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**THE ESTABLISHMENT OF A POTENTIAL TREATY OBLIGATION
FOR MILITARY AIRCRAFT TO FLY WITH ACTIVATED
TRANSPONDERS OVER THE BALTIC SEA**

Master's Thesis

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Tallinn

2018

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INTRODUCTION

There have been numerous incidents in the airspace of the Baltic Sea area concerning military aircraft that do not have transponders or have switched them off. Most airplanes do not violate the State border deliberately. However, they do cause problems in military as well as in civil aviation. In order to reduce the number of flight incidents and to promote aviation safety in the Baltic Sea airspace, Sauli Niinistö proposed:

“A small step of this kind could help avoid accidents, in the context of which I have brought up the much-discussed issue of flying without transponders. We have been aware, or made aware, that this may also present a major risk of accidents. I have proposed that, in the Baltic Sea region, we seek a general agreement to use transponders; that no flights are made without them.”¹

The main problems about the establishment of the obligation to use activated transponders is that the freedom of overflight in the Exclusive economic zone (EEZ) is a customary law principle and it is questionable if coastal States have a right to set limits to this freedom. Also, UNCLOS Article 311(3) sets limits to signing *inter se* treaties to limit the principal freedoms that are provided by the convention, but do not specify what are those principals that are meant under this provision.

Freedom of overflight is typically characterized as a freedom of the high seas as set in Article 87, but as set in Article 58(1) it can be used in the EEZ also. The United Nations Convention on the Law of the Sea (UNCLOS)² does not give a clear and concrete answer about the legal rights and obligations in regard to aircraft in the airspace above the EEZ.³

The EEZ is relatively new comparing to other maritime zones. It was first discussed during the third United Nations Conference on the Law of the Sea. To guarantee that States would

¹ The President of the Republic of Finland. Joint press conference by President of the Republic Sauli Niinistö and President of Russia Vladimir Putin at Kultaranta on 1 June 2016 (transcript, English translation). News, 04.04.2016; Accessible at: <http://www.presidentti.fi/public/default.aspx?contentid=348650&culture=en-US> (12.10.2017).

² United Nations Convention on the Law of the Sea. Montego Bay 10.12.1982, e.i.f. 16.11.1994.

³ K. Hailbronner. Freedom of the Air and the Convention on the Law of the Sea. - 77 The American Journal of International Law 1983, p. 503.

recognize EEZ significant allowances were made for navigational freedoms.⁴ EEZ is described in UNCLOS Part V as an area beyond and adjacent to the territorial sea where the rights and jurisdiction of the coastal State and the rights and freedoms of other States are both represented.⁵ The freedom of navigation may have several restrictions in the EEZ as compared with the unlimited right in the high seas.

There are scholars who see the freedom of navigation as part of customary international law. For example, there is an opinion, that all provisions about freedom of movement in UNCLOS are customary law and because of that reason they are binding to all nations.⁶ This leads to an argument that the freedom of overflight can be used by all States, even those who are not parties to UNCLOS.

The right of overflight is an important part of freedom of navigation, but rights are often limited or there are duties that must be considered with while performing the right. According to UNCLOS, the State who is using the right of overflight is required to respect the laws and restrictions adopted by the coastal State.⁷ This means that there is a right that applies to all States, but that right can be limited with the laws of a coastal State. In which conditions and on what extent, are to be analyzed in the present thesis.

While there are comprehensive conventions that regulate the civil aviation, military aircraft have been left out of them, causing another unclear aspect in solving the problem. Although, there are some specific aspects those conventions determine about military aircraft as well, those are mostly about what they are not allowed to do and not about the overall regulation or even to define the term State aircraft.

The goal of international aviation law is to find a balance between freedom of the air and jurisdictional claims of the coastal States and because of that some scholars interpret the

⁴ Rothwell, Stephens, *op. cit.*, p. 242.

⁵ UNCLOS, Art. 55.

⁶ R. Pedrozo. Is It Time for the United States to Join the Law of the Sea Convention - 41 Journal of Maritime Law & Commerce 2010(2), p. 156.

⁷ UNCLOS, Art. 58(3).

UNCLOS in favor of the freedom of the air principle that is understood to be customary law⁸ next to the other customary law principle from the law of the sea – freedom of the high seas.

The main purpose of this study is to find out on which legal grounds it is possible to establish an international obligation for military aircraft to fly with activated transponders over the Baltic Sea. This paper will determine if this kind of an obligation is possible at all considering international law and on what conditions can it be created.

This study is important for all States in the Baltic Sea area to help to guarantee the aviation safety in their airspace and understand the rights and obligations that apply to themselves and to other States who use their airspace in the EEZ for transit passage or for other reasons. Since the status of military aircraft in time of peace has been studied in very limited times, this thesis can be informative for other States and international organizations as well.

The primary research question is: On which legal grounds would it be possible to establish an international obligation for military aircraft to fly with activated transponders over the Baltic Sea? Additionally, the problem refers to a question, if coastal States have a right to limit the freedom of overflight in the EEZ only for navigational safety purposes?

