique/la-crise-en-ukraine-durera-emmanuel-macron-inquiet-dune-situation-imprevisible-26-02-2022-3NS6LHFN5BDL3OODUYYYUZPJ2U.php, last accessed 28 February 2022.

96 United Nations General Assembly Resolution ES-11/1 is a resolution of the eleventh emergency special session of the United Nations General Assembly, adopted on 2 March 2022. The resolution was sponsored by 96 countries, and passed with 141 voting in favor, 5 against, and 35 abstentions.

97 EASA updates Conflict Zone Information Bulletin with respect to Ukraine, https://www.easa.europa.eu/en/newsroom-and-events/news/easa-updates-conflict-zone-information-bulletin-respect-ukraine, last accessed 15 September, 2022.

98 https://www.reuters.com/business/aerospace-defense/europe-moves-close-its-skies-russian-planes-2022-02-27/, last accessed 28 February 2022.

conditions to close airspace, such as non-discrimination and reasonable extent in Article 9 of the Chicago Convention, have to be satisfied under such circumstances;[99] this section re-emphasizes that, as said in Section 2.5 of Chapter II, once a war breaks out and Article 89 of the Chicago Convention is thus activated, Contracting States affected, whether as belligerents or as neutrals, in this case Ukraine, the EU countries, and Russia,[100] are able to resume liberty so that their airspace closure measures are free from the preconditions in Article 9 of the Chicago Convention.

Therefore, the key conclusion is that whether the parties to the conflict recognize themselves as being at war or not is irrelevant.[101] Even if States have not declared war or notified the ICAO Council, as long as their armed forces have begun firing, they are legally in wartime. Based on the evolution of the law of war, including the revision of Geneva Conventions in 1949,[102] "war" in Article 89 of the Chicago Convention means IAC, that is, the recourse to armed forces between sovereign States.[103] This construction of 'war', meaning IAC, can explain the decisions of ICAO and the ICJ, in a way that is consistent with the development of both air law and IHL. Deeds mark the beginning of 'war' in Article 89 of the Chicago Convention. In times of national emergency, a Contracting State has to notify the ICAO Council of such situation in order to trigger the application of Article 89 of the Chicago Convention. Article 89 allows the State concerned to have a final say as to whether or not it encounters national emergency. Once Article 89 is activated, Contracting States are no longer bound by Article 9 of the Chicago Convention and thus are free to establish prohibited airspace against particular State(s).

2.4.3 The geographic dimension of combat zone and conflict zone

Having clarified that 'war' in Article 89 refers to IAC, the previous section explained the *temporal* dimension of war: the recourse to armed forces among

99 See Sections 2.5 and 2.6 of Chapter II.

100 See EU response to Russia's invasion of Ukraine – "The EU has shown unity and strength and has provided Ukraine with humanitarian, political, financial and military support." https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/, last accessed 15 September 2022. "EU agrees to give _500M in arms, aid to Ukrainian military in 'watershed' move", https://www.politico.eu/article/eu-ukraine-russia-funding-weapons-budget-military-aid/, see also https://www.ft.com/content/800b9cdc-e0a8-42c5-9cb5-3e04242ad9b3, last accessed 28 February 2022. It deserves a separate study to examine EU's role in the war and discuss whether EU's support to Ukraine put European nations in a situation of war against Russia, albeit the lack of formal recognition through declarations of war. On the declaration of war, see Section 2.3.4.2 of this chapter.

101 See Section 2.3.4.2 of this chapter

102 *ibid.*

103 *Heinsch*, pp. 235-236.

sovereign States marks the beginning of 'war'.[104] This section is designed to clarify the *geographic* dimension of war as laid down in Article 89.

A combat zone, or colloquially a 'war zone', is the place where an armed conflict takes place: IHL rules apply to armed conflicts;[105] and the geographical scope, as a matter of fact, can be called combat zones, although the latter is rather a factual term than a legal concept.[106] Plainly, military operations may not be carried out beyond the area of war.[107]

Relevant and similar to a combat zone, in the air law context, ICAO uses the concept of "conflict zones", defined as follows:

> Airspace over areas where armed conflict is occurring or is likely to occur between militarized parties, and is also taken to include airspace over areas where such parties are in a heightened state of military alert or tension, which might endanger civil aircraft.[108]

The ICAO definition of a conflict zone is not limited to areas in which an armed conflict is occurring or is likely to occur between militarized parties. It also includes "a heightened state of military alerts or tension". This definition covers more than the zones of armed conflict where actual armed fire exists. The expression "might endanger civil aircraft" only requires a *possibility* of endangering overflying aircraft. For instance, in November 2018, Russia captured three Ukrainian Navy vessels attempting to pass from the Black Sea into the Sea of Azov through the Kerch Strait.[109] This led to military tension in the areas surrounding the Kerch Strait. This area was a conflict zone according to the ICAO definition because missiles were deployed and the missiles posed risks to civil aircraft.[110] However, the area of Kerch Strait in November 2018 was *not* a *combat* zone in the sense of IHL: it was an area of military

104 See Section 2.4.1 of this chapter.

105 The thresholds of IAC and NIAC are explained in Section 2.3 of this chapter.

106 "The term 'combat zone' is a factual term which does not have any consequences for the application of IHL." See Heinsch R.W. (2012), Unmanned Aerial Vehicles and the Scope of the 'Combat Zone': Some Thoughts on the Geographical scope of Application of International Humanitarian Law, Humanitäres Völkerrecht – Informationsschriften 25(4): 184, p.185.

107 C. Greenwood, Scope of Application of Humanitarian Law, in: D. Fleck, Handbook of International Humanitarian Law, Oxford 2008, p. 216.

108 ICAO, "Procedure to Disseminate Information on Risks to Civil Aviation Arising from Conflict Zones," C-WP/14498, 2/5/16. ICAO, "Civil Aircraft Operations Over Conflict Zones," November 2016 (restricted).

109 "Kerch strait confrontation: what happened and why does it matter?", https://www.theguardian.com/world/2018/nov/27/kerch-strait-confrontation-what-happened-ukrainian-russia-crimea, last accessed 2 January 2019.

110 "Russia is going to deploy new missile systems in Crimea", https://www.cnbc.com/2018/11/28/russia-to-deploy-new-s-400-missile-systems-in-crimea.html, last accessed 2 January 2019.

standoff, but there was no intervention of members of armed forces among sovereign States.

That is to say, the ICAO definition of a conflict zone includes both combat zones, and areas of military alerts and tension. Combat zones are where armed intervention takes place, and areas of military alerts are where, for instance, missiles are positioned, posing risks to civil aviation, but no intervention has occurred yet. Nonetheless, a State may consider that these situations make national interest in peril and declare a *national emergency* and trigger the application of Article 89 of the Chicago Convention; alternatively, the State can declare emergency or public safety concerns;[111] therefore, in such as case, a State has the right to establish prohibited, restricted, or dangerous areas over its territory, subject to the conditions and requirements in Article 9 of the Chicago Convention.

