The Regimes of Airspace of The Sea: Quo Vadis?

By

Oladimeji Olaleye*

Abstract

The paper briefly examines the legal evolution and progressive development of the regime of international law governing the airspace of the seas within contexts of its turbulent legal-historical developments and processing of institutional factors that created the legal regime by demonstrating the confusion and how the regime has been shaped by a complex system of norms juxtaposed from the legal principles of 'State Sovereignty', 'Freedom of the Sea' and 'Freedom of the air'. It highlights the nature and process of structural imbalances existing in the law of the airspace of the seas, within contexts of the legal streams of the rights of Overflight created under the Law of the Sea and the Law of the Air. The paper further explains briefly the problems of meaning and overlapping of concepts to illustrate the unlikelihood of any direct or clear legal connections between the regime structure of the laws of the sea and of the air showing in these areas of law, if at all, any pattern of comparative connection can ever exist. The paper finally proposed several reforms to bring the law of the air in tandem with the current state of affair in the law of the Sea on the subject.

Keywords: Airspace, Sovereignty, Freedom of the Sea, Freedom of the Air, Overflight,

Introduction

Any comparative analysis of legal regimes of airspace over the sea raises questions and complications. Though intertwined, the confusion created is hardly a subject of critical evaluation[1] in legal literatures,[2] though the subject has been of immense fascination from ancient times. The Earth, as a planet, is a legal environment having diversities of legal relations. Its immediate physical environment is naturally divided into tripartite spheres of demarcation, consisting of land, sea, and the sky above the regions, which raises diverse laws and jural relations. The sea geographically covers nearly 70% of the Earth,[3] while the inhabited land consists of 30% of the surface area. The entire planet (both land and sea) is covered by the *'airspace'* of the sky. This *'airspace'* over time has acquired its own legal and

---

*LLB (Hons), LLM, MILD, BL, Senior Lecturer, Department of International Law and Jurisprudence, Bola Ajibola College of Law, Crescent University Abeokuta Nigeria, email; deji.olaleye@bacolaw.edu.ng dolaleye13@gmail.com .

[1] The first known comprehensive and exceptional discourse of the subject of this legal relations between the law of the sea and the regime of the airspace was by Nicholas Grief, *Public International Law in the Airspace of the High Seas*, (Dordericht, Boston, London; Martinus Nijhoff Publishers; 1994) p. 1-250.

[2] Legal discussion of comparison between the law of the sea and/of the airspace are very rare. They may often arise as incidental discourse from legal appraisals of issues on the law of the sea or air law. See for example K. Hailbronner, *Freedom of the Air and the Convention on the Law of the Sea*, AJIL 1983,Vol. 77 p.490; See also K. Hailbronner, *The Legal Regime of the Airspace above the Exclusive Economic Zone*, Air Law 1983 Vol. 8 p. 30; J. Martial, *State Control of the Airspace Over the Territorial Sea and the Contiguous Zone*, Canadian Bar Review 1952 Vol. 30 p.245; J. T. Murchison, *The Contiguous Airspace Zone in International Law*, (Ottawa, 1955); J.E. Carroz, 'International Legislation on Air Navigation over the High Seas', *Journal of Air Law and Commerce* 1959 Vol. 26, p. 158.

[3] See United State Geological Survey, How Much Water is there on Earth, available at http://water.usgs.gov/edu/earthhowmuch.html actually puts the figure at 71% of the Earth surface area.

extra-legal importance and is technically defined as '*the space above the earth's surrounding atmosphere'*.[4]

In recent years, different regimes have emerged along separate lines, whether for the sea[5] or the airspace,[6] based on the application of the principles of '*state sovereignty'*'[7] or '*freedom of the sea'* [8] and *freedom of the air*.[9] The regimes of freedom and sovereignty relates both to the law of the sea and the law of the airspace above it. They are treated however in both laws as separate legal entity, whereas the two are commonly integrated domains of complex jural relations for states. Each regime existed as well-structured international legal norm without adequate legal connections of its regime-applications, or its interpretive components. The airspace extends its regal dominium above territories, and the seas, to gain its general legal status and economic incidents, whether for commercial aviation[10] or for strategic purposes.[11]

The out-spread of airspace over the sea (maritime airspace) for example, evinces numerous questions and controversies about the *corpus organum* of the law of the sea.[12] Several efforts at codifications and progressive development of the law were undertaken.[13] Hugo Grotius in his classical work *Mare Liberum (1609)* was the first international law scholar to propound the legal linkages between the airspace and the law of the sea, in his famous theory of

[4] The atmosphere around the Earth begins from the land or sea surface right up into the skies technically divided into various atmospheric layers, like the Troposphere, Stratosphere, Mesosphere, Thermosphere and Exosphere. For clearer elucidation see Wikipedia, Stratosphere, available at http://en.m.wikipedia.org>wiki>Stratosphere last visited on 08/03/2019. No treaty has yet defined the airspace.

[5] B.H. Oxman, The Third United Nations Conference on the Law of the Sea; The 1977 New York Session AJIL 1978 Vol.72 p.57; See also Michael Milde United Nations Convention on the Law of the Sea; Possible Implications for International Air Law, *Annals of Air and Space Law* 1983 Vol. 8 p. 167

[6] There are three major treaty- regimes for regulation of the airspace. See Convention on Aerial Navigation for the Regulation of Aerial Navigations, Paris, 13 October 1919, which came into force on the 7 November 1920. *LNTS* Vol. 11 p. 173; See also Convention on International Civil Aviation, Chicago 29 April 1944, which came into force on the 4 April 1947 *UNTS* Vol. 15 p. 295; See further Michael Milde, 'United Nations Convention on the Law of the Sea; Possible Implications for International Air Law', opp cit, note 4.

[7] This concept or principle of sovereignty supports the right of coastal states adjoining the sea to exercise territorial jurisdiction over the seas contiguous to its territory. See G. Kreijen, et'al (eds) *State Sovereignty and International Governance* Liber Amicorum Peter H. Kooijmans (2002) 483-495

[8] This concept of freedom of the sea expounds the right or liberty of all states to utilize the sea for the common interests of all without discrimination or exercise of dominium or imperium by any particular state or group of states. See Hugo Grotius, *Mare Liberum*, (1609).

[9] Sir E. Richards, *Sovereignty over the Air*, (Clarendon Press, Oxford) 1912; See also W.J. Wagner, *International Air Transportation As Affected By State Sovereignty*, (Bruylants, Brussels 1970)

[10] International air transport services provide avenues for daily movement of peoples and goods across the globe with a total annual world trade output of over 2.7 trillion US Dollars according the International Air Transport Association available at http://www.iata.org.pressroom last visited 18/05/2022.

[11] The air is equally valuable for military and national defence programs of states. See James Clay Moltz, *The Politics of Space Security*, 3rd edition (Stanford University Press; California, 2019.

[12] The *'Law of the Sea'* was settled and codified by virtue of the Third United Nations Convention on the Law of the Sea (popularly referred to as UNCLOS III) signed at Montegro Bay, Jamaica opened for signatures on Dec 10, 1982 UN Doc. A/CONF.62/122. This international treaty was in succession to another 4 international Conventions on Territorial Sea and Contiguous Zone; Continental Shelf, Conservation of Fisheries and Marine Living Resources; and the High Sea all of which were signed at the first United Nations Conference on the Law of the Sea 1958 at Geneva.

[13] For brief history of the law of the sea, See R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoffs; The Hague, 1983); See also T. Scovazzi, The Evolution of the International Law of the Sea; New Challenges' (2001) 286 *Recueil des Cours* 39, chs I and II; Tullio Treves, 'Historical Development of the Law of the Sea' in Donald R. Rothwell, Alex G.Oude Elferink, Karen N Scott, et'al, (eds) *The Oxford Handbook of The Law of Sea* (Oxford University Press; Oxford, 2017) p.7-22.