At the time this thesis was written, there was no international obligation to make military aircraft turn their transponders on and that is a big concern for military aviation safety, but also a great threat to civil aviation as well. All States are sovereign to sign a treaty and take commitments with it, but the problem is that international law should include responsibility to use the given freedoms and rights in a safe way to ensure safety for themselves and others. There is a need to find out if that kind of an obligation would even be possible to create and on which legal grounds.

The object of the study is military aircraft. For civil aircraft and flight safety there is already an international convention signed in 1944, but in a field of military a treaty is difficult to compile. Author of this thesis has decided to narrow down the research by focusing about the freedom

⁸ Hailbronner, *op. cit.*, p. 520.

of overflight for military aircraft, since there is not yet an international obligation for them. The thesis is limited to the time of peace and therefore regulations set in Geneva Conventions and their Additional Protocols, Hague Conventions of 1899 and 1907, San Remo Manual and other humanitarian law treaties and rules will not be analyzed in this paper.

The hypothesis of the study is that it is possible to establish a treaty obligation to make military aircraft fly with activated transponders in the EEZ.

Papers on the freedom of navigation have been published by international law scholars, but it is difficult to find a paper solely about freedom of overflight. However, there is a master's thesis by Estonian researcher Habakuk in a field of security studies about Russian Air Force's Risk Behavior in the Baltic Sea Region. Since the freedom of overflight used by military aircraft in time of peace is not directly regulated under international law, there is a need to clarify the regulations that exist and if limits can be made to the freedom.

The study consists of three parts. For the understanding of the problem of this thesis it is important to understand the background of the problem, therefore, the principle of the freedom of overflight was explained in the first chapter in more detail. The first chapter focuses on the freedom of overflight and the problems related to it in the Baltic Sea area. It focuses on the origin and historical development of the freedom of overflight as a separate concept that is practiced in the EEZ, also on the reasons why military aircraft without transponders create problems, and why are they a threat to navigational safety in the Baltic Sea region. The difference of status of civil, state, and military aircraft under international law is also analyzed.

The second chapter shows what obligations and rights States have during the freedom of overflight under international law. Furthermore, it is analyzed if and how it is possible to limit those rights by an international treaty. There are numerous international organizations to which the States in the Baltic Sea region are parties to, so it will be shown in the second chapter if any of them could help to solve the problem with nonactivated transponders. As a result of the research made in this chapter, it will be understood if an obligation to use activated transponders is allowed to establish under international law.

In the third chapter there will be analyzed if States in Baltic Sea region have already limited the freedom of overflight under their national legislation and if they have already solved the

situation with non-activated transponders in their territory. This part of the thesis is also about if States have used international law in their benefit by interpreting it the way they see it as propriate.

The primary source used in this thesis is the UNCLOS adopted in 1982. As secondary sources there are used articles from books and academic journals about the freedom of overflight in the EEZ and other topics related to this thesis, additionally, the Chicago Convention on Civil Aviation (Chicago Convention)⁹ and relevant case law. The Chicago Convention is about civil aircraft, but the author has decided to use it to make sure if there are still some fundamental principles that have been internationally agreed on and could be acceptable in military as well. The topic of this thesis is limited to military aircraft, so international law in conflict situations is not analyzed. The thesis is supported with numerous newspaper articles to show that the problem is real and timely, and that the solution is needed.

The sources of the third chapter are limited due to the fact that Polish law on aviation was not available in English and most States do not have a separate Act for national defence.

Analytical legal method is mainly used in this study. In the part of historical analyze of the development of the freedom of overflight, the historical research method will be partly used as well. Comparative method is used in the third chapter to analyze the legislation of the States in the Baltic Sea region.

I am deeply thankful to Marten and my family for all the support they have offered me and for giving me an opportunity to continue my studies. I would like to express thanks to my supervisor Alexander Lott who introduced me to this topic and guided me throughout the process of writing the thesis.

⁹ The Convention on International Civil Aviation. Chicago: 7.12.1944, e.i.f. 4.04.1947.

This thesis was written with a support of a scholarship given by the Ministry of Defence of the Republic of Estonia as a reward in the annual defence-related master's thesis scholarship competition.

The keywords for this thesis are international law, freedom of overflight, Baltic Sea, military aircraft, exclusive economic zone.

I. FREEDOM OF OVERFLIGHT AND THE USE OF TRANSPONDERS

1.1. The principle of freedom of overflight

Freedom of navigation is one of the oldest principles in the international law of the sea.¹⁰ It was enshrined already in the 17th century by Hugo Grotius who wrote that navigation is free for everyone¹¹ and because of that no State should rule the sea.¹² The principle idea of the freedom of the high seas was the freedom of movement in general.¹³ In time the freedom of movement became the freedom of navigation and overflight and during the time of the Law of the Sea conferences some limitations to the freedom of navigation were accepted by the international community.