2.5 Interim conclusions

In cases of war and national emergencies, the Contracting States affected are entitled to resume their freedom from action under the Chicago Convention and take self-preserving measures, including airspace restrictions. As to the meaning of war, this section explored the ordinary meaning, the preparatory history, and ICAO proceedings to confirm that in 1944 'war' meant armed conflict between sovereign States. Due to the development of the law of war since 1949, this section clarified that the equivalent concept to 'war' is 'international armed conflict', as it has been predominantly used in international (humanitarian) law. The starting point of international armed conflict, a war, is the beginning of recourse to armed forces, regardless of the declaration of war.

A combat zone is where an armed conflict takes place, including international and non-international armed conflicts (IAC and NIAC). The ICAO definition of conflict zones is broader than the concept of combat zone in IHL, because it includes areas where parties are in a heightened state of military alert or tension.[112] In a heightened alert area, perhaps there was no recourse to armed forces yet, but deployed weapons still pose a risk to civil aircraft.

For such a heightened alert area, in accordance with Article 9 of the Chicago Convention, a Contracting State, invoking military necessity, emergencies, or public safety concerns, has the right to establish prohibited areas

111 Regarding the conditions to prohibit or restrict the use of airspace, see Chapter II of this study.

112 ICAO, "Procedure to Disseminate Information on Risks to Civil Aviation Arising from Conflict Zones," C-WP/14498, 2/5/16. ICAO, "Civil Aircraft Operations Over Conflict Zones," November 2016 (restricted).

over its territory; in extreme cases where national interest is in peril,[113] the State may declare a national emergency due to this heightened area, and notify the ICAO Council – this means the State triggers the application of Article 89 and resumes freedom from the Chicago Convention.

In the case of an IAC, that is 'war', a State does not need to notify the ICAO Council and Article 89 is activated automatically. In case of a NIAC, a State should notify the ICAO Council when it considers that the situation amounts to national emergency. In doing so, Article 89 of the Chicago Convention is activated and a Contracting State resumes liberty from the Chicago Convention: the said State is no longer bound by the requirements in Article 9, such as that of non-discrimination, in establishing prohibited airspace. The following table helps clarify the terms and governing rules of each situation.

113 See Chapter II of this study, Section 2.4.4.

Table 2: Prohibited airspace in times of IAC, NIAC and military tensions[114]

	Temporal dimension	*Geographic dimension*	*Link with the Chicago Convention*	*Applicability of IHL*
IAC	Starting from the recourse to armed forces	Combat zones, meanwhile also Conflict zones	- Automatic trigger Article 89; the State's acts are regulated by IHL - the State is entitled to establish prohibited airspace free from qualifications in the Chicago Convention	Applicable
NIAC	Starting from the existence of a conflict not of an international character		- The State is entitled to invoke military necessity, emergencies, or public safety concerns to establish prohibited airspace, subject to the requirements such as non-discrimination in Article 9 - alternatively, when national interest is in peril, the States has to notify ICAO of national emergency to trigger the application of Article 89; and after that, the State is entitled to establish prohibited airspace free from qualifications in Article 9	Applicable, in a limited fashion compared to IAC
Military alert or tension	Starting from military tension or alert that might endanger civil aircraft	Conflict zones only	Depending on the situation, the State may - invoke military necessity, emergencies, or public safety concerns to establish prohibited airspace, subject to the requirements such as non-discrimination in Article 9 - alternatively, when national interest is in peril, the States has to notify ICAO of national emergency to trigger the application of Article 89; and after that, the State is entitled to establish prohibited airspace free from qualifications in Article 9	Not applicable

114 Source: created by the author.

3 THE OBLIGATION TO ESTABLISH PROHIBITED AIRSPACE OVER CONFLICT ZONES

3.1 Preliminary remarks

As said, IHL rules apply to armed conflicts; and the factual geographical scope can be expressed as combat zones.[115] With respect to combat zones, throughout the year 2019,[116] the Uppsala Conflict Data Program (UCDP) recorded 54 active state-based conflicts: the highest number in the post-1946 period, including seven wars and 28 state-based conflicts involving IS (Islamic State), al-Qaida, or their affiliates.[117] The graphically concrete description would be that "dozens of passenger planes are still flying over combat zones and conflict areas on a daily basis".[118] As aviation naturally needs to traverse great areas, it is highly probable that thousands of people fly over conflict zones that are left open by the territorial States every day.

In discussing rules for establishing prohibited areas, it is inevitable to examine general IHL rules, in addition to the Chicago Convention.[119] Therefore, this chapter studies IHL obligations for combat zones and explores the rationale for expanding IHL obligations to ICAO's conflict zones. This section argues that prohibited airspace over conflict zones should be set up as precautionary measures to safeguard aviation safety and security. The obligation to set up prohibited airspace over conflict zones is underpinned by humanitarian rules in public international law. The rationale to prioritize civilian

115 See Section 2.4.2 of this chapter.

116 This study uses the data from the year 2019, prior to the global COVID-19 pandemic, to discuss the impact of armed conflict to air travel. The reason is that, since the global pandemic begun, the study of conflict prevention and resolution has brought in a new focus – the fight against the virus COVID-19: on 23 March 2020, Secretary-General António Guterres issued an urgent appeal for a global ceasefire in all corners of the world to focus together on the true fight against COVID-19. See https://www.un.org/en/globalceasefire, last accessed 27 December 2021. The author believes that the pandemic is an extraordinary period of time which will finally end, so this study does not investigate the data during the pandemic. The chapter is written to prepare for humanity's return to the normal.

117 Pettersson, Therese & Magnus Öberg (2020) Organized violence, 1989-2019. Journal of Peace Research 57(4), pp. 597-613.

118 Janene Pieters, "Passenger Jets Still Flying Over Conflict Zones" < http://www.nltimes.nl/2015/07/14/passenger-jets-still-flying-over-conflict-zones/> accessed 5 May 2020. Since 2016, armed conflicts are increasing, so more flights are operating over conflict zones. Arguably, not all armed conflicts could affect air space and some conflicts present no missile capability so far. However, MH17 accident was also considered astonishing in that the conflict should expand to airspace above the flight level 320. See Dutch Safety Board, *Crash of Malaysia Airlines flight MH17,* (the Hague, October 2015) <www.safetyboard.nl> accessed 15 May 2020, 195. A full examination of aviation risk assessment and management is beyond the scope of the normality discussion this paper hopes to offer.

119 See Section 2.2 of this chapter.

protection is built on, as cited in the *Corfu Channel* case, the "elementary considerations of humanity".