'Freedom of the Sea'.[14] The airspace of the high sea was primarily treated by Hugo Grotius as an integral legal part of an open sea. This trend was later adopted when the sea was demarcated into maritime zones at the *United Nations Conferences on the Law of the Sea*.[15] Hugo Grotius regarded both the high sea and its super jacent airspace as a ***'gift of Nature'*** for the common use and enjoyment of mankind, which is incapable of appropriation as a ***-res nullius***. Similarly, the airspace of the Sea was regarded by Grotius as an integral part of the entire Sea, over which no state can exercise any rights of sovereignty or ownership. Hugo Grotius consequently expanded the premises of his theoretical propositions to include *'Freedom of the Air'* as adjunct to the general theory of *'Freedom of the Sea'* which was declared as ***res communis***. These regimes of airspace of the sea constitute the critical subject of this discourse.

The paper briefly examines the legal evolution and progressive development of the regimes of international law governing the airspace of the sea, within contexts of the turbulent legal-historical developments of the law. It traces the processes of institutional factors that created the legal regime, demonstrating the confusion within the law, and how the legal regime has been shaped by a complex system of norms juxtaposed from the legal principles of *'State Sovereignty'*, *'Freedom of the Sea'* and *'Freedom of the air'*. The paper highlights the nature and process of the structural imbalances in the law of the airspace of the high seas within context of the legal stream of the rights of *Overflight* created under the Law of the Sea and the Law of the Air. The paper further explains briefly the problems of meaning and overlapping of concepts to illustrate the unlikelihood of any direct or clear legal connections between the regime structure of the law of the sea and of the air showing in these areas of law, if at all, any pattern of comparative connection can ever exist. The paper finally proposed several reforms to bring the law of the air in tandem with the current situation in the law of the sea on the subject.

The Evolution of Airspace Regime

The airspace, from time immemorial, has been a subject of interest and scientific fascination, due to Man's desire to reach the skies. The evolution of international law rules that governs the airspace of the seas was of a progressive development, traceable to a set of comlex, legal-historical developments, and a few processed institutional factors which culminated in the legal regimes. The legal developments demonstrate the confusions in the law, and how the regimes have been shaped by a complex system of norms, juxtaposed and derived from the legal principles of *'State Sovereignty', 'Freedom of the Sea'* and *'Freedom of the air'*, and how these concepts have become ineffective and unsustainable.

The foremost international attempt to procure a general legal regime for the use of airspace in treaty-format was the ***1919 Convention Relating to the Regulation of Aerial Navigation,*** popularly called the '***Paris Convention'***[16] Prior to this Convention, there was no special interest among states to regulate the airspace, except by the French *Police Directives* of 26 April, 1784, a municipal attempt to regulate the Balloon Flights of Montgolfier Brothers' which demanded a permit or authorization.[17] Following this the *1899 Hague Peace*

[14] Hugo Grotius, *The Freedom of the Seas; Or the Right which Belong to the Dutch to Take Part in the East Indian Trade* (trans R. Magoffin) (Oxford University Press; Oxford, 1916) p.28.

[15] The 1982 United Nations Conventions on the Law of the Sea hereinafter called 1982 UNCLOS for purposes of State exercise of jurisdiction divided the Sea into various Maritime Zones comprising of the Internal Waters, the Territorial Sea, Contiguous Zone, Continental Shelf, Exclusive Economic Zone and the High Sea.

[16] The Paris Convention was adopted by 32 Countries on the 13 October 1919.

[17] See I. H.Ph. Diederiks-Verschoor revised by Pablo Mendes de Leon *An Introduction to Air Law* 9th revised ed (Woulters Kluwer, The Netherlands) p.2-3

Conference on aerial warfare, the 'International Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons' was passed.[18] As early as 1900, a French Jurist, Fauchille, had suggested the need for an international air navigation code to be created by the *Institut de Droit Internationale.*[19] Nothing concrete was however done. With the invention of aircraft by Wilbur and Orville Wright in 1903, at Kitty Hawk, the necessity to regulate the airspace became more compelling for states.[20] The Franco-German Balloon crises brought some hope of regulations as it resulted in the Paris *International Air Navigation Conference* of 1910.[21] This Conference was not very successful, nor was anything tangible achieved other than general discussions on the desire of states for protection and maintenance of state sovereignty over the air.[22] The development of aviation during this period was totally halted until the 1st World War.[23]

At the end of 1st World War, the first commercial air scheduled flight took place from London to Paris on the 8th of February1919[24] launching the beginning of a new epoch of aviation. The 1919 *Paris Convention on the Regulation of Aerial Navigation* was specifically called to address problem of lack of regulation The Conference extensively discussed the USA proposal or motion to adopt the *'Freedom of the air'*[25] as applicable regime for aviation, to create unrestricted access for aircraft over all national airspaces. This proposal was out rightly rejected by majority of states in favour of a regime of *'Air Sovereignty'*.[26] The Conference had based its popular decision on the desire of states to control their national airspace for reasons of national defense and security. The turbulent, unpleasant and devastating effects of the 1st World War also showed how critical to national defense was the exigency to control the airspace of states. States were apprehensive of the damaging effects of wrongful uses of aircrafts over their territory for reconnaissance, as a weapon of mass destruction in war, for unauthorized radio broadcasts, troop monitoring, aerial surveillances, air bombardment, and other military uses. At the end of the War, states for the first time at an international level saw a greater need to restrict the rights of aircrafts to fly freely over foreign states territories. This instant recognition of dangers was subsequently confirmed by aerial bombardments and crises of devastation caused by German warplanes during the 2nd World War. All these historical events quickly led to adoption of a regime of *'state sovereignty'* later reflected in the provisions of Arts 1 and 2 of the Paris Convention of 1919 which vest on states the ***complete*** and ***exclusive*** sovereignty over their territorial airspace.[27] This norm became the basic law of national airspaces.

---

[18] Ibid See also K.W Colegrove, International Control of Aviation 46 (World Peace Foundation, 1930).
[19] Ibid
[20] Ibid
[21] See J.C. Cooper, 'The International Air Navigation Conference, Paris 1910', *Journal of Air Law and Commerce* (1952) p.127-143.
[22] Ibid, Many States were more in agreement with state control of the airspace over their territory.
[23] 1914-1918
[24] See I. H. Ph. Diederiks-Verschoor revised by Pablo Mendes de Leon *An Introduction to Air Law* 9th revised ed opp cit note 17 p.2-3
[25] The concept of *Freedom of the air* was first propounded as an adjunct to Hugo Grotius theory of 'Freedom of the Sea' in the *Mare Liberum* 1609; See also K. Hailbronner, 'Freedom of the Air and the Convention on the Law of the Sea', *AJIL*1983 Vol. 77 p.490
[26] See G. Goedhuis, 'The Air Sovereignty Concept and the United States Influence on its Future Development' (1955) 22 *JALC* p.209-221; See also G. Goedhuis, 'Sovereignty and Freedom in the Air Space' (1955) 41 *Transactions of the Grotius Society* p.137-152. This theory for the first time argued out the need for states to adopt a legal regime and principle that recognized the ***complete*** and ***exclusive*** sovereignty of states over the airspace above their national territories.
[27] See Bin Cheng *The Law of International Air Transport* (1962).

Perhaps the single achievement of the 1919 Convention was to settle the controversy whether air sovereignty or freedom of the air should govern the legal regime of airspace jurisdiction and its subjacent territorial waters. Article 1 of the Paris Convention 1919, in this regard, confirmed the existing customary international law principle of '*State sovereignty'* over the airspace above their territory. This regime is enshrined permanently now as a basic law of air treaties. Thus, a regime of national control over territorial airspace was established. This regime continues to govern all issues of rights of use of national airspace by foreign aircrafts in many international treaties. Arguably, the Paris Convention standardized the *'rule of the air'* over state territory, but the '*rule of the air'* over the high sea remained unclear and a matter of complex legal conjectures at the time. Thus, the regime of '*freedom of the air'* was jettisoned at the Paris Convention as applicable regime over the airspace of states.