Although, freedom of navigation is in most part important because of the carriage of goods by the sea, the freedom of overflight has also always been very important since airplanes were started to use, because they can create a great military advantage and by that they may cause threat to the peace and security in some regions of the world.¹⁴ Aircraft, that are challenging the freedom of overflight by entering another State's territorial sea are, in most cases unintentionally, risking with diplomatic conflicts that could in worst cases lead to armed conflicts. Another type of actions that challenge the freedom of overflight happen even more often and can cause the same risks and a risk of collision with other aircraft in addition, is the failure to use activated transponders by military aircraft. Due to these problems, discussions about the concept and regulation of the freedom of overflight has been more frequent in international community.

¹⁰ R. Wolfrüm. Freedom of Navigation: New Challenges. International Tribunal for the Law of the Sea – M. H. Nordquist, T. T. B. Koh and J. N. Moore. Freedom of seas, passage rights and the 1982 Law of the Sea Convention. Leiden: Martinus Nijhoff Publishers 2009, p. 80.

¹¹ H. Grotius. The Free Sea. – K. Haakonssen (ed). Liberty Fund: Indianapolis 2004, p. 10.

¹² *Ibid.*, p. 30.

¹³ Wolfrüm, *op. cit.*, p. 81.

¹⁴ Rothwell, Stephens, *op. cit.*, p. 241.

General principle is that the high seas are open to all States, no matter if they are coastal or land-locked.¹⁵ According to the latter statement, the freedom of navigation is equal to use by all States despite their geographical position. The rule under Article 89 says that no State may subordinate any part of the high seas to its sovereignty, the rule is the same about the superjacent airspace beyond the outer limit of the territorial sea.¹⁶ The freedom of navigation is intended to be used by all, irrespective if the vessel or aircraft belongs to any State or even when it is stateless. Freedom of overflight is an example of the lawful uses of the airspace above the high seas that can be used for such activities as military exercises, aerial reconnaissance and other activities of military and civil aircraft.¹⁷ Originally, the navigation for vessels and aircraft is meant to be free and not a subject to limitation by coastal States.

Under a term “overflight” there is meant an action when an aircraft leaves the airspace of its State of nationality.¹⁸ The freedom of overflight allows the aircraft to fly anywhere in the world, as long as they fly over the high seas or the EEZ, without the control of coastal States. While the innocent passage regime has been known as a customary law rule for centuries, even today, this right applies only to ships and there is no customary right to overflight above another State’s territorial sea.¹⁹

According to UNCLOS Art 87(1)(b) the freedom of overflight is originally a right of the high seas, but it also applies to the EEZ according to the clause in Article 58(1). UNCLOS Article 58(1) directly refers to the freedoms of the high sea in Article 87, so the right is based on the same principle in the EEZ as it is in the high seas and the basic rights and obligations that are regulated about the freedom of navigation in the EEZ should be identical to those in the high seas. Compared to the freedom of navigation that applies to the high seas, there are still created limitations in UNCLOS that apply to the EEZ, so general provisions about the high seas that are in Articles 88-115 apply to the EEZ as far as they are not incompatible with the Articles about the EEZ that are in Part V of the UNCLOS.²⁰ Accordingly, the freedom of navigation and

¹⁵ M. H. Nordquist, S. N. Nandan, et al. *United Nations Convention on the Law of the Sea 1982: A Commentary*. Vol. III. Leiden: Martinus Nijhoff Publishers 1995, p. 80.

¹⁶ *Ibid.*, p. 80.

¹⁷ Hailbronner, *op. cit.*, p. 503.

¹⁸ J. Wouters, B. Demeyere. Overflight. *Max Planck Encyclopedia of Public International Law*, July 2008, para. 1.

¹⁹ *Ibid.*, para. 9.

²⁰ H. Lindpere. *Kaasaegne rahvusvaheline mereõigus*. [Contemporary International Law of the Sea] Tallinn: Kirjastus Ilo 2003, p. 84.

overflight in the EEZ is in big part the same as in the high seas, but specific characteristics of the EEZ that include the rights and obligations of States have to be considered.

Articles in UNCLOS do not show any difference between the rules of freedom of navigation and freedom of overflight, so the freedom of overflight has the same limitations as the freedom of navigation.²¹ Since the basic idea of the freedom of navigation is freedom of movement, as discussed previously, then there is no difference if it is carried out by the sea with a vessel or above the sea with an aircraft. It can be argued that the freedom of navigation and overflight can be limited in relation to the coastal State's right to construct artificial islands and installations, furthermore, the coastal State's competence to regulate the dumping of waste and some States add that the use of aircraft for military exercises are also limited in the EEZ of the coastal State.²²

Within the First Conference on the Law of the Sea there was a dispute that subsequently lead to the Exclusive Fisheries Zone that was asserted by international practice.²³ At the Third Conference on the Law of the Sea there was already held a debate on the navigation regime in the EEZ.²⁴ In that debate, the developing States saw the EEZ as an extension of national jurisdiction in which the coastal State would enjoy sovereignty, while the maritime powers saw the zone as a part of the high seas and believed that States should have extra rights only over offshore resources.²⁵ The conflict was thus between the coastal State's right over the marine resources and other State's right to freedom of navigation. As a result of long negotiations, UNCLOS Article 58(1) was accepted claiming that all States enjoy the freedom of navigation and overflight in the EEZ while according to Article 58(3) States have to follow the rules of the coastal State during their navigation in other States EEZ.