3.2 General international law – the *Corfu Channel* case

In the famous *Corfu Channel* case,[120] where two British ships struck mines in Albanian waters, the perpetrator of mine laying remained unknown. While Albanian knowledge of the mine was abstract, Albanian responsibility was nevertheless established.[121] The ICJ reckoned that the obligation to disclose the existence of a minefield and warn approaching British warships was based on "elementary considerations of humanity."[122]

The *Corfu Channel* statement is significant in two particular ways: first, it takes note of the need to safeguard the safety and security of transportation;[123] second, it highlights the importance of a general norm regarding human protection.[124] At the time when the UN Charter had just entered into force, and no elaborate human rights law regime was in place, such "considerations of humanity" were in fact "related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy."[125]

Notably, the phrase "elementary considerations of humanity" has been echoed and emphasized in subsequent domestic and international decisions.[126] It has been invoked in humanitarian, environmental, human rights,

120 ICJ, *Corfu Channel Case (United Kingdom v Albania),* Merits, ICJ Reports, 1994, p. 4.
121 *ibid,* p. 36.
122 *ibid,* pp.15-23.
123 The *Corfu Channel* doctrine was later reiterated and developed later in the law of the sea cases, e.g. The *M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)* Merits, Judgment, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), 1 July 1999, International Tribunal for the Law of the Sea [ITLOS], para. 155 ('*Saiga*'); *The "Juno Trader" Case (Saint Vincent and the Grenadines v Guinea Bissau)* Prompt Release, ITLOS Case No 13, ICGJ 346 (ITLOS 2004), 18 December 2004, ITLOS, para. 77, see also Separate Opinion of Judge Treves, para. 1; Joint Separate Opinion of Judges Mensah and Wolfrum, para. 34.; *Guyana v Suriname*, Award, 17 September 2007, Permanent Court of Arbitration [PCA] para. 405. *The Arctic Sunrise Arbitration (Netherlands v Russia)* Award, 14 August 2015, PCA, para. 191.
124 Ian Brownlie, *Principles of Public International Law*, 7th edn, OUP 2008, p. 27.
125 *ibid.*
126 See the recounts in Matthew Zagor, "Elementary considerations of humanity," in Karine Bannelier, Theodore Christakis & Sarah Heathcote (eds), *The ICJ and the Evolution of International Law,* Routledge 2012, p. 264.

and maritime law cases.[127] This established the basis of what some consider to be a constitutionalist, value-oriented formulation of international law.[128]

However, the connotation of "elementary considerations of humanity" is not unequivocal. Those seeking further enlightenment as to the nature and status of the principle or how the judges reached their conclusion in the *Corfu Channel* case find little assistance in the judgments or arguments put to the ICJ.[129] Before other tribunals, decisions can vary in what exactly those "considerations of humanity"[130] are, as well as their legal implications. For some judges, the expression is considered to be indicative of fundamental human rights and dignity, serving the purpose of protecting individuals,[131] whereas others seemed to consider it as a matter which underpins the *lex lata*, yet at the same time, leads to a more human-oriented *lex ferenda*.[132] Importantly, the background behind both schools of thought is that these "considerations of humanity" are invoked solely by individuals against allegedly unlawful

127 *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para. 215; *Prosecutor v Kupreškiæ et al*. (Trial Judgment) ICTY-95-16-T (14 January 2000), para.524. Especially, In *Abu Zubaydah v Poland*, European Court of Human Rights held that Poland violated Article 3, art. 8 and art.13 of European Convention of Human Rights, because Poland made no attempt to prevent those violations of human rights from happening, see *Abu Zubaydah v Poland* App no 7511/13 (ECtHR, 24 July 2014). See also *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998), para. 116; *Z and Ors v United Kingdom* App no 29392/95 (ECtHR, 10 May 2001), para. 73; Inter-American Court of Human Rights *Velásquez Rodriques v Honduras (Merits),* 29 July 1988, Series C, No. 4, paras 172-175; Helen Duffy, *The 'War on Terror' and the Framework of International Law* (CUP 2015), pp. 472-473, 804; Sandra Kra¨henmann, 'Positive Obligations in Human Rights Law During Armed Conflicts' in Robert Kolb and Gloria Gaggioli eds., *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar 2013, p. 170.

128 Matthew Zagor, "Elementary considerations of humanity," in Karine Bannelier, Theodore Christakis & Sarah Heathcote eds., *The ICJ and the Evolution of International Law,* Routledge 2012, p. 264.

129 *ibid* p. 266. As to the doctrine's place in the topology of international law sources, there have been quite voluminous discussion, e.g., Fitzmaurice aligned "an obligation to act in accordance with elementary considerations of humanity" in the context of discussing "general principles of good conduct," see G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles and Substantive Law" (1950) 27 British Ybk Intl L, p. 4; H. Waldock, "General Course on Public International Law"(1962) 106 Recueil des Cours de l'Académie de Droit International p. 63 ; F. Francioni, "International 'Soft Law:' A Contemporary Assessment," in V. Lowe and M. Fitzmaurice (eds) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings,* CUP 1996, p. 169; F.O. Raimondo, "The International Court of Justice as a Guardian of the Unity of Humanitarian law" (2007) 29 *Leiden Journal of International Law,* p. 597.

130 ICJ, *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep, pp. 15-23. Coupland, R. (2001). Humanity: What is it and how does it influence international law? *Revue Internationale de La Croix-Rouge/International Review of the Red Cross*, *83*(844), pp. 969-970.

131 *Saiga, Separate Opinion of President Mensah*, para. 20.

132 *Saiga*, *Dissenting Opinion of Judge Ndiaye*, para. 90.

action exercised by the State.[133] This is the anchor point at which the present issue of airspace usage can relate to considerations of humanity.

Considering the contentious and ever-lasting debate over the nature and application of these "considerations of humanity", this section does not endeavor to further elaborate on its normativity, but rather argues that this formulation offers the proposition that air law discussions must take humanitarian considerations into account. This compromise of subjecting airspace management to civilian protection is consistent with general principles of international law. The interaction of air law and the law of war deserves attention for discussions about prohibited airspace over conflict zones.

3.3 Humanitarian rules

As discussed in Section 2.4 of this chapter, pursuant to Article 89 of the Chicago Convention, a Contracting State enduring a war resumes freedom automatically from the Chicago Convention, meaning that it does not need to notify the ICAO Council. The State concerned does not need to fulfill the requirements in Article 9 of the Chicago Convention to establish prohibited airspace. Meanwhile, the said State has to observe IHL as the applicable law in armed conflicts.[134] As explained in Section 2.2 of this chapter, Article 89 bridges the Chicago Convention and IHL. IHL rules supplement the Chicago Convention when it comes to the time of war.

3.3.1 Customary rule on precautionary measures

As the prevailing regime governing armed conflicts, established IHL rules reveal the effort of the human conscience to mitigate the brutalities and dreadful sufferings created by armed conflicts.[135] The four Geneva Conventions and

133 Traditionally, such "considerations of humanity" are applied to cases where the rights of people are on one side and State obligation is on the other. However, the *Enrica Lexie* case presents a different situation, in which the rights of two groups of humans oppose each other and they both invoke humanitarian arguments. A distinction is carefully drawn here. See *The "Enrica Lexie" Incident (Italy v India)* Provisional Measures, Order of 24 August 2015, ITLOS, para. 133. <www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/C24_Order_24.08.2015_orig_Eng.pdf > accessed 25 July 2016. On the one hand, Italy invokes considerations of humanity to protect its marines from the alleged breaches of due process; on the other hand, India put forward humanitarian considerations to bring to trial Italians who have allegedly killed two Indians. As Judge Paik has observed, "there are differences between the present case and those other cases, the most critical one being the difference in terms of the gravity of the offence allegedly committed by the accused." *Declaration of Judge Paik*, para. 7.

134 See Section 2.4.2 of this chapter.

135 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Dissenting Opinion of Judge Weeramantry) [1996] ICJ Rep, pp. 429, 443.

their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war.[136]

> Among others, IHL establishes the obligation to take precautionary measures, [I]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects.