The period[28] after the Paris Convention witnessed the starting point of the use of commercial aircrafts for aviation, and the conduct of international air transport services between states by national airlines. The first commercial flight from Paris to London in 1919 opened this new chapter for air transportation between state-owned airlines[29] who operates scheduled[30] and non-scheduled[31] flights across states. The establishment of national airlines[32] brought into prominence commercial flight operations and the requirement for licensing of aircrafts by states, before an aircraft can undertake direct flight operations[33] or take advantage or benefits of state airports to conduct daily, weekly or monthly air service operations. These commercial operations involved the use of airspace of foreign states through signed *Bilateral Air Services Agreements (BASA)*[34] and *Multilateral Air Transit Agreements.*[35] The new usage of airspace resulted in the development and application of various legal principles by advocates of concepts of air law, and the rights of states over aircraft in the airspace.[36]

The second major treaty development in the law of the Air came at the twilight of the Second World War out of sets of complex processing factors. The need arose then for dichotomy between civil and military aviation, and between state and civil aircraft, on the technical rules for operation of aircraft, aeronautic equipment, safety measures, dispute settlement etc. There was also need for rules of facilitation, meteorological communication, air navigation, repair and maintenance of airports etc. Furthermore, the rules of commercial transports across states, limits of state control over airspace and over the high seas, and the great profit potentials available all interested states from various air service routes needed to be clearly

[28] 1919-1944

[29] The first set of airlines were state controlled airlines or 'legacy carriers', but the policy of Privatization and Commercialization of the 1978-90 periods brought into four privately-owned airlines as a result of divestitures of shareholdings of public enterprises.

[30] This provision later became Art 6 of 1944 Chicago Convention.

[31] This provision subsequently became Art 5 of 1944 Chicago Convention.

[32] See I. H.Ph. Diederiks-Verschoor revised by Pablo Mendes de Leon *An Introduction to Air Law* 9th revised edn opp cit note 17 p.2-3. The KLM (Netherland), Sabena (Spain), Swissair (Switzerland), Air France (France), Alitalia (Italy), British Airways (UK) Delta Airline (USA), etc were established.

[33] See M. Chatzipanagiotis, Establishing Direct International Flights to and from Northern Cyprus (2011) 60(3) *Zeitschrift fur Luft-und Weltraumrecht.*

[34] See P.S Dempsey and L.E Gesell *Air Commerce and the Law* (2004); P.S Dempsey and L.E Gesell, '*Air Transportation Foundations for the 21st Century'* (2005); See also Michael Milde, *'International Air law and ICAO'* (2008); P.P.C. Haanappel *The Law and Policy of Air Space and Outer Space ; A Comparative Approach* (Woulter Kluwer; Netherlands, 2003) p.18-19.

[35] 'The International Air Services Transit Agreement' *84 UNTS* (vesting the Two Freedom rights) was signed along with the 'International Air Transport Agreement' *171 UNTS 38* (vesting the Five Freedoms rights) are the two multilateral air Agreements applicable to air transport services.

[36] such as *'air sovereignty', 'freedom of the air', 'licensing regimes', 'aircraft nationality', 'transit passage', 'designation'* etc.

defined. All of these became the processing factors for a new regulation. The United States foreseeing the commercial benefits and prospects of the air transport sector after the war, decided to convene a new Diplomatic Conference at Chicago Illinois in 1944 to determine and discuss the future prospects of civil aviation and the rules of the air that must govern the use of airspace. The deliberations at the Chicago Conference culminated in the signing and adoption of a new treaty, the ***Convention on International Civil Aviatio***n popularly called the ***'Chicago Convention'***.[37]

The new Convention adopted similar legal formula like the 1919 Paris Convention on the recognition of basic rule of -'air sovereignty' which permits states jurisdiction over national airspace.[38] The 1944 Chicago Convention regulated questions of nationality[39] and registration of aircraft,[40] designation marks[41] technical rules of navigation[42] aircraft conditions[43] safety regulations[44] air transportation agreements,[45] general operation of civil aircrafts by states,[46] disputes settlement[47] war[48] etc. But the Chicago Convention failed to provide any comprehensive or detailed regime for the airspace of the high sea raising countless questions and controversies on the legal status of the airspace regime created in respect of the high sea and other delimited maritime zones. It is important to note at this juncture, the facts that the 1944 Chicago Convention was purposely signed and adopted to solve various problems of jurisdiction and power of states over the air and aircrafts. The natural intendment of signatory state, at the time it was adopted, was not to regulate or create a regime for the seas. But current analysis of the regime of the air has shown how confusing and complex is the established regimes of airspace over the seas.

The Legal Regime of Airspace Over the Seas

An appraisal of the regime of *'maritime airspace'*, as a subject matter, refers to the legal examination of the status of that region of space over and above the seas and oceans of the Earth. This region is compact and indivisible.[49] Arts 1 and 2 of the Chicago Convention 1944 vests complete and exclusive jurisdiction on states over the airspace above their territory, and areas over which they exercise sovereignty or suzerainty.[50] Similarly, a state exercises jurisdiction over the seas adjacent to its territory.[51] For the purpose of air law, the jurisdiction of states extends only to its *'territorial waters'*. The 1944 Chicago Convention[52] despite its

---

[37] See C.J Cheng (ed) *Regulatory Reforms in International Air Transport* (collected publication of H.A Wassenbergh, 2000).
[38] See Art 1 of 1944 Chicago Convention; see also P.M.J. Mendes de Leon, 'The Dynamics of Sovereignty and Jurisdiction in International Aviation Law in G.Kreijen et'al (eds) *State Sovereignty and International Governance* Liber Amicorum Peter H. Kooijmans (2002) 483-495.
[39] See Art 17 of 1944 Chicago Convention.
[40] See Arts 18 and 19 Ibid.
[41] See Art 20 Ibid.
[42] See Arts 22-28 Ibid.
[43] See Arts 29-36 Ibid.
[44] See Arts 37-42 Ibid.
[45] See Arts 67-79 Ibid.
[46] See Arts 80-83bis Ibid.
[47] See Art 84-88 Ibid.
[48] See Art 89 Ibid.
[49] This is without prejudice to the capacity of states to calculate and measure spatial distances either upward (vertically), or downward (horizontally), in nautical miles, or sea levels through maps, charts, and other geographical or cartographic maps.
[50] See Art 2 of 1944 Chicago Convention.
[51] See Art 1 Ibid.
[52] The *Chicago Convention 1944* was adopted at the time when the Law of the Sea Convention was not yet in existence, which directly explains the wide disparity of expression between the two regimes. If the 1982 Law of

positive contributions completely failed to relate the jurisdictions of the skies with those of the seas as necessary adjuncts under UNCLOS III[53]. The Chicago Convention in dealing with the problems of maritime airspace only restated and applied the developed regime-formulas[54] of 1919 Paris Convention to give all states jurisdiction or sovereignty over its territorial waters, without defining what constitute the nature, limit and scope of the boundaries, or reference to delimitations of any *'territorial waters'*.[55] The legal term was equally not used or defined under the 1982 LOSC[56] leading to plethora of confused meanings and interpretations.

With the later adoption of 1982 Law of the Sea Convention (LOSC)[57] *'maritime airspace'* was regulated based on the delimited maritime zones, each with clearly defined legal rights and obligations. The 1982 'LOSC had divided the Oceans into different portions of maritime delimitations, measuring spatial distances from the baseline to the outward limits of the nautical miles. The recognized maritime zones consist of the *Internal Waters,*[58] *Territorial Sea,*[59] *Contiguous Zone*[60] *Continental Shelf,*[61] *Exclusive Economic Zone*[62], and the *High Sea*.[63] It is not clear under 1982 LOSC if the principle of '*state sovereignty'* applies in any way to all the maritime zones except the High Sea. The Exclusive Economic Zone[64] and High Sea[65] in contradistinction, had remained the recognized maritime zones where it is believed the Hugo Grotius' concept of '*Freedom of the Sea'* still apply as a matter of principle. The airspace above each maritime zone derives and encloses its own basic legal incidents and

---

the Sea Convention had taken cognizance of the precursor 1944 Chicago Convention maybe the incongruity in the laws would have been avoided.

[53] The 1958 Geneva Conference on the Law of the Sea popularly called UNCLOS I was the first United Nations attempt to develop a comprehensive legal regime as the Law of the Sea. This conference was quickly followed by another conference, the 1968 Geneva Conference called UNCLOS II with the objective to review the 4 treaties signed at the 1958 Conference. The 1982 United Nations Conference on the Law of the Sea was the third UN Conference popularly known as UNCLOS III.