During the negotiations that were held over the establishment of the EEZ as a new maritime zone, arguments about the legal status of the EEZ needed to be settled as well. After considering the consequences in cases where the EEZ would be a residual phenomenon of whether the

²¹ R. R. Churchill and A. V. Lowe. *The Law of the Sea*. 3rd ed., Manchester: Manchester University Press 1999, p. 173.

²² *Ibid.*, p. 173.

²³ G. Andreone. *The Exclusive Economic Zone - The Oxford Handbook of the Law of the Sea*. D. Rothwell, *et. al.* Oxford University Press: Oxford 2015, p. 161.

²⁴ S. Bateman. *Security and the Law of the Sea in East Asia: Navigational Regimes and Exclusive Economic Zone – The Law of the Sea: Progress and Prospects*. David Freestone *et. al.* (ed). Oxford University Press: New York 2006, p. 379.

²⁵ *Ibid.*, p. 379.

territorial sea or the high seas, it was decided that the EEZ forms a separate functional zone between the high seas and the territorial sea and has a *sui generis* character.²⁶ After the negotiations, State practice in establishing EEZ-s was constant and widespread. Before UNCLOS came into force in 1994, EEZ was already declared to be a part of customary international law by the ICJ.²⁷

The fact that EEZ is totally separate zone with its own rules has led to a principal question: What kind of aerial navigation regulations apply to aircraft that fly over the EEZ?²⁸ Scholars have for a long time claimed that it is uncertain which rules of the air apply to aircraft in the EEZ.²⁹ The 1944 Chicago Convention that applies to civil aircraft has been offered as one option.³⁰ However, the Chicago Convention was adopted before the Third Conference on the Law of the Sea and it did not consider the future existence of the EEZ. So, when applying that convention, the characteristics and legal regime of the EEZ and its difference from the regime in the high seas that is brought out in UNCLOS Articles 88-115 would still have to be considered.

During the UNCLOS debate, when the developing States were able to geographically extend the legal regime of territorial sea up to 200 nm, the developed States saw this as a threat to the possibility to fly their aircraft around the globe.³¹ As a compromise, the extended area became a new zone, the EEZ, where there the right of overflight was granted, since it was not related to the issue of the access to resources that was under the jurisdiction of the coastal State.³² However, when coastal State uses its rights it could still have an effect on the navigation rights of other States.

The Chicago Convention regulates the navigation of civil aircraft and the convention itself is remarkably old, considering that there are many new important issues that have appeared and need to be regulated. It might be reasonable to discuss the possibility that the Civil Aviation

²⁶ Churchill, Lowe, *op. cit.*, p. 166.

²⁷ Andreone, *op. cit.*, p. 162; Churchill, Lowe, *op. cit.*, p. 161.

²⁸ Lindpere, *op. cit.*, p. 86.

²⁹ Churchill, Lowe, *op. cit.*, p. 173.

³⁰ Lindpere, *op. cit.*, p. 86.

³¹ Wouters, Demeyere, *op. cit.*, para. 25.

³² *Ibid.*, para. 25.

Organization rules apply to the EEZ,³³ however, it is questionable if the regulations in the Chicago Convention should be applied to military aircraft if relevant changes would be made.

However, the freedom of overflight above international waters does not mean that the aircraft exercising this right would be out of the reach of law.³⁴ A limitation to this freedom is set in UNCLOS Article 87(2), according to which, the freedoms of the high seas, including the freedom of overflight, must be exercised with due regard for the interests of other States who also exercise those rights. Therefore, States must enjoy the freedom of navigation and overflight in a way they do not limit other State's abilities to do so.

A dispute has arisen over the different interpretations of UNCLOS over the coastal State's capacity to regulate certain types of overflight by military aircraft, since the right of overflight applies within the international airspace of the EEZ³⁵ and the coastal State has some options to restrict that. The question about the coastal States rights and capabilities under international law to limit or regulate the freedom of overflight in the EEZ will be further analyzed in the second chapter of this paper.

The freedom of overflight provided in UNCLOS does not distinguish between military and civil aircraft in the matter of navigation and overflight. Only parts where UNCLOS brings out military aircraft specifically are a seizure on account of piracy,³⁶ right of visit on the high seas,³⁷ the right of hot pursuit,³⁸ the powers of enforcement against foreign vessels,³⁹ and a possibility to make declarations about a dispute settlement category.⁴⁰ While military aircraft has been pointed out in UNCLOS only in specific Articles and it has not been done so in the freedom of navigation and overflight provisions, it rather leads to understanding that the right of overflight is applicable to all types of aircraft equally no matter if it is civil or military aircraft. This has also been the understanding of scholars.⁴¹ For supporting the latter claim, the distinction between civil and military aircraft under international law will be analyzed.

³³ Churchill, Lowe, *op. cit.*, p. 173.