As such, "those who plan or decide upon an attack shall […] *take all feasible precautions* in the choice of means and methods of attack with a view to avoiding, and in any event, minimizing incidental loss of civilians".[137] The ICTY in the *Kupreškiæ* case further ordered "each party to the conflict, *to the extent feasible*, *to remove civilian persons and objects under its control from the vicinity of military objectives* in both international and non-international armed conflicts."[138]

In terms of the principle of precautions, this section does not expand on the application of this principle in IAC and NIAC, because State practices established this rule as a norm of customary international law applicable in both international and non-international armed conflicts.[139] Consequently, as long as armed conflicts exist, no matter whether it triggers an IAC (war) or a NIAC which gives rise to national emergency, the territorial State is entitled to resume freedom from the Chicago Convention, but at the same time is obliged to take feasible precautious measures in accordance with IHL.

The crucial question is, what can be understood by 'feasible' precautions? In general, feasible refers to those measures which are practicable, taking into account all circumstances at the time.[140] General Assembly Resolution 2444 (XXIII) and Resolution 2675 (XXV), reflecting *opinio juris*,[141] clarified that *every*

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136 See ICRC, 'The Geneva Conventions of 1949 and their Additional Protocols', https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols, last accessed 27 December 2021.

137 See Article 57 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('API').

138 *Prosecutor v Kupreškiæ et al*. (Trial Judgment) ICTY-95-16-T (14 January 2000), paras. 49, 132 and 524.

139 ICRC, Customary IHL Database, Rule 15, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15#Fn_4C706F6B_00019, last accessed 27 December 2020. In addition, for Contracting States of the Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts, they are obliged to observe Article 57 and 58 of API and take precautionary measures in attach and against the effects of attacks.

140 See ICRC, Customary IHL Database, Rule 15, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15#Fn_4C706F6B_00019, last accessed 27 December 2020.

141 With respect to an *opinio juris*, its existence may be proven by UN General Assembly Resolutions that may have normative value, especially those in certain formulations that contain the term "should". See *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* para. 70.

effort should be made to spare civilian populations from the ravages of war, and *all necessary precautions should be taken to avoid injury, loss, or damage to civilians*.[142] Therefore, in considering feasible precautions, every and all necessary measures shall be taken into account.

In particular, precautionary measures must be taken by both the attacking party ("precautions in attack") and the attacked party ("precautions against the effects of attack").[143] Before an attack, those who plan and decide upon the attack must do everything feasible to verify that their targets are military and not civilian in nature.[144] The party to be attacked must remove the civilian population under their control from the vicinity of military objectives, like military headquarters or barracks.[145] The attacked party is obliged, to the maximum extent feasible, to take measures to protect the civilian population under their control against military attacks from the enemy.

3.3.2 *Customary obligation of removing civil objects from combat zones*

Having clarified the customary international law rule to take precautions in armed conflicts, this section argues that this precaution rule obliges States dealing with armed conflict to establish prohibited areas. Customary IHL rules and ICTY jurisprudence confirm that States have the customary humanitarian obligation to remove civilian objects from combat zones.[146] Parties to armed conflict, including the State engaging in international or non-international armed conflict, should remove civilian persons and objects under its control from the vicinity of military objectives to the extent feasible.[147]

Considering that civil aircraft fall into the category of civilian objects, applying the IHL rule on precautionary measures, a State dealing with armed conflict is obliged under IHL to remove civil aircraft and civilians away from combat zones. In the discharge of this obligation, the concerned State shall establish restrictions to the use of airspace in advance, because this precautionary measure is the only feasible and effective way to *remove* in-transit civil aircraft from dangers in the sense that aircraft will not come into combat zones. If a civil aircraft has to fly into a combat zone, the aircraft is highly vulnerable to attacks from weapons such as missiles. For the vast majority of civil aircraft, no mitigating actions is available once a plane is operating on a dedicated flight

142 UNGA Res 2444 (XXIII) (19 December 1968) UN Doc A/7218 (adopted by unanimous vote of 111 votes in favor to none against); UNGA Res 2675 (XXV) (9 December 1970) UN Doc A/RES/2675 (adopted by 109 votes in favor; none against, and eight abstentions).

143 *Heinsch*, pp. 242-243.

144 *ibid.*

145 *ibid.*

146 See Section 3.3.1 of this chapter. See also *Prosecutor v Kupreškiæ et al*. (Trial Judgment) ICTY-95-16-T (14 January 2000), paras. 49, 132 and 524.

147 *ibid.*

route at cruising altitude where a missile was waiting.[148] Any mitigating actions to reduce vulnerability will need to take place prior to the flight reaching the conflict zone.[149] The only mitigation action available is to urgently close airspace.[150] Alternatives such as to intercept or divert flights at the last minute requires coordination between the pilot and technical departments;[151] in time-sensitive situations as such, it is difficult, if not impossible, for a civil aircraft in-flight to escape from the chase of flying missiles.

It is worth re-emphasizing that establishing prohibited airspace for in-transit aircraft is necessary because such civil aircraft deserve protection. The aircraft is civil in nature, and it flies *over*, not *lands into*, a combat zone.[152] Due to the inherent technical aspects of aviation, the civil aircraft and passengers highly rely on the provision of ATS.[153] The civil aircraft operates at a height of more than 31,000 feet without any military capability, and passengers are fastened into their seats. In the course of its normal operation, free from external interferences, the aircraft and passengers on board do not have the chance to get into touch with hostiles on the ground.

Takin into account of the vulnerability of civilians, IHL customary rules have established a State's obligation to take feasible precautionary measures; *a fortiori,* in the context of protecting in-transit civil aircraft, States thus shall take more stringent precautionary measures to protect in-transit aircraft and passengers. Considering the technical realities, precautionary measures as such should include the establishment of prohibited airspace.[154] This standing is supported by "the actual practice and *opinio juris* of States."[155] A number of States adhere to the practice of advising their airlines not to fly over conflict zones. For example, regarding the case of MH17, national aviation authorities and airlines, including all US commercial airlines, British Airways, Qantas, and Cathay Pacific had been avoiding Ukrainian airspace for months after receiving a Notice to Airmen (NOTAM).[156]

Airspace usage over conflict zones is to be compromised by the obligation under IHL to take precautionary measures. These obligations are powerful

148 ICAO Doc 10084, *Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones*, 2nd ed., 2018, para. 4.1.4.

149 *ibid.*

150 *ibid,* para.4.6.7.

151 See Chapter III on the technical aspects of air traffic control.

152 See Dutch Safety Board, *Report on the MH17 accident,* pp. 23-24.

153 See Chapter III, Section 2.

154 On technical aspects of contingency plans, see Chapter III, Section 4.3 of this study.

155 Continental Shelf (Libyan Arab Jamahiriya v Malta), (Merits) [1985] ICJ Rep 13, para. 27.

156 U.S. FDC 4/2182 (A0025/14)–null AIRSPACE SPECIAL NOTICE UKRAINE POTENTIALLY HAZARDOUS SITUATION -SIMFEROPOL (UKFV) AND DNEPROPETROVSK (UKDV) FLIGHT INFORMATION REGIONS (FIR). See also Rupert Neate and Jessica Glenza, 'Many airlines have avoided Ukrainian airspace for months' (London, 18 July 2014), http://www.theguardian.com/world/2014/jul/18/airlines-avoid-ukraine-airspace-mh17, last accessed 14 May 2016. See also the following Section 3.3.3.2 of this chapter.

constraints for all the States subscribed to the cause of maintaining peace and security. Both air law and IHL aim to promote civilian safety. The commitments set out in humanitarian instruments lead to the security assurances given by the international community to civilians. Based on the IHL principle of precautions, air law should recognize an obligation to establish prohibited airspace over combat zones.