[54] See Arts 1 and 2 1919 Paris Convention on Aerial Navigation.

[55] The use of the expression *''territorial waters''* in Art 2 of 1944 Chicago Convention needs to be reconciled with *''territorial sea''* used under the 1958 Geneva Convention on the Law of Sea and 1982 UN Convention on the Law of the Sea. The *''territorial waters''* under the 1944 Chicago Convention probably pre-empted the later maritime developments under the 1982 LOSC whereby the *''territorial sea''* can be interpreted or construed as part of what can rightly be regarded as the *''territorial waters''* of a coastal state comprising also of the other maritime zones within its national jurisdiction like the contiguous zone, continental shelf and exclusive economic zone etc.

[56] Art 2 of the 1982 LOSC only mentioned *'territorial sea'*.

[57] The 1982 Convention on the Law of the Sea was signed at Montegro Bay, Jamaica.

[58] This refers to all waters landward from the baseline such as lakes, quays, canals, rivers, streams, bays etc lying within the territory of a State. See Art 8 1982 LOSC.

[59] The *Territorial Sea* refers to all waters seaward from the baseline up to 12 nautical miles. See Art 2 1982 LOSC. States have complete and exclusive jurisdiction over the Territorial Waters subject to the rights of transits and innocent passage granted to ships of foreign states.

[60] The *Contiguous Zone* was created under Art 33(1) of 1982 LOSC to vest legislative and administrative jurisdiction on states over customs, fiscal, immigration or sanitary laws and regulations.

[61] The *Continental Shelf* refers to the seabed and subsoil thereof of the natural prolongation of subterranean land of the sea consisting of 200 nautical miles from the baseline. See Arts 76-85 1982 LOSC. States have complete but not exclusive jurisdiction over the superjacent airspace above this maritime region under Arts 77 and 78 of 1982 and can license out the use of the natural resources of this maritime area under Art 79-83 1982 LOSC.

[62] The *Exclusive Economic Zone* is the superjacent region above the Continental Shelf measured at 200 nautical miles from the baseline. See Art 55-75, 1982 LOSC.

[63] The *High Sea* as a maritime Zone is measured from beyond 200-350 nautical miles from the baseline of the Continental Shelf. See Art 76(1),(4) and (5) of 1982 LOSC.

[64] By virtue of Art 58(1) 1982 LOSC the right of *'Freedom of the Sea'* contained in Art 87 of 1982 LOSC was extended to the Exclusive Economic Zone.

[65] See Art 87(1), 1982 LOSC.

obligations respectively as maritime zones,[66] and is governed by the kind of rights and jurisdictions imposed under the 1982 LOSC.

Art 2(1) of 1982 LOSC confers jurisdiction and sovereignty on a coastal state.[67] The sovereignty of a coastal state therefore extends beyond its land territory and internal waters to an adjacent belt of its territorial sea.[68] This sovereignty extends to the airspace over the territorial sea.[69] Under the 1982 LOSC the airspace of the territorial sea is limited to 12 nautical miles above the sea. But under Art 1 and 2 of the Chicago Convention 1944 what constitute a state's *'territorial waters'* raises quite different considerations. To clarify the legal problems of interpretations, two different approaches can be adopted to resolve the contextual meaning of the confusion inherent in the comparison of the two regimes of maritime airspaces, having regards especially to the perspectives of the 1982 LOSC on the same subject matter.

First, if we apply the ***broader*** hermeneutical approach, it is apposite and arguable, concluding from the legal context of maritime delimitations under the law of the sea, that, in so far as a state is permitted to exercise some qualified degrees of additional jurisdictions over maritime zones, in the specific manners stipulated under the 1982 LOSC, the respective airspaces over and above each of the maritime zones, except the high sea, would fall directly into some degree of state jurisdictions or sovereignty.[70] Consequently, the various airspaces above these maritime zones can be regarded as part of the '*territorial waters'* of a state pursuant to Arts 1 and 2 of 1944 Chicago Convention. The legal implication of this contention is that all airspaces above the Contiguous Zone, Continental Shelf and Exclusive Economic Zone would immediately form part of the *'territorial waters'* of a state under Arts 1 and 2 of the Chicago Convention 1944. This situation, some may argue, still appears farfetched, inconsistent or relatively absurd. But the real intention of the framers of the 1944 Chicago Convention is unknown. What exactly is the legal status of airspace of these other maritime zones under LOSC one may ask? Was it to realign the law of the sea with the provisions of the 1944 Chicago Convention? The answer remains a matter of conjectures if indeed the 1982 LOSC seeks to remedy this confusion of the Chicago Convention or its failure to define 'territorial waters'.

Second, if we apply the ***restrictive*** hermeneutical approach, it means that the provisions of Arts 1 and 2 of the Chicago Convention 1944 is applicable and limited only to the territorial sea under Art 2(1) and (2) of 1982 LOSC. This interpretive perspective accords somewhat with the extant provisions of Art 2(2) of 1982 LOSC which extends and limit the airspace of a coastal state to its *'territorial sea'*.[71] But again the question may be asked, was this the intendment of the Chicago Convention, when it speaks of '***territorial waters***? This interpretation would appear still incongruous and unacceptable, since '*territorial waters'* is totally different and dissimilar from the '*territorial sea'* in Art 2(1) and (2) of 1982 LOSC.

---

[66] The airspace of the '*Territorial Sea'* for example takes its legal incidents from the rights and obligations stated in Art 2(1) and (2) of 1982 LOSC.

[67] See Art 2(1) 1982 LOSC.

[68] Ibid.

[69] See Art 2(2) 1982 LOSC.

[70] The 1982 LOSC in referring to the spatial location known as the *'High Sea'* in Part XI for the purpose of determining the jurisdiction over the natural resources of the Seabed and the spatial scope and limit of its delimitations refers to the ***'Area'…*** ***'beyond the limit of national jurisdiction***'. This expressions implies that all the former maritime zones mentioned are within the limits of national jurisdiction, consequently States can exercise some regular type of substantive and administrative jurisdictions

[71] See Art 2(2) 1982 LOSC.

The restrictive interpretation here, however, cannot cover the full meaning of ***'territorial waters'*** as stated under the Chicago Convention as more than the territorial sea is implied in that pluralistic expression. Thus, there is a yawning gap in meanings. Thus, we contend here that the two provisions currently leave a legal vacuum or lacunae between the regime of the air and the law of the sea on the scope and extent of what constitute the airspace of a state's territorial waters. The question remains unanswered whether 'territorial water' for the purpose of the Chicago Convention 1944 includes the airspaces of the territorial seas, contiguous zone, continental shelf and exclusive economic zone together? or it is to be restricted under the law of the sea only to the *'territorial sea'*.

The determination of this issue remains a fundamental question that both the law of the air and the law of the sea has failed to answer. Even the state practice has not resolved this problem for a rule of international custom to crystallize in the subject area. Some states like USA, UK, Germany, France, Russia and China treat all parts of the maritime zones as its territorial airspace by exercising extensive 'Police powers' over these zones including the high sea contrary to extant provisions of the LOSC. Again, this practice is without authority given the current state of international law on the subject.[72] It would appear the broader interpretive approach continues to widen perhaps in total breach of the spirit and intendment of international law on the limit of state control over airspace, while the limit of national airspace over maritime zone is in fact restricted to 12 nautical miles of the territorial sea and no more.