³⁴ Wouters, Demeyere, *op. cit.*, para. 24.

³⁵ Rothwell, Stephens, *op. cit.*, p.305.

³⁶ UNCLOS, Art. 107.

³⁷ UNCLOS, Art. 110(4).

³⁸ UNCLOS, Art. 111(5).

³⁹ UNCLOS, Art. 224.

⁴⁰ UNCLOS, Art. 298(1)(b).

⁴¹ Wouters, Demeyere, *op. cit.*, para. 23.

1.2. Distinction between civil and military aircraft under international law

It is worth to notice that while UNCLOS does not distinguish between military and civil aircraft, the Chicago Convention does make that difference.

Since the Chicago Convention sets obligations to civil aircraft only, it is argued if its Article 3(b) gives a clear definition to what is a civil or military aircraft or not.⁴² Numerous other conventions about aviation exclude military aircraft as well.⁴³ Therefore, applicable regulations for civil and military aircraft under international law are different and it is important to understand the difference civil and military aircraft have under international law.

First, it has to be clear what is meant under an aircraft. The Chicago Convention is the only source in international law where it is possible to find the definition of an aircraft in general and according to latter it is “any machine that can derive support in the atmosphere from the reactions of the other than the reaction of the air against the earth’s surface.”⁴⁴ There is no accepted dictionary meaning for the term “aircraft,” however, the word does cover so many different types of flying instruments that would be almost impossible to cover by the dictionary meaning anyhow.⁴⁵ Failure to define a specific definition of an aircraft does not mean that the regulation of navigation for different types of aircraft could not be established.

The status and operation of State aircraft is excluded from the scope of applicability of international air law.⁴⁶ The status of military aircraft is also unclearly determined by positive rules of international law, while only some fragmentary aspects can be found from different international treaties and even those are mostly negative, stating what does not apply to them

⁴² J. Wouters, S. Verhoeven. State Aircraft. Max Planck Encyclopedia of Public International Law, July 2008, para. 6.

⁴³ See for example: the Geneva Convention on the International Recognition of Rights in Aircraft (1948), the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).

⁴⁴ M. Milde. Essential Air and Space Law. International Air Law and ICAO. Eleven International Publishing: Utrecht 2008, p. 59; Chicago Convention. Annex 7, Foreword, p. 5.

⁴⁵ *Ibid.*, p. 59.

⁴⁶ *Ibid.*, p. 60.

or what are they not allowed to do.⁴⁷ While there is quite much information in literature about the legal position of military aircraft during an armed conflict, there is very few international agreements that apply in a time of peace.⁴⁸

Since the beginning of aviation, States have not been open to debate over international regulation of State aircraft, because it was seen as a potential tool for belligerent activities.⁴⁹ No State wants to limit the advantage aircraft can give during an armed conflict or simply for national security reasons. Some scholars are in an opinion, that the Chicago convention should never be applicable to military aircraft because of the abovementioned reason of national security.⁵⁰ However, the Chicago convention applies to aircraft from most of the States and amending it to be applicable to military aircraft as well is the most simple option to establish navigation rules for military aircraft in other areas than the high seas and the EEZ.

The primary distinction under international law is made between civil and state aircraft. There are two approaches for that. First one defines all aircraft owned and operated by the government, including those operated by a public body for commercial purposes.⁵¹ Although, the scope of the definition is very wide, this approach is preferred because of its clarity and transparency.⁵² Another approach distinguishes aircraft on the basis of the purpose of their use, so if the aircraft is used for civil purposes then it is considered to be a civil aircraft.⁵³ The latter definition would hence include the following aircraft as a state aircraft: aircraft of customs authorities, police aircraft, military aircraft, mail-carrying aircraft, coastal guard aircraft, search and rescue aircraft, disaster relief aircraft, aircraft for fire-fighting, scientific aircraft, and others.⁵⁴ In any case, a military aircraft in the meaning of this paper is a state aircraft used by a government body for military purposes.

The distinction between civil and military aircraft was made by States in an international instrument already in 1919 in the Convention Relating to the Regulation of Aerial Navigation⁵⁵ (Paris Convention). According to Article 31 of the Paris Convention, a military aircraft is every

⁴⁷ *Ibid.*, p. 61.

⁴⁸ *Ibid.*, p. 61.

⁴⁹ *Ibid.*, p. 61.

⁵⁰ Wouters, Verhoeven, *op. cit.*, para. 8.

⁵¹ *Ibid.*, para. 1.

⁵² *Ibid.*, para. 1.

⁵³ *Ibid.*, para. 1.

⁵⁴ *Ibid.*, para. 1.

⁵⁵ Convention Relating to the Regulation of Aerial Navigation. Paris 13.10.1919, e.i.f. 1922.

aircraft that is commanded by a person in military service detailed for the purpose. According to latter convention, the legal framework that applies to military aircraft is also different than the one for civil aircraft. For example, Article 32 foresees that military aircraft cannot fly over another contracting State or land thereon without its authorization.