3.3.3 *The expansion of customary obligations to 'conflict zones' defined by ICAO*

Building on the existence of an obligation to protect civilians in international humanitarian law, this section continues to argue for a humanitarian obligation to establish prohibited airspace over conflict zones which encompass heighted alert areas, in addition to combat zones. The use of airspace over heighted alert areas needs to consider the IHL obligation to take precautionary measures.

IHL applies to armed conflicts, excluding disturbances and tensions;[157] whereas previous sections of this chapter clarify that the concept of conflict zones may also cover situations of military tensions. Observing the mismatch, this section argues that the humanitarian obligation to establish prohibited airspace, deriving from IHL, should be expanded from armed conflict scenarios to include military tensions which could endanger civil aircraft. Even if there has been no active armed conflict as defined in IHL, since local situations create military alerts or tension that could endanger civil aircraft, this airspace should be closed. The reason is that such military alerts or tension creates risks to overhead aircraft no less real than those in active armed conflict: this proposition is testified by the PS752 tragedy.

3.3.3.1 *The tragedy of PS752*

On 3 January 2020, Iran declared the intention to strike US bases in Iraq, though at the time of writing it has not yet done so.[158] The areas of concern are conflict zones that have created military tension, but there has been no firing yet. Nonetheless, flight PS752 was shot down shortly after takeoff from Tehran Imam

157 International humanitarian law distinguishes between international armed conflicts, opposing two or more States, and non-international armed conflicts. ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, paras. 84, 135-179. D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', The Hague Academy Collected Courses, Vol. 63, 1979-II, p. 147.

158 See BBC, 'Iran missile attack: Did Tehran intentionally avoid US casualties?', https://www.bbc.com/news/world-middle-east-51042156, last accessed 7 July 2021.

Khomeini International Airport on 8 January 2020.[159] All 176 people aboard were killed.[160]

The tragedy of PS752 could have been avoided, if relevant States had established prohibited airspace over the areas around the said airport due to heightened military alert situations following the killing of Iranian General Qasem Soleimani;[161] it was widely reported in January 2020 that Iran retaliated by launching ballistic missiles against US bases in Iraq.[162] Although there was no armed conflict in Tehran in the sense of IHL, airlines nonetheless took precautions. Several countries prohibited their airlines from operating in Iranian and Iraqi airspace due to the high safety risk to civil aircraft.[163] Civil aviation authorities chose to suspend operations rather than run the risk of flying over the areas of heightened military alert situations.[164] These practices upholding aviation safety and security conform to the object and purpose of the precautionary principle in IHL.[165] Therefore, the author argues to translate the precautionary principle into restrictions of airspace usage over heightened alert areas.

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159 "Iran Says It Unintentionally Shot Down Ukrainian Airliner". The New York Times. 10 January 2020. Archived from the original on 11 January 2020. Retrieved 10 January 2020. "Ukrainian airplane with 180 aboard crashes in Iran: Fars". Reuters. 8 January 2020. Archived from the original on 8 January 2020. Retrieved 8 January 2020.

160 BBC, 'Iran plane crash: What we know about flight PS752', https://www.bbc.com/news/world-middle-east-51047006, last accessed 7 July 2021.

161 "FAA bans US airlines flying over Iraq, Iran and Gulf after missile attacks". South China Morning Post. 8 January 2020. Archived from the original on 8 January 2020. Retrieved 9 January 2020. Hatch, Patrick (8 January 2020). "Qantas to divert some flights after Iran missile attack". The Sydney Morning Herald. Archived from the original on 8 January 2020. Retrieved 9 January 2020. "Airlines re-route flights away from Iraq, Iran airspace after missile attack on U.S. troops". gulfnews.com. Archived from the original on 9 January 2020. Retrieved 9 January 2020. "Major airlines re-route flights away from Iraq, Iran airspace". The Business Times. 9 January 2020. Retrieved 9 January 2020.

162 Bhattacharjee, Amanda Macias,Jacob Pramuk,Riya (7 January 2020). "Iran fires missiles at multiple bases housing US troops in Iraq". CNBC. Archived from the original on 8 January 2020. Retrieved 9 January 2020.

163 Kaminski-Morrow, Davin. "US bans Iranian and Iraqi overflights citing risk to aircraft". Flight Global. Retrieved 8 January 2020.

164 "FAA bans US airlines flying over Iraq, Iran and Gulf after missile attacks". South China Morning Post. 8 January 2020. Archived from the original on 8 January 2020. Retrieved 9 January 2020. Hatch, Patrick (8 January 2020). "Qantas to divert some flights after Iran missile attack". The Sydney Morning Herald. Archived from the original on 8 January 2020. Retrieved 9 January 2020. "Airlines re-route flights away from Iraq, Iran airspace after missile attack on U.S. troops". gulfnews.com. Archived from the original on 9 January 2020. Retrieved 9 January 2020. "Major airlines re-route flights away from Iraq, Iran airspace". The Business Times. 9 January 2020. Retrieved 9 January 2020.

165 On the object and purpose of the precautionary principle, see ICRC, Customary IHL Database, Rule 15, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15#Fn_4C706F6B_00019, last accessed December 27, 2020. In addition, for Contracting States of the Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts, they are obliged to observe Article 57 and 58 of API and take precautionary measures in attach and against the effects of attacks.

Regarding the risk assessment, as said in Section 2.6 of Chapter I, aviation safety does not mean zero risk but aims to reduce the risk to an acceptable level. This chapter highlights the fact that the risk level associated with civil aviation over Iraq and Iran was not acceptable in January 2020 due to the trajectories of ballistic missiles: this legal study is not to explore the technical algorithm used by civil aviation authorities but reiterate their findings[166] that the risk of operating civil aircraft exceeded the acceptable level. Considering the unacceptable risk level associated with destruction weaponry, the scope of the conflict zone should take into account the radius of the possible destruction by anti-aircraft weaponry. Therefore, conflict zones as defined by ICAO, meaning areas posing risks to civil aircraft in-transit, should include the areas of Iran and Iraq that were susceptible to ballistic missiles, even if there is no armed conflict under IHL. The author proposes extending the precautionary measures to heighted alert areas by establishing prohibited airspace.

Understanding that civil aviation operations over certain areas during a certain time may be too risky, States should be aware that they have an obligation to protect civilian aircraft from *upcoming* missile strikes. The establishment of prohibited airspace is a commendable example of performing such humanitarian obligations. Due to the possibility of endangering civil aircraft, ICAO specifically included those heightened military alert situations into the concept of 'conflict zones'.[167]

If one still thinks that the tragedy of PS752, during heightened military alert situations, is 'one single shot', the following table shows that recurrent attacks happened during heightened military alert situations, that is, over 'conflict zones' as defined by ICAO. Whether all of these incidents were in fact during armed conflicts is still a matter of considerable debate, such as Afghanistan in 1984.[168] Some heightened military alert situations did not satisfy the thresholds in IHL such as "protracted armed violence",[169] but those situations pose the same risk to overflying aircraft just as active armed conflicts. Bearing in mind the comparable risk level, it is reasonable to extend precautionary measures to airspace over heightened alert areas by establishing prohibited airspace.