The Legal Regime of Airspace Over the High Sea

Similar consideration of legal status of the airspace over the high seas portends other different contradictions and questions on the subject of discourse. The legal status of the high sea was laid within context of the Grotian thesis of '*Freedom of the Sea'*.[73] The high sea has been declared as a '*res communis*'[74]or a *'common heritage of mankind'*.[75] The high sea exists as a region of interest for all states. All states enjoy substantively common rights of access and navigation over the sea. The regime of *'Freedom of the sea'*[76] over the high sea which had existed in customary international law was eventually transformed and recognized under Art 87(1) of the 1982 LOSC. The provision confers additional number of freedoms on states which includes:

1) Freedom of navigation.
2) Freedom of overflight.
3) Freedom to lay submarine cables and pipelines subject to Part VI.
4) Freedom to construct artificial islands and other installations permitted under international law, subject to Part VI.
5) Freedom of fishing.
6) Freedom of scientific research[77]

These freedoms are exercised with due regards for the interests of other states, in their own exercise of freedom of the high seas, and with due regards to international law and the rights

[72] Art 89 of 1982 LOSC for example provide that *'[N]o State may validly purport to subject any part of the high seas to its sovereignty.*
[73] Hugo Grotius, *Freedom of the Sea*, opp cit, note 14, p.28.
[74] Douglas Guilfoyle, '*The High Sea'* in Donald R. Rothwell, Alex G.Oude Elferink, Karen N Scott, et'al, opp cit note 13, p.203-225.
[75] Art 136 1982 LOSC
[76] Hugo Grotius, *Freedom of the Sea*, opp cit, note 14 p. 28
[77] See Art 87(1) 1982 LOSC; See also Douglas Guilfoyle, in Donald R. Rothwell, Alex G.Oude Elferink, Karen N Scott, et'al, opp cit note 13, p. 203-225.

under the convention.[78] The airspace of the high sea in similar vein is ruled or governed by the principle of '*freedom of the air'* or what is rightly called '*freedom of overflight'*[79] for all aircrafts. All states have equal rights and joint interest over the airspace of the high seas, as superjacent space above the maritime belt. No single state or group of state is permitted to exercise any exclusive right or claim of sovereignty[80] or appropriate *in-situ* mineral or natural resources of the '*Deep Seabed'* Area,[81] except as provided for under Part XI of the 1982 LOSC.[82] In furtherance of this important concepts and distinctions, the airspace above the seas generally falls into two main categories (1) those within territorial airspace of a state (i.e under '*air sovereignty'*) and (2) those outside territorial airspace of a state (i.e under '*freedom of overflight*') by virtue of Art 87(1)(b) of 1982 LOSC. The '*freedom of overflight'* here is closely akin to the '*freedom of the air'*. Both are applicable however to the exclusive economic zone[83] and high sea.[84] While an aircraft derives jurisdiction to fly over territorial airspace based on the consent and authority of a state[85] in line with concept of air sovereignty[86] no consent or authority is required to fly over the airspace of the high sea, in line with the right of overflight. Thus the airspace of the high sea is completely oblivious of claims of right and exercise of sovereignty, except where a state exercises exclusive jurisdiction over its national aircraft as the flag state.[87] It may be argued that the right of overflight contained in Art 87(1) (b) 1982 LOSC is unsuitable and antithetical to the law of the sea, since the law of the sea should essentially deal with the sea environment alone. The '*freedom of overflight'* as it is rightly belonged to the law of the air and ought to have found in its rightful place (the Chicago Convention). No similar provision is enshrined in the Chicago Convention to guarantee freedom of flight to states over national airspace or the airspace of the high sea under the law of the air. This is a serious lacuna currently being exploited by powerful states,[88] who vests on their own state rights of hot pursuit,[89] or air interdiction.[90]

The 1982 LOSC has continued to remain unstructured, fragmentary and impracticable in guaranteeing equal rights for all states in the common enjoyment and use of the airspace. This is because the LOSC and the law of the air had developed along separate historical streams in

[78] Art 87(2) Ibid.
[79] Art 87(1)(b) of 1982 LOSC
[80] Art 89 of 1982 LOSC
[81] Michael W. Lodge, '*The Deep Seabed'* in Donald R. Rothwell, Alex G.Oude Elferink, Karen N Scott, et'al, opp cit note 13, p.7-22.
[82] Art 137(1),(2) and (3) of 1982 LOSC
[83] Art 58(1) 1982 LOSC renders the '*Freedom of Overflight'* applicable to the exclusive economic zone.
[84] Art 87 (1) 1982 LOSC.
[85] Art 6 of 1944 Chicago Convention in respect of the rule of territorial sovereignty does not permit the use of the territorial airspace of a state without the '*special permission'* or '*authorization'* of that state.
[86] Art 2 of 1982 LOSC which vests on a '*coastal state'* the sovereignty over their airspace. There is nothing in the same provision to vest similar jurisdiction of airspace over landlocked states.
[87] Richard A. Barnes, *'Flag State'* in Donald R. Rothwell, Alex G.Oude Elferink, Karen N Scott, et'al, opp cit note 13, p.304-324.
[88] Many states exercise air sovereignty over and beyond the limits of 12 nautical miles of their territorial sea. It is interesting to note however, that Art 2(2) of the 1982 LOSC only extends state sovereignty over airspace specifically to the territorial seas.
[89] See Art 111 1982 LOSC.
[90] There is no known legal authority for the exercise of rights of interdictions, but the growing practice has been suggestively premised on the 'right of Visit' contained in Art 110 1982 LOSC, but that provision prohibit the practice or acts of interference, except in relation to the instances mentioned like piracy, slave trade, unauthorized broadcasting, stateless ship and failure to display national flag.

their respective centuries[91] and along different legal developments resulting in divergence of rules and lack of proper co-ordination of the norms of both systems of law on the subject matter of discourse. Another example of confusion and incongruity is the conception of what in itself is meant by 'overflight' under both laws. Under 1982 LOSC 'overflight' may refer to the absolute right of aircrafts to fly through or over the airspace of the high sea without obtaining the special permission, consent or authorization of any state or institution. Under the law of the air, there is no right of overflight over states territorial waters by virtue of Art 5 and 6 of 1944 Chicago Convention. The right to fly over national airspace largely requires special permissions and authorization of states[92] obtained through BASA signed between states. Consequently, there is no right of overflight over and above the territorial waters of any State.[93] But can there be right overflight over contiguous zones and exclusive economic zones? The answer is neither here nor there. The interpretation of what constitutes meaning of '***territorial waters'*** under 1982 LOSC maritime delimitations is in a state of flux having regards to the limits of spatial distances. So, the benefit offered by freedom of overflight is rendered inapplicable to national airspace. The right is affected by -whether *'territorial waters'* refers to territorial sea alone or the expression includes both the territorial sea and other waters within the limits of national jurisdiction.[94] Again the road is not very clear.

Further critical evaluation of the regime of airspace of the high sea under 1982 LOSC reveals other serious confusions of legal implications and application of the right of overflight over the high sea. There is no direct connections or similar legal effects between the freedom of overflight in Art 87(1)(b) 1982 LOSC in respect of the high sea and the legal regime of airspace of the high seas as contained in the Chicago Convention of 1944.[95] For example, the focus of the law of international civil aviation is on air transport service which is completely different from the objective of the general right of overflight given to states under the 1982 LOSC. While the 1982 LOSC seeks to preserve *'freedom of the air'* by *freedom of overflight*, to allow ships and aircraft to navigate airspace of the high sea, without discrimination or molestation from foreign states, the objective of Art 12 on the right of aircraft to fly freely over the high sea pursuant to the Chicago Convention was limited specifically to how to develop special air transport rules for technical operation of aircrafts on the high sea.

[91] The need for a law of the air was first propounded by the French jurist Fauchille who suggested the need for a code of International air navigation as early as 1900. See I.H.Ph. Diederiks- Verschoor An Introduction to Air Law 9th revised edition (Woulter Kluwer; Leiden Netherlands 2012) p.2-3
[92] See Art 6 of 1944 Chicago Convention
[93] I.H.Ph. Diederiks- Verschoor *An Introduction to Air Law* opp cit note 89, p.2-3.
[94] That is, whether the territorial waters under the 1944 Chicago Conventions includes the airspaces of the contiguous zone and exclusive economic zone of a State giving to that state the combined distance of 200 nautical miles as airspace, as against the 12 nautical miles of the 'territorial sea'.
[95] The *International Civil Aviation Conference* was convened by the US from 1st November to 7th December 1944 towards the end of the 2nd World War to determine the future of international civil aviation and air transportation. The conference which was attended by 52 states and observers from 2 occupied states led to the signing and adoption of the *International Civil Aviation Convention* popularly called the '*'Chicago Convention"* 61 Stat 1180, TIAS No 1591, UNTS vol 15 295; See US Department of State Printing Office (ed), *Proceedings of the International Civil Aviation Conference Chicago, Illinois, November 1-December 7 1944* (ICAO; Washington 1948) 2 Vols; See also Ludwig Weber The Chicago Convention in Paul Stephen Dempsey and Ram S. Jakhu (ed), *Routledge Handbook of Public Aviation Law,* (Taylor & Francis Group; London, New York 2017) p.9-32; Paul Stephen Dempsey, Multilateral Conventions and Customary International Law in Paul Stephen Dempsey and Ram S. Jakhu (ed), *Routledge Handbook of Public Aviation Law*, (Taylor & Francis Group; London, New York 2017) p.1-8.