In the past, a military aircraft was simply defined as an aircraft under the command of a military officer, later on the basis of its technical characteristics.⁵⁶ With the influence of the Chicago convention and because of the dual use of aircraft, the actual use of an aircraft for military purposes became the main criterion to determine its type.⁵⁷

It is also possible to use analogy with the definition of a warship established in UNCLOS when defining what is a military aircraft.⁵⁸ According to Article 29 of UNCLOS, a warship is:

“a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.”

Accordingly, a military aircraft belongs to the armed forces of a State, has external marks to distinguish its nationality, is under the command of an officer appropriately commissioned by a government of a State, and is manned by a crew which is under regular armed forces discipline. However, this definition leaves out drones, since they are not manned by a crew, and has deficiencies when it comes to aircraft that does not belong directly to the military but are used in the military purposes. Military drones are used by some States almost on daily basis and there is no international convention signed to regulate their status and use.

The Paris convention was superseded by the Chicago Convention where in Article 3(c) States kept the rule that prohibits foreign military aircraft to enter State territory without their special authorization. The Chicago Convention Article 3(d) establishes a rule that when States issue regulations for military aircraft, they must take into account the navigational safety of civil aircraft. This leaves an impression that States have considered the navigational safety for civil

⁵⁶ Wouters, Verhoeven, *op. cit.*, para. 9.

⁵⁷ *Ibid.*, para. 9.

⁵⁸ *Ibid.*, para. 9.

aircraft to be more important than the regulation over navigation for military aircraft. The amendment for Article 3 *bis* to the Chicago convention that prohibits the use of force against civil aircraft in flight was adopted in response to the 1983 aviation tragedy where the Soviet air force shot down a Korean Airlines civil aircraft.⁵⁹

According to the Paris Convention Article 32, military aircraft are not allowed to fly over the territory of another State nor land thereon without a special authorization from that State. With this, from the inception of international air law, military aircraft were given a different status from the civil aircraft and it was restricting the freedom of operation in foreign sovereign airspace with making it a subject to an authorization from the State that would be overflowed.⁶⁰ As already mentioned, States did not strive for regulating the navigation of State aircraft in international level, so the Article 32 of the Paris Convention might have been one of the most important aspects that the States had to agree on.

While the Chicago Convention singles out the concept of state aircraft, it does not give a definition to the term.⁶¹ Article 3(b) of the convention only states that state aircraft are those used in military, customs and police services, but nothing more specific can be found. The examples in Article 3(b) cannot be taken as comprehensive list though, since State functions also include coastal guard, medical service, research and other, which should also be covered in the meaning of State aircraft.⁶²

The members of ICAO understood the potential that the military aircraft have in the concept of national defence, but also the advantage new technology could bring to a State and did not want to share it with others. The ICAO document Circular 330 highlighted that the fundamental requirement of each and every State is to be able to train and operate its State aircraft effectively,⁶³ because there is a requirement that State aircraft would have guaranteed the right to access all airspace, within the limits of the specific operational needs, to enable the military, customs and police to perform the national defence, security and law enforcement missions that

⁵⁹ L. Tomas. Chicago Convention (1944). Max Planck Encyclopedia of Public International Law, July 2009, para. 3.

⁶⁰ Milde, *op. cit.*, p. 62.

⁶¹ *Ibid.*, p. 70.

⁶² *Ibid.*, p. 70.

⁶³ International Civil Aviation Organization. Cir 330, Civil Military Cooperation in Air Traffic Management, 2011, para. 5.1.1; Accessible at: https://www.icao.int/apac/meetings/2012_cmc/cir330_en.pdf (16.03.2018).

are mandated by their States or by international agreements.⁶⁴ When from the Circular 330 the States have an obligation to operate its state aircraft effectively, then accordingly, there is an obligation to operate military aircraft effectively. However, it is premature to conclude that using activated transponders goes under this obligation.

There are certain characteristics that can be considered in their mutual combination and may help to determine the military nature of an aircraft, those are:

- Design and technical characteristics of the aircraft are constructed exclusively for military combat;
- The nationality and registration marks may define it as used in military service;
- The ownership of the aircraft is by the State or by the military of the State;
- The nature of the specific flight operation.⁶⁵

It is not reliable to define an aircraft as military solely on one of those characteristics, but all together they do help to find the answer.⁶⁶ The wording of Article 3(b) however suggests, that the drafters might not have thought about the characteristics of the aircraft, but only the basic purpose of the use of that aircraft.⁶⁷ Therefore, the way an airplane is used designates its type and determines if it is a military aircraft or not.

The rules of international air law, including the obligation to use activated transponders, apply to civil aircraft and not to military aircraft. Then again, why are transponders so important in the meaning of the freedom of overflight and why should the obligation apply to military aircraft as well? This is the question that will be answered in the next subchapter.

⁶⁴ *Ibid.*, para. 5.1.1.

⁶⁵ Milde, *op. cit.*, pp. 70-71.

⁶⁶ *Ibid.*, p. 71.

⁶⁷ *Ibid.*, p. 71.