166 *ibid.*

167 See Section 2.4.3 of this chapter.

168 Coldren, Lee O. "Afghanistan in 1984: The Fifth Year of the Russo-Afghan War." Asian Survey, vol. 25, no. 2, 1985, pp. 169–179.

169 Dustin A. Lewis, The Notion of "protracted armed conflict" in the Rome Statute and the termination of armed conflicts under international law: An analysis of select issues, International Review of the Red Cross (2019), 101 (912), pp. 1091–1115.

Table 3: Attacks against Civilian Aircraft over 'Conflict Zones' as defined by ICAO (1978-2020)[170]

Date	*Location*	*Aircraft*	*Operator*	*Outcome*
8 Nov 1983	Angola	Boeing 737	Angolan Airlines (TAAG)	130 fatalities of 130 people on board
9-Feb 1984	Angola	Boeing 737	Angolan Airlines (TAAG)	Aircraft overran runway on landing after being struck by a missile at 8,000 ft during climb out. No fatalities with 130 on board.
21 Sep 1984	Afghanistan	DC-10	Ariana Afghan Airlines	Aircraft was damaged by the missile, including damage to two hydraulic systems, but landed without further damage. No fatalities.
3 July 1988	Strait of Hormuz	Airbus A300B2-203	Iran Air	290 fatalities of 290 people on board.
10 Oct 1998	Democratic Republic of Congo	Boeing 727	Congo Airlines	41 fatalities of 41 people on board.
4 Oct 2001	Black Sea	Tupolev Tu-154M	Siberia Airlines	78 fatalities of 78 people on board.
22 Nov 2004	Iraq	Airbus A300	DHL Cargo	Aircraft suffered a complete loss of hydraulic power and departed the runway during an emergency landing.
17 July 2014	Ukraine	Boeing 777-200ER	Malaysia Airlines	298 fatalities of 298 people on board.
8 Jan 2020	Iran	Boeing 737-8KV	Ukraine International Airlines	176 fatalities of 176 people on board.

These accidents involving planes being shot down could have been avoided if prohibited airspace had been established. Said accidents create a growing awareness of the need to protect the aviation industry and passengers from conflict zones and from the misunderstanding that unsafe airspace can nonetheless be utilized. If such protection is not achieved, how many more civil aircraft will need to be destroyed over conflict zones in order to bring changes?

170 Source: created by the author.

3.3.3.2 Obligatory prohibited airspace over heighted alert areas

Reality testifies that not only armed conflict but also heightened military alert situations can endanger overflying civil aircraft. The most recent example is the closure of Ukrainian airspace in February 2022. On 12 February 2022, the United States warned that Russian troops could invade the eastern European nation at any time.[171] Ukraine officially closed the country's airspace to commercial flights on 24 February 2022, citing a "high risk" amid Russia's invasion;[172] this official flight restriction notice came *just before* Russian President Vladimir Putin announced that his forces would launch a "military operation" in Ukraine. Having clarified in Section 2.3.4 of this chapter that the actual resort to armed forces marks the beginning of "war", that is 24 February 2022; whereas the Russian deployment of troops at the eastern border of Ukraine had already posed imminent risk to overflying aircraft at least since February 13, according to the US intelligence.[173] Immediately on 13 February 2022, the Dutch airline KLM and Germany's Lufthansa stopped their service to Ukrainian airspace.[174] After the tragedies of MH17 and PS752, it is widely acknowledged that the risk associated with conflict zones exceeds the acceptable level and civil aircraft should not continue run the such risk.

171 The Economist. "Russia's invasion of Ukraine". 26 February 2022. Archived from the original on 26 February 2022.

172 A full list of affected airlines and their responses can be found at https://www.euronews.com/travel/2022/02/24/ukraine-travel-are-airlines-still-flying-to-poland-russia-belarus-lithuania-moldova, last accessed Feb 25, 2022.

173 See https://www.reuters.com/world/biden-putin-speak-ukraine-warnings-mount-2022-02-12, last accessed 25 February 2022.

174 See https://www.reuters.com/world/europe/ukraine-sees-no-point-closing-its-airspace-presidential-adviser-says-2022-02-13/, last accessed Feb 25, 2022.

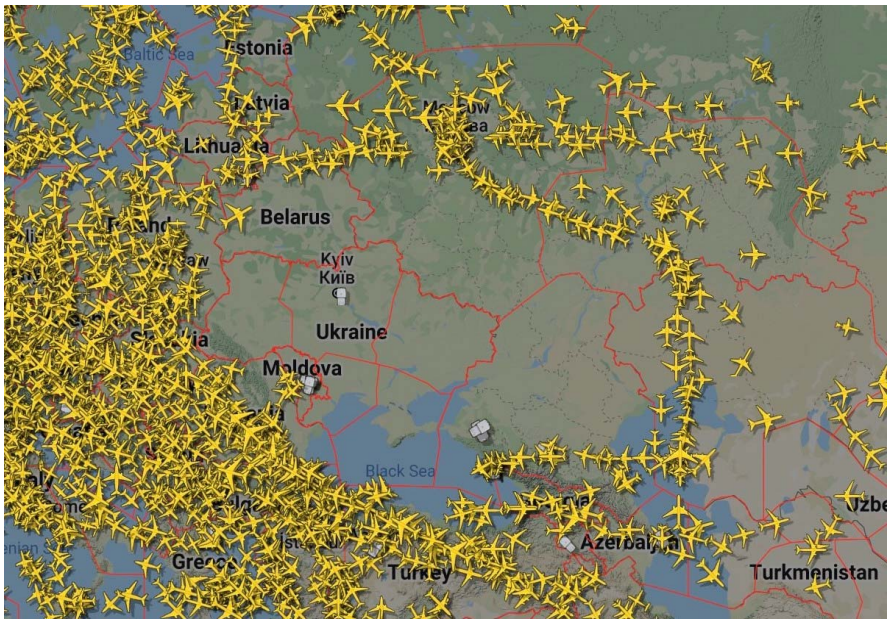

Figure 16: Civil aviation over Ukraine on 24 February 2022[175]

It is well accepted by airspace users that to close airspace after military attacks would be too late.[176] Drawing the lessons from the tragedy of PS752,[177] Canada, together with ICAO, has championed the Safer Skiers Initiative to protect civil aircraft flying over conflict zones.[178] The conscience of the international community has also responded in the Security Council Resolution[179] with the sufficiently demonstrated collective will to eliminate such external

175 Source: https://www.flightradar24.com/blog/ukraine-aviation-situation-updates/, last accessed 26 February 2022.

176 See https://www.standard.co.uk/news/world/major-airlines-divert-flights-ukraine-airspace-russia-b982417.html, last accessed 26 February 2022.