Art 12 of the Chicago Convention is the only relevant provision of the Convention dealing with the high seas.[96] The Chicago Convention failed to effectively deal with the jurisdiction over airspace of the high sea in providing restrictive governing rules. Art 12 of the Convention only deems applicable the '*Rules of the Air'* contained under Annex 2 of the Convention.[97] The intended rules refer to operational regulations of aircraft flying over and above the high sea. These rules are not substantive in nature, but technical -procedural rules. Annex 2 rules deals with matters of speed, distance, visibility, height, sound, altitude, equipment etc. stated in Article 12 of the Convention.[98] Thus Annex 2 rules apply to national aircraft to guide flights to safety. Furthermore, the Chicago Convention contains many coordinated, integrated rules as safety regulation. [99] But we are here concerned with the non-integration of the two legal systems of the air and the sea. The two Conventions have prevented meaningful efforts to streamline respective applicable rules on both sides, especially on when and how each of the rules apply to regulate particular state actions.

The current regulatory rules of airspace and the high seas take their symptomatic principles from the concepts of '*freedom*' or '*sovereignty*'. Every attempt to create similar rules for the airspace ends up with divergent rules without corresponding integration, or proper consideration of complexities of effects involved or likely implications. The two systems of laws developed from different original sources, along different legal, historical considerations. For example, Art 2 of 1982 LOSC, vesting airspace sovereignty on territorial states mentioned only 'coastal states'. Nothing was put together on the '*airspace'* of *landlocked*[100] or '*geographically- disadvantaged*[101] states but the airspace of *'strait'* [102] and *Archipelagic* States[103] were preserved. Art 1 of Chicago Convention gives general '*sovereignty'* to all states over airspace above its territory.[104] This yawning gap in both laws is significant, though not dealt with appropriately. The airspace of geographically disadvantaged and landlocked states may be probably regarded as sufficiently dealt with by the provisions of Art 2(2) of 1982 LOSC on the maritime airspace of territorial states.[105]

Every legal system creates different rights and obligations for states, under its conception of sovereignty or freedom having regards to the length of a territorial sea. Foreign states under Art 1 of Chicago Convention are excluded from interference with national sovereignty of a state[106] in absolute context. The LOSC qualifies the kind of sovereignty a state can exercise

---

[96] Art 12, 1944 Chicago Convention.

[97] The '*Rule of the Air'* contained in Annex 2 of the Chicago Convention are applied by virtue of Art.12 of 1944 Chicago Convention to ensure the safety of the aircraft.

[98] Art 12 of 1944 Chicago Convention provide ''*...Over the high seas, the rules in force shall be those established under this convention....''*

[99] See for examples Annexes 1 and 3-19 of the 1944 Chicago Convention. See Jimena Blumenkron, 'International Safety Requirements' in Paul Stephen Dempsey and Ram S. Jakhu (eds) opp cit, note 93, p.33-63; see also Christopher M. Petras and Mathieu Vaugeois,'Safety Regulation and Oversight' in Paul Stephen Dempsey and Ram S. Jakhu (eds) opp cit, note 93, p.64-85.

[100] Arts 69,124-132 1982 LOSC.

[101] Arts 70-75 1982 LOSC.

[102] Art 34(1) and (2) 1982 LOSC.

[103] Art 49(2) 1982 LOSC.

[104] Art 1 of 1944 Chicago Convention.

[105] Similar provisions can be found in Arts 1 and 2 of 1944 Chicago Convention.

[106] Art 1 of 1944 Chicago Convent ion. The provision was a restatement of the existing customary international law of air sovereignty of states. See Bin Cheng Airspace Sovereignty; International Law and High-Altitude Flights; Balloons Rockets and Man-Made Satellites 6 *ICLQ* (1957) p.487 at 494; Bin Cheng, Recent Developments in Air Law 9 *CLP* (1956) p.208.

over maritime airspace as delimited.[107] But the Chicago Convention has no similar provisions. A state is enjoined, for instance, by Art 17 of 1982 LOSC to allow the right of ***innocent passage*** over its territorial sea[108] under certain conditions.[109] Rights of innocent passage extends over contiguous zones, continental shelf and exclusive zones and can allow other states to enjoy certain rights over exclusive economic zones.[110] But no right of *innocent passage* exists over territorial airspace of a state under 1944 Chicago Convention.[111]Thus the concept of sovereignty in LOSC is limited as qualified rights. Furthermore, in the Chicago Convention, the territory of a state is restricted to the land area or the '*territorial waters'* adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.[112] This definition appears much wider than the definitions of adjacent territorial sea under the LOSC as it includes seas and territories under 'suzerainty' or mandates of the state, not necessarily adjacent to the coasts of the state. The provision for example can admit of airspace of vassals or tributary states. The airspace of Taiwan and Hong Kong can be regarded with this provision as China's airspace.

Furthermore, the 1982 LOSC differentiates the plight of *Stra*it and *Archipelagic states* where *Transit Rights* are permitted to ships and aircrafts within their airspaces, whereas no similar provision or rights is recognized under the Chicago Convention. This immediately creates contradiction of rights between states and foreign aircrafts claiming transit rights over the territories. In addition, the 1982 LOSC failed to establish any superintending organization or institutional structure for the use and control of airspace of the high sea.[113] The 1944 Chicago Convention established the *International Civil Aviation Organization (ICAO)* as a publicly-constituted intergovernmental institution for regulating global aviation and coordinating commercial air transport services.[114] The problem of integrating rules of maritime airspace with the legal regime of international air transport constitutes a major drawback for many states in the joint use of the airspace of the high sea. The applicable law keeps changing when states utilize their aircraft on the high sea as flag state, depending on the particular incident or activity under consideration. This untoward situation had resulted in heavy reliance on the law of the flag state for jurisdiction and control.[115] Again this brings the problem of *'flags of*

---

[107]Art 33 1982 LOSC for example qualifies the *Contiguous Zone*; Arts 55-60 1982 LOSC qualifies the *Exclusive Economic Zone*; Art 76-85 1982 LOSC qualifies *Continental Shelf.* The *High Sea* is qualified by Art 86-98 LOSC.
[108] Art 17 of 1982 LOSC.
[109] Arts 18 and 19 of 1982 LOSC.
[110] Art 56 (2) and Art 58 (1) and (3) of 1982 LOSC.
[111] Under Arts 5 and 6 of 1944 Chicago Convention, the requirement of special permission and authorization of a territorial State is required for operation of all foreign aircraft carrying on non-scheduled and scheduled air transport services respectively before any such aircraft can fly over the airspace of a state.
[112] Art 2 of 1944 Chicago Convention.
[113] Unlike in Part XI of 1982 LOSC dealing with the jurisdiction of the Deep Seabed mineral resources which established the International Seabed Authority, Seabed Chambers and International Seabed Tribunal to regulate and manage the exploitation of the seabed minerals as well as dispute settlement. See also 1994 Implementation Agreement on Part XI of the Law of the Sea.
[114] Ludwig Weber 'The Chicago Convention', in Paul Stephen Dempsey and Ram S. Jakhu (ed), opp cit, note 93, p.9-32; See also Art 3(a) of 1944 Chicago Convention excludes state and military aircrafts from the operation of the Convention; R. de Oliviera, 'The Distinction Between Civil and State Aircraft; Does the Current Legal Framework Provide Sufficient Clarity of Law with Regard to Civil and State Aircraft in Relation to Aviation Practicalities' (2016) 41 (4/5) *Air & Space Law* 329-344; Bin Cheng, 'State Ships and State Aircrafts' 2 *Current Legal Problems* 225, 233
[115] Art 17-18 of the 1944 Chicago Convention requires an aircraft to acquire the nationality of the state of registration.

convenience' and the requirements of '*genuine link'* with their flag states.[116] In the absence of proper regulation powerful states are in the habit of using the airspace of the high seas for the promotion of exclusive and unilateral interests, both strategic and commercial. The airspace of the high sea has been converted into an arena of military activities, nuclear testing, landing of missiles, fighter jets and aircraft carriers. These activities of states lack legal authority or back-up and are carried out without proper regulations or restraint.[117]

Military activities of state aircrafts[118] fighter jets and surveillance aircrafts are a threat to maritime security[119] of the high seas. The freedom of the air and right of overflight leaves states a wider discretion to conduct various activities within this space. The situations have resulted in various unconventional activities and fragmentary rules scattered in various national laws. There is no serious effort at the international level to adequately deal with the matter, or adequately regulate the political economic, environmental and strategic uses of the airspace of the high seas by states. This dilemma is now acute and complex, that the law of the air that should have taken care of these various abusive uses of airspace was not structured to address these problems in anyway while the law of the sea also is vague and ambivalent is that now providing the right of oversight.