1.3. Importance of transponders in the concept of freedom of overflight

A transponder is a device for receiving and automatically transmitting a radio signal.⁶⁸ At first, transponders were used by military authorities to identify friendly aircraft by transmitting a coded signal when interrogated by military radar.⁶⁹ Aircraft use transponders to avoid collisions in the air and ensure the navigational safety. Military aircraft may switch off the transponders when they want to stay unnoticeable to others, but it can cause a threat of collision with civil airplanes who cannot see the military aircraft near them from their radars when the transponders are not used. Possible outcomes of flying with non-activated transponder or without a transponder include, *inter alia*, loss of communication, airspace infringement, loss of separation and inefficient planning and conflict detection by air traffic controllers.⁷⁰ The consequences might have an effect on the pilot as well as other nearby aircraft.

Reports about aircraft flying without activated transponders have increased considerably in recent years.⁷¹ In the Baltic Sea area, these airplanes are mostly Russian, but some sources claim that Sweden has identified aircraft with inactive transponders that belong to the North Atlantic Treaty Association (NATO) also.⁷² Russian spokesmen have too given notice that military aircraft from NATO Member States do not use activated transponders when flying near their border.⁷³

To give an approximate understanding about the frequency of how often military aircraft have not used activated transponders, Estonian Minister of Defence has claimed, for example, that

⁶⁸ See the definition for example from Oxford Dictionaries. Available at: <https://en.oxforddictionaries.com/definition/transponder> (03.11.2017).

⁶⁹ Skybrary. Transponder. Accessible at: <https://www.skybrary.aero/index.php/Transponder> (19.01.2018).

⁷⁰ Skybrary. Operation without a Transponder or with a Dysfunctional Transponder. Accessible at: https://www.skybrary.aero/index.php/Operation_without_a_Transponder_or_with_a_Dysfunctional_Transponder (19.01.2018).

⁷¹ Radio Sweden. Increasing reports of planes flying without transponders. 05.07.2016. Available at: <http://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6467616> (03.11.2017); A. Vahtra. NATO jets escort 32 Russian aircraft over Baltic Sea last week. ERR.ee 19.06.2017; Accessible at: <https://news.err.ee/603060/nato-jets-escort-32-russian-aircraft-over-baltic-sea-last-week> (07.03.2018).

⁷² Radio Sweden, *op. cit.*

⁷³ AFP/The Local. Russia denies near miss with Copenhagen flight. The Local 14.12.2014; Accessible at: <https://www.thelocal.dk/20141214/russia-denies-jet-near-miss-close-to-denmark> (22.03.2018).

within the first eight months in 2015 Estonian Air Forces have used the help of NATO's fighter jets for over 100 times to identify Russian airplanes that flew without active transponders.⁷⁴ This is a huge number of times when civil airplanes could have been in a threat of collision with those aircraft that were not detected by them.

In December 2014, Russian aircraft and a civil airplane that was starting from the airport of Copenhagen got too close to each other and there was an actual risk of collision.⁷⁵ Swedish officials said, that this had been the second time of that year, when a situation that kind had happened and the Swedish Defence Minister had commented to the press after the incident: "This is serious. This is inappropriate. This is outright dangerous when you turn off the transponder."⁷⁶ The incident was widely covered by media and the act of switching off transponders was broadly condemned. The same source refers to the Sweden's air force chief's claim that this had been the second incident of that kind near Copenhagen in 2014.⁷⁷

In June 2017, a Russian military aircraft came within a few feet of a U.S. Air Force reconnaissance jet above the Baltic Sea and risked a collision, while the Russian jet once again was not using activated transponders.⁷⁸ Pictures of the situation were released in media where it can be seen that the two aircraft really were dangerously close to each other.⁷⁹ It can be argued if letter situation was intentional by the Russian jet or not. However, it can still be concluded, that failure to use activated transponders is a threat to civil as well as military aircraft. If a collision would take place between two military aircraft between different States, then in addition to the loss of lives of the crew on those aircraft, it could lead to tensions between the States and even to more serious consequences.

⁷⁴ Kaitseministeerium. Mikser: Eesti õhuruumi turvalisus on tagatud. 25.08.2015. Available at: <http://www.kmin.ee/et/uudised/mikser-eesti-ohuruumi-turvalisus-tagatud> (04.11.2017).

⁷⁵ Scandinavians warn Russia after air near-miss. Financial Times 15.12.2014. Available at: <https://www.ft.com/content/95751ff2-837e-11e4-8a84-00144feabdc0> (04.11.2017).

⁷⁶ Associated Press. Russian military jet turns off transponders in near miss with passenger jet, Sweden says. Fox News, World, December 13, 2014; Accessible at: <http://www.foxnews.com/world/2014/12/13/another-near-miss-in-baltic-skies-sweden-says.html> (22.03.2018).

⁷⁷ *Ibid.*

⁷⁸ R. Oliphant. Photos show dramatic near miss of Russian and US jets in 'dangerous' interception over Baltic Sea. The Telegraph. News, 23.06.2017; Accessible at: <https://www.telegraph.co.uk/news/2017/06/23/photos-show-dramatic-near-miss-russian-us-jets-dangerous-interception/> (22.03.2018).

⁷⁹ *Ibid.*

These are only some of the examples of the reported and publicly known cases that got wider coverage by the publicity and when there was a real threat of collision that could have been avoided when transponders would have been activated on the military aircraft.

When it comes to navigational safety at sea, it is conceivable to draw parallels between the regulations for vessels and aircraft in some certain areas like regulation for reducing collision risk with a reporting system. While the civil liability for causing collisions by vessels at sea is not firmly fixed, the breach of the regulations is commonly made an offence under the criminal law of the flag State.⁸⁰ For avoiding international incidents it is vital to create an international agreement where the liability and consequences for creating a threat to navigational safety are fixed. Series of regulations that have been made to prevent collisions at sea are all principally concerned with the conduct and movements of vessels.⁸¹ There is a time and need for creating regulations for the safety of military aircraft also and making the use of activated transponders an obligation under international law.

The management of marine traffic has become more comprehensive in time, but it was unlikely to reach the precision of air traffic control.⁸² In 1994 the mandatory reporting systems were introduced, according to which the vessels had to give their position, identity and other relevant information, this was to make sure that when there was a risk of collision, the shore authority would be able to warn the ship and take necessary action.⁸³ Transponders are used for similar purposes, since they automatically receive and send out information about their location and are used to avoid collisions and guarantee the safety of navigation.

After the convention International Regulations for Preventing Collisions at Sea⁸⁴ entered into force in 1977 the observance of traffic separation schemes became mandatory and the general number of collisions at sea declined significantly.⁸⁵ For air navigation traffic separation schemes are called flight information regions that are designated by the ICAO and they only control the civil aviation. They would be difficult to set and agree on for controlling military aviation as well and considering the air-routes they even might be unreasonable. The use of

⁸⁰ Churchill, Lowe. *op cit.*, p. 267.

⁸¹ *Ibid*, p. 267.

⁸² *Ibid*, p. 268.

⁸³ *Ibid.*, p. 268.

⁸⁴ The International Regulations for Preventing Collisions at Sea. International Maritime Organization. London 20.10.1972, e.i.f. 15.07.1977.

⁸⁵ Churchill, Lowe. *op. cit.*, p. 267.

transponders would be simple enough manner for avoiding collisions and other dangerous situations during navigation.

Next to the threat of collision with civil and military airplanes, there is another problem that comes up and it concerns the resources that are used to identify the aircraft that are approaching the coastal State's airspace. States who have to send out fighter planes to identify other airplanes without activated transponders are using great amounts of money for their actions, considering that a flight hour with a fighter plane may cost tens of thousands of dollars.⁸⁶ That is an immense amount of resources that could be used for other ways to promote the security in the Baltic Sea area.

There is no treaty concluded that gives military aircraft obligations in time of peace. There is no direct obligation under international law for military aircraft to send out information about an airplane's location with a transponder in international air space as similar obligation exists for vessels, but it is considered to be ethical that military aircraft make way for civil flight traffic.⁸⁷ There is an obligation for civil aircraft to use activated transponders, furthermore, even the type of the transponder that must be used on aircraft can be regulated by the ICAO.⁸⁸ For creating an effective obligation for military aircraft, the States must create a treaty or a convention where they set the specific rules and consequences in cases of irregularities by the member States.

It is stated in the Chicago convention Article 3(d) that when States are regulating the rules of state aircraft under their national laws, they must have due regard for the safety of navigation of civil aircraft. This is probably the only obligation for military aircraft under international law in time of peace. The use of activated transponders helps the civil aircraft to see military aircraft and therefore it is a simple and effective method to guarantee the safety of civil aviation from a threat of collision with military aircraft. All in all, this means there are three persuasive reasons to create the latter obligation: air navigation safety, resources and ethics.

⁸⁶ A. Macias. A look into how much it costs to fly America's military planes per hour. Business Insider 13.08.2016. Available at: <http://www.businessinsider.com/price-military-aircraft-per-flight-hour-2016-8/#a-10c-1> (04.11.2017).

⁸⁷ Radio Sweden. Increasing reports of planes flying without transponders. 05.07.2016. Available at: <http://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=6467616> (03.11.2017).

⁸⁸ See for example: Annex 2 for the Convention on International Civil Aviation: Rules of the Air, ICAO 24.02.2005.

In the concept of international aviation law, transponders are not directly limiting the freedom of overflight, but have an importance as a safety measure used for the protection of aircraft using the right of freedom of navigation and overflight. Regarding this result, it is important to analyze if the coastal State has more right to lay an obligation for foreign aircraft to use activated transponders in their EEZ. This question will be answered in the next paragraph, where it will be analyzed under the rules of international law and also under the national laws of the States in the Baltic Sea region.

While the use of unmanned aircraft has increased remarkably, numerous types of drones suggest that some of them should also be affected by the obligation to use an activated transponder. The next paragraph shows the status and regulation of aviation navigation for aerial drones and analyzes if the coastal State has more rights to regulate the navigation of drones than aircraft in its EEZ.