177 See the remarks of Canadian Minister of Transport for intervention in the ICAO Council: Fifth meeting of the 222nd session of the Council ICAO headquarters, Montreal, Canada (Via Zoom),https://www.canada.ca/en/transport-canada/news/2021/03/speaking-notes-for-the-honourable-omar-alghabra-minister-of-transport-remarks-for-intervention-in-the-icao-council-fifth-meeting-of-the-222nd-sessi.html. last accessed 26 February 2022.

178 On Safer Skies Initiative, see https://tc.canada.ca/en/initiatives/safer-skies-initiative, last accessed February 26, 2022. See Canadian Minister of Transport provides update on Safer Skies Initiative at ICAO Council meeting, https://www.canada.ca/en/transport-canada/news/2021/06/minister-of-transport-provides-update-on-safer-skies-initiative-at-icao-council-meeting.html, 18 June 2021, last accessed 26 February 2022.

179 UN Security Council Resolution 2166 (21 July 2014)

risk to civil aviation. The general public expressed their dissatisfaction in the Dutch Parliament Hearing on 22 January 2016.[180]

Over conflict zones, airspace has to be closed prior to the beginning of military strikes: the timing should be when the local situations create military alerts or tension that pose risks to civil aircraft, including the situations of military standoffs. This timing echoes the definition of "conflict zones" as proposed by ICAO, encompassing combat zones and heightened alert areas.[181] As argued in Chapter III,[182] ICAO regulations have emphasized the responsibility of the appropriate ATS authority to assess risks and close airspace. Both IHL and ICAO regulations[183] consistently require States to take precautionary measures to protect civil aircraft from armed conflict. The obligation to take precautionary measures has been highlighted in ICJ jurisprudence,[184] IHL, and ICAO regulations. Removing civil aircraft from 'conflict zones' as defined by ICAO, is consistent with "elementary considerations of humanity", and is also consistent with ICAO regulations for the safety and security of aviation.

Before conclusion, it is necessary to emphasize that this study is set out to examine the establishment of prohibited airspace for *civil aircraft.*[185] The operation of military and state aircraft for the evacuation purpose is an important issue worthy of separate considerations by another study.

In conclusion, it is necessary to establish prohibited airspace for civil flights not only after the firings start, in combat zones, but also when the military standoffs or tensions create risks to aircraft, that is, heighted alert areas. The geographic scope would be conflict zones, as defined by ICAO, encompassing combat zones and heightened alert/tension areas which pose risk to overhead civil aircraft.

3.4 Caveat to the obligation: technical considerations

Having argued for a State's obligation to establish prohibited airspace, this section emphasizes a *caveat* to the performance of this obligation – the obliga-

180 Tweede Kamer der Staten-Generaal, MH17 Hoorzitting, Beleidsreactie Onderzoeksrapporten over MH17, <https://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2015A05483>, last accessed 14 May 2016.

181 See Section 2.4.3 of this chapter.

182 See Chapter III, Section 4.3.

183 On the customary international law status of ICAO regulations on contingency responses, see Section 4.4 of Chapter III.

184 See Section 3.2 of this chapter.

185 See the research questions in the Introduction chapter. The term 'private aircraft' refers to what we now term 'civil aircraft'. The term was suggested by the drafting Committee of Subcommittee 2 on 10 November 1944 (ICAO WP/2-1, Secretariat Study on 'Civil/State Aircraft', Presented by the Secretariat at the Legal Committee 29th Session, Montreal (3 March 1994) Attachment I at 2.2.1). Under Article 3(b) of the Chicago Convention, aircraft used in military, customs and police services shall be deemed to be State aircraft.

tion may be suspended due to technical impossibility. As explained in Section 3.2.3 of Chapter III, Contracting States of the Chicago Convention provide ATS and implement contingency arrangements commensurate to their state of art or technical capability.

ICAO emphasizes that the responsibility for instituting special measures remains with the States responsible for providing ATS and that State is to act based on *all available information*. As clarified by ICAO in its correspondences to Member States,

> The responsibility for instituting special measures to assure the safety and security of international civil aircraft operations remains with the State responsible for providing air traffic services in the airspace affected by the conflict, even in cases where coordination is not initiated or completed. Based on *all available information*, the State responsible for providing air traffic services should identify the geographical area of the conflict, assess the hazards or potential hazards to civil aircraft operations, and determine whether such operations in or through the area of conflict should be avoided or may be continued under specified conditions.[186]

ICAO attaches importance to the availability of information,[187] but did not specify the criteria of *available* information from conflict zones.[188] Annex 11 generally requires technical infrastructure and personal expertise for flight information services.[189] In conflict zones, a Contracting State responsible for ATS may have lost the technical control over the ATS: for example, infrastructure has been destroyed or staff went missing, therefore ATS authorities lose the technical competence to collect available information. Technical authorities, thus, are unable to precisely decide the height up to which the airspace should be closed.

If a Contracting State is not able to take precautionary measures due to the limited technical competence, that concerning State, or technical authorities providing services for that State,[190] can invoke, 'the impossibility to perform' to discharge itself from the obligation to establish prohibited airspace. As explained in Section 3.2.3 of Chapter III, this caveat is built on "the impossibil-

186 ICAO, State Letter AN 13/4.2-14/59, 24 July 2014.

187 Annex 17, Standard 3.1.3 requires contracting States to keep the level of threat to civil aviation "within its territory" under constant review; Standard 2.4.3 expressly obliges contracting States to establish procedures to share threat information with other Contracting States. On the information sharing between ATS units and military authorities, see Annex 11, Standards 2.18.1 – 2.18.3 and 2.24.3.

188 See K. Samuel, M. Aronsson-Storrier, & K. Bookmiller ed., *The Cambridge Handbook of Disaster Risk Reduction and International Law*, CUP 2019, pp. 331-332.

189 Annex 11 to the Chicago Convention. See Chapter III of this study.

190 On the delegation of the provision of ATS, see Section 3.4 of Chapter III.

ity to perform", prescribed in Article 61 (1) of the VCLT and accepted as a rule of customary international law.[191]

> A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance of destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

This provision enables a party to invoke the impossibility of performance as a ground for terminating or suspending its obligation. Due to the fact that aviation operation is heavily dependent on technical support,[192] it is reasonable to consider technical possibility of performing an obligation under air law. The suspension of an obligation is justified by temporary technical impossibility, meaning not terminating but temporarily delaying the performance of the obligation in question.[193]

This *caveat* does not apply automatically, because the words of Article 61(1) of the VCLT[194] make it clear that the suspension must be "invoked."[195] In invoking Article 61(1) of the VCLT, a State has to notify the situation, such as through issuing NOTAM(s),[196] to inform the 'unavailability of information' about certain conflict zones. NOTAMs as such sensitize airspace uses so that flights can timely change flight plans and file for alternative routes. As explained in Section 2 of Chapter III, although a pilot-in-command has the final say as to the disposition of an aircraft, flying through airspace with a NOTAM warning of "not safe/secured/available" could constitute negligence or reckless operation of an aircraft.[197] In the end, that said conflict zone, being avoided by all flights, become prohibited airspace *per se*.