The different conception of what freedom is guaranteed by both system of law is an example of lack of proper coordination of the two areas of law. While the LOSC speaks of the '*freedom of overflight*'[120], the law of the air speaks of '*freedom of the air'*. What constitute these notions was not clearly defined under each system of law. The freedom of overflight is enjoyed as a benefit under a treaty, whereas the freedom of the air is enjoyed as benefit under international customary law. The freedom of overflight recognized the right of states to use the high sea, and is restricted to the high sea exclusively, whereas air law in its scope is restricted to operation of aircraft. In addition, the freedom of the air is a legal concept that imposes complete freedom of use and transit access for aircrafts over all airspaces, whether territorial or of the high sea. Unlike freedom of overflight, freedom of the air seeks to eliminate air sovereignty over their specific territories. The idea of *'freedom of the air'* has been jettisoned for *'state sovereignty'* in respect of territorial waters in recent times, while freedom of the air only exist now on the high sea for the purpose of applying aircraft navigation rules under Art 12 1944 Convention. Both concept are however not equally favored or commonly accepted.[121]

Where Do We Go from Here?

The numerous disparities between the legal regimes of the sea and airspace is a matter for grave concern. The unstructured legal regime of airspace affects the sustainability of both regimes. The lacuna in the two regimes leads to fragmentation and diversification as applicable international norms dealing with the airspace. The current legal positions leave

---

[116] See Art 91(1) of 1982 LOSC for ships; Arts 17-20 and 83bis of 1944 Chicago Convention on aircrafts nationality and transfer of the aircraft ownership.

[117] State aircraft for military, postal, custom immigration activities or police services are usually excluded from the application of many international treaties regulating various activities in the airspace.

[118] See Art 3 of the 1944 Chicago Convention.

[119] Natalie Klein, *'Maritime Security and the Law of the Sea*' (Oxford University Press, Oxford, 2020)

[120] See Art 87(1) (b) of 1982 LOSC

[121] The principle of air sovereignty has become well favoured by the consensus of majority of states as the time of the Convention on aerial Navigation of 1910 otherwise known as the Paris Convention of 1910 where the US suggestion of the Freedom of the air was mooted and consequently rejected. The Paris Convention in its Art 1 adopted the principles of air sovereignty subsequently included in Art 1 and 2 of 1944 Chicago Convention

rooms for *'creeping jurisdiction'* [122] and exploitation by unscrupulous powerful states who wants to extend their airspace and territorial waters to cover areas designated as contiguous zones, continental shelf, exclusive economic zones and high sea. There are missing links and inconsistencies in the application of right of innocent passage permitted over a state's territorial sea in Arts 17 and 19 of 1982 LOSC but excluded over a state's territorial airspace by Arts 1 and 2 of Chicago Convention. Again, the right of overflight recognized in Art 87(1) (b) of 1982 LOSC over the airspace of the high sea, is not relevant to territorial airspace by Art 1 and 2 of Chicago Convention; or the airspace of the high sea by Art 12 of the Chicago Convention.

The resultant confusion created has affected the nature of rights, duties and obligation of states in the airspace of the high sea and regions. The conditions of the two legal regimes and the system of right under them need to be streamlined. But can the law of the sea be realigned with the law of the air to bring its international law norms in tandem with the use of aircrafts, for the expediencies of national economy, defense and security? The answer is yes. But there is a gradual erosion of the influences and power of the legal regime of airspace or freedom of the high sea among the powerful states who have converted the airspace of the high seas into an arena of sovereign activities and exclusive uses in an attempt to develop a new liberal regime of state practice supportive of impunity in the use of airspace, to coalesce a newly created customary international law rules out of the uncertain regime system of the airspace of the sea. The unfortunate trend was possible due to confusion of meanings and interpretations of the applicable legal regime of the airspace of the sea, particularly within context of the practical realities of current uses and control of maritime airspace, and current activities of states on maritime security[123] in the maritime regions.

This confusion of meaning in turn has further connected the other problem of lack of proper coordination between the law of the sea and the legal developments in the law of the air culminating in the absence of a comprehensive legal system that could guarantee equal opportunities for all states to jointly enjoy or benefit from the common use of the seas, and its superjacent airspace. The author recommends a proper reinventing of both laws to deal with the fragmentary and unstructured parts of the regimes. This would require total revision of LOSC rules and the norms of the Chicago Convention on the limit of national jurisdiction over airspace and the manner of acquiring or using the airspace of the high sea having regards to the intent and spirit of the law of the sea to make the high sea an arena of freedom for all states. A new international treaty may be promoted for state adoption in form of a ***Convention on the Limits of Maritime Airspace***. This treaty would provide a new comprehensive set of norms for the meaning and application of 'overflight', the limit and scope of state sovereignty, use of airspace, application of general principles of 'Freedom of the air'[124] within maritime airspace of the high sea to make the law more certain.

---

[122] See Barbara Kwaiarkowska,'Creeping Jurisdiction Beyond 200 Miles in Light of the 1982 Law of the Sea Convention and State Practice' (1991) 22 *ODIL* 153; Erik Francka, 'The 200-Mile Limit; Between Creeping Jurisdiction and Creeping Common Heritage' (2007) 39 *George Washington International Law Review* 467.

[123] Natalie Klein, '*Maritime Security and the Law of the Sea'* opp cit, note 115, p.1-23.See also Natalie Klein, Joanna Mossop, and Donald R.Rothwell, 'Australia, New Zealand and Maritime Security' in Natalie Klein, Joanna Mossop, and Donald R.Rothwell (eds) *Maritime Security; International Law and Policy Perspectives from Australia and New Zealand* (Routledge, Oxford, 2010) p.1, 8;; Jon D. Peppetti,'Building the Global Maritime Security Network; A Multinational Legal Structure to Combat Transnational Threats' (2008) 55 *Naval Law Review* p.73 at 77-78.

[124]

The exclusive use and solitary enjoyment of benefits of the airspace by states derived from unilateral activities such as seizure, control and occupation of the airspace of the high seas for military activities and strategic purposes or exploitation of mineral resources of the 'Area' (Deep Seabed) in Part XI of 1982 LOSC should be elaborately regulated. The jurisdiction, control and use of the airspace by powerful states that had continued to result in tensions, and war between states like the Russia/Ukraine air claims over the Crimean Sea can be avoided. States with technological power have deployed military weapons, warships and aircrafts carriers and jets to patrol the airspace of the high seas without restrain constitute threats. They regularly traverse the airspace for various reasons of maintaining law and public order of the Oceans, prevention of piracy and other maritime-related offences, or protection of offshore oil installations, or preservation of marine resources and environment. These put the interest of developing states who lacks technology and constrained by technical power at greater advantage over others.

Since there is no clear international law enforcement institution to regulate or control the activities of states in the airspace of the high sea, the powerful states have equally arrogated to themselves '*special police powers'* and responsibilities for international crime-prevention over the high sea,[125] flight patrols by state aircrafts over the airspace had resulted sometimes in the arrest of pirates, smugglers, contrabands, stateless and renegade ships etc, or in the maintenance of order over the airspace of the high sea for general enforcement of international regulations on narcotic drugs and psychotropic substances, custom, fiscal, immigration or sanitary laws of states. States adopts the rights of visits, interdiction and hot pursuit as legal groundwork for enforcement of international laws. All these legal aspects relate to the manner of use or control of airspace of the high sea by states. At the moment, there is absence of a comprehensive system of regulations to govern the use of airspace of the high sea. The existing rules, where they exist, are not coordinated or structured into a systemic legal framework. The rules comprise of fragmentary set of norms and principles scattered within extant provisions of 1982 LOSC or 1944 Chicago Convention, or in other international law treaties on civil aviation, climate change, air pollution, aircraft noise, safety measures, carriage of goods, liability of carriers, aircraft finance, law of the air, etc as they affect the airspace. The prospect of addressing these varied problems in the near future is bleak, except through a treaty.

The author in the circumstance urgently canvasses the need for the international convention to develop and regulate the fundamental principles of international law to govern air jurisdiction, and the use and management of the airspace of the Oceans. While the relative importance of 1982 LOSC already included certain provisions that govern the maritime airspace of the sea or delimit the maritime zones either as state territory for various legal purposes, or as part of the high sea, it is true that the same 1982 LOSC did not adequately provided satisfactory rules on how states are to freely use the airspace of the high sea. The LOSC rather leaves too many details of this aspects to chance, by just granting the freedom of overflight on the high sea, leaving out a whole lot of other issues about how developed and developing states can jointly derive benefits from the free uses of the airspace in sustainable manner taking cognizance of social, strategic economic and developmental needs of the developing countries. Art 148 of the 1982 LOSC enjoins states, in this regard to promote the '*'effective participation of developing states in activities in the Area''* and '*'having due*

[125] For instance, Britain, France, German, Japan, USA, Russia and China have assumed extensive police powers over their respective territorial airspaces and the airspace of the high sea regions contiguous to their territory for enforcement of the provisions of Art 99 of 1982 LOSC prohibiting the transport of slaves; Art 100 prohibiting piracy and Art 108 prohibiting illicit traffic in narcotic drugs and psychotropic substances.

regard to their special interests and needs'' [126] Consequently there are wide lacunae on how states can jointly acquire rights, or utilize and jointly use the airspace of the high seas in pursuit of the common ideals of peace, international cooperation, friendly relations and having regards to the special interests of states. An alternative approach to bring the two regimes *in tandem* is to define the term '*'territorial waters''* in Arts 1 and 2 of the 1944 Chicago Convention to include the maritime airspace of the contiguous zone, continental shelf and exclusive economic zone, as part of a state's territorial airspace. Another alternative approach may be to amend Art 1 and 2 of the 1944 Chicago Convention to read '*territorial water'* in place of *'territorial waters'*. This latter amendment would limit the meaning of territorial water to mean the territorial sea under the two Conventions. The amendments proposed here would allow direct application of the requirements of general principles of '*freedom of the high sea'*, '*res communis'*, '*non-appropriation'*, '*freedom of the air*' and '*right of overflight'* etc. to cases of maritime airspace of the high sea. The current state of affair of the regime of airspace has continued to attract or demand these normative reforms to be applied or adopted.

The legal gaps in the law of the sea and the law of the air had further necessitated the author's quest to research the appropriate legal status of laws and rules that could govern the equitable use and control of the airspace above the high sea. The law of the sea and the law of the air had developed along separate historical streams over the centuries, resulting in divergence and lack of co-ordination of the legal rules of both system of law on the subject matter. A critical examination of the legal regime of maritime airspace of the high sea further portends serious legal implications, and lack of direct connections with the legal regime of the air under the Chicago Convention of 1944 dealing with international civil aviation. It is within this rather settled principles the powerful states have developed the untoward practice of trying to alter the existential legal rules by creating or re-molding a new process of international law-making beneficial to its development interests, but inimical to third party state- interests, a phenomenon the author considers as an emerging customary international law. The UNCLOS III enunciated and recognized these legal statuses of the high sea and preservation of the region for the common use of all states with fairness equity and justice. By implication unlike res nullius, no state is expected to exercise any right of appropriation or lay claim over the airspace of the high sea for any reason as would amount to an exclusive use or proprietary claims. The freedom of the airspace is guaranteed to all states for their interests in the exercise of the same freedom under the 1982 LOSC.[127] There exists a wide disparity between what the legal provision is, and the actual practice of state on the ground relating to freedom of use of airspace, whether between developed or developing states.

Though the current legal principles and status of the high sea of 1982 LOSC had been clearly formulated and fully settled by treaty law,[128] the manner of use of its airspace is currently being violated by states by the unregulated use of the space and lack of control of maritime airspace of the high sea. There is a continuous pattern of conflict between the applications of sovereignty[129] principles and the freedom of the high sea.[130] Since states love to extend the boundaries of their territories, the near exclusive use of the air by states has been a cause of common friction over the high sea and its airspace. Incidentally, in an attempt to formulate a regime for '*areas within national jurisdiction'* the spatial limits of sovereignty over each

[126] Art 148 of 1982 LOSC
[127] See Art 87(2) of 1982 LOSC
[128] See Arts 87-115 of 1982 LOSC
[129] See Art 2(1) and (2) of 1982 LOSC
[130] See Art 87(1) of 1982 LOSC

maritime zone are clearly delineated, and the extent of powers a coastal state already stated [131] but it is not clear whether they are territorial waters under the Chicago Convention. The concepts of sovereignty, freedom of the high sea and freedom of the air the three central concepts of the sea and airspace are randomly observed and difficult to explain when the legal regime and status of the high sea and the airspace above the seas is considered. The international community must come together once again to address these regime problems of the airspace of the oceans.

Conclusion

The panacea for this area of legal problem calls for complete reform of international law rules on maritime airspace. The reform would involve proper treatment of the subject of our discourse above by an international conference with mandate of states to deal with the lack of proper integration of the LOSC with developments in the law of the air. There would be need to handle the fragmentary nature of the current regime and its revolving negative impacts on the law of maritime airspace. The new developments in the law of the air for instance on right of overflight and freedom of the air when juxtaposed with legal developments in the law of the sea, as earlier explained shows veritable lacunae, problems of coordination and confusion of meanings resulting in the current fragmentations of norms. The diversification of uncoordinated but intermingling rules of the two regimes of airspace and the sea must be restructured. The norms of the two regimes though not directly connected in international law are however connected. Thus, they must be streamlined to achieve normative order. Although the LOSC has copiously provided a legal regime to govern the airspace of the high sea and the use of the maritime zones by states, the alternative is to amend the Chicago Convention to conform its provisions as an arena of freedom.[132] Notwithstanding various freedoms of use granted to states under Art 87(1) (b) of 1982 LOSC on the right of overflight, there is yet a total disconnect between the intention of the law of the sea and the practical application of international law of civil aviation which has rejected freedom of overflight over territorial waters of states pursuant to Arts 5 and 6 of Chicago Convention, which requires permission or authorization for foreign aircraft to use state airspace. The right of freedom of overflight in the airspace includes a right of navigation and equal access to the airspace of states. But this right is still ephemeral in substance and reality. Right of use should include the right to the benefits and resources of the airspace of the high sea for the common enjoyment of all states peacefully[133] and without national appropriation.[134]

In formulating new concepts, international law has often developed a basic approach of applying a rule of general necessity that is exigent on the practice of characterizing and delimiting the maritime space into separate spheres of legal relations. This approach is ineffective and unworkable here as the two regimes under consideration are not separate realms of legal relations but are coordinate and related. One only hopes that the wide disparity in laws would be addressed soon by the United Nations, the International Maritime Organization or International Civil Aviation Organization as the case may be.

[131] See Art 3 on the breath of territorial sea; Art 33(2) on the breath of the contiguous zone; Art 57 on the breath of the exclusive economic zone; Art 76(1) on the breath of the continental shelf.
[132] See Art 87 of 1982 LOSC
[133] See Art 88 of 1982 LOSC where the high sea is reserved for peaceful purposes
[134] See Art 89 of 1982 LOSC