All in all, establishing prohibited airspace over conflict zones has to consider technical feasibility. Where a Contracting State has lost control of ATS

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191 *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, paras. 102-103. Giegerich, Thomas, Article 61. Supervening Impossibility of Performance, in O Dörr/K Schmalenbach (Hrsg), *Vienna Convention on the Law of Treaties. A Commentary*, Springer 2012, p.1051.

192 See Chapter III, Section 3.2.3.

193 See Chapter III, Section 3.2.3.

194 Art. 61 (1) reads, "A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty."

195 Villiger, M. E. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Brill 2009, pp. 757-758. See also Olivier Corten and Pierre Klein ed., *The Vienna Conventions on the Law of Treaties: A Commentary*, OUP 2011, entry of Article 61.

196 See Chapter III, Section 2..

197 For example, in 2016, Qatar Airways operates in airspace prohibited by the FAA (Federal Aviation Administration), in violation of the conditions of its statement of authorization.

infrastructure or information sources for a conflict zone, this State could, through diplomatic means or by issuing alerts and/or NOTAMs, clarify that it cannot perform the obligation to establish prohibited airspace due to technical difficulties. Technical impossibility as such precludes the wrongfulness for not imposing airspace restrictions over conflict zones.

In conclusion, in line with an ICAO working paper,[198] each State shall

1) make all possible efforts for timely and proper restriction of flights of civil aircraft over conflict zones, where there exist threats to civil aircraft, including combat zones, military standoff areas and exercise zones;
2) the prohibited airspace established shall cover, at a minimum, the radius of the possible destruction by anti-aircraft weaponry;
3) in case it is not technically possible to do so, the State shall invoke Article 61 (1) of the VCLT and inform ICAO and other States immediately of the existence of threats to civil aircraft.

3.5 Interim conclusions

This section argued that a State is obliged to establish prohibited airspace over a conflict zone, encompassing combat zones of both international armed conflict and non-international armed conflict. The legal underpinning is reflective of a norm of customary international law applicable in both international and non-international armed conflicts: constant precautions must be taken to spare civilians and civilian objects. Contracting States are obliged under IHL to take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. Building on humanitarian considerations, a practical solution is to isolate civil aircraft from the battlefield by establishing prohibited airspace. Otherwise, the failure to mitigate risks from conflict zones can result in great sufferings.

By virtue of Article 89 of the Chicago Convention, it may now be safely concluded that the drafters of the Chicago Convention and its Contracting States did not hesitate to pursue the 'unity' of international law, especially when rules outside the regime appeared to better serve the safety priorities of aviation legal systems. Air law therefore cannot be considered to be fully

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As a result, Qatar Airways violated 49 U.S.C. §§41301 and 41712. "US FAA therefore directs Qatar Airways to cease and desist from future violations of these provisions, and assesses the company a compromise civil penalty of $185,000." US Department of Transportation Office of the Secretary Washington, D.C. Order 2016-11-11. 'Qatar Airways Q.C.S.C. Violations of 49 U.S.C.§§ 41301 and 41712. 'Docket OST 2016-0002. https://www.transportation.gov/sites/dot.gov/files/docs/eo-2016-11-11.pdf, last accessed April 17, 2022.

198 ICAO, Risk Assessment of Operations Over Airspace Affected by Armed Conflict – Responsibility of States For Ensuring The Flight Safety of Civil Aircraft within Their National And Delegated Airspace over Armed Conflict Zones or Zones Of Military Exercises, C-WP/14227, 20 Oct. 2014, para. 3.5.

comprehensive. It is compelled to face the reality by adopting humanitarian rules. The obligation to take precautionary measures under IHL should be applied *mutatis mutandis* to conflict zones as defined by ICAO, including heightened alert situations, such as military standoff, where armed conflict has not yet but is likely to occur between militarized parties. Such a heightened military alert or tension can endanger civil aircraft at very short notice. The State and responsible ATS authorities should execute contingency plans by establishing prohibited/restricted areas. It is the only effective way to reduce aircraft vulnerability over conflict zones.

4 Chapter summary and conclusions

International customary and treaty law do not contain specific prescriptions requiring a State to establish prohibited airspace in times of war or national emergency. Nonetheless, in accordance with Article 89 of the Chicago Convention, in wartime, or time of international armed conflict, a State resumes freedom from the Chicago Convention and is entitled to establish prohibited airspace against one or more States. Furthermore, as a consequence of respective IHL rules, a State is obliged to remove civil aircraft from dangerous airspace. This can be done by establishing prohibited/restricted airspace.

This chapter explored the rationale and application of Article 89 of the Chicago Convention. *War* means international armed conflict (IAC), whose threshold has been developed through IHL. *National emergency* refers to situations when national interest is in peril, as assessed by the State concerned; national emergency may include but not limited to NIAC. Depending on the intensity, NIAC can create *national* emergency, as well *emergencies,* military necessity, public safety issues, and exceptional circumstances – the four situations in Article 9 of the Chicago Convention.[199] IHL establishes that during NIAC, the parties involved shall remove civil aircraft by establishing prohibited airspace; though in practice the threshold of NIAC may be subject to different interpretations, at least a State dealing with military tensions or standoffs can choose, according the existing positive law:

1) to establish prohibited airspace in accordance with Article 9 of the Chicago Convention, or
2) to notify ICAO Council of a *national emergency*, and consequently, Article 89 of the Chicago Convention is triggered – and the State resumes freedom from the Chicago Convention; and if in case of NIAC, IHL will apply.

Such conclusions provide answers to the first two research questions of the thesis. Furthermore, to answer the third research question – how to enhance

199 See Chapter II, Section 2.4.

aviation safety – this author has argued in this chapter that due to the development of IHL, a State, *when technically possible to do so*, is obliged to establish prohibited areas over conflict zones in its territory, encompassing combat zones and zones of heighted alert situations. This obligation is underpinned by "elementary considerations of humanity" as raised in the *Corfu Channel* judgment, and the full-fledged humanitarian rules emphasizing the precautious measures to protect civilians. Considering the recurrent tragedies over conflict zones, military tension/standoffs have posed the same level of risk to civil aircraft as active armed conflict. There is no reason to ignore such risk. A State shall be obliged to remove civil aircraft from conflict zones through establishing prohibited airspace.

Considering equivalent grave risks from military tensions, the author proposes to apply the principle of precautions to heightened alert situations and thus expand the obligation to close airspace to 'conflict zones', including but not limited to 'combat zones'.

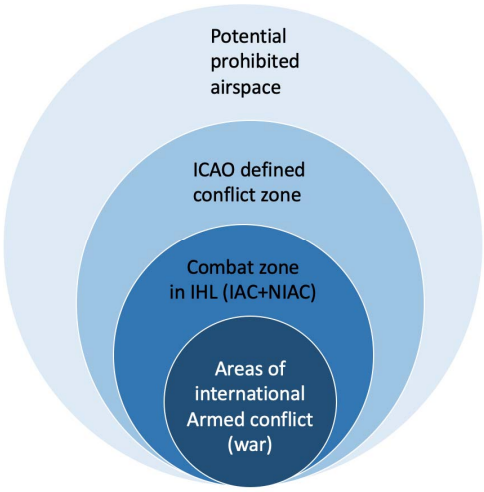

Figure 17: The relationship among conflict zones, prohibited airspace, and combat zones[200]

200 Source: created by the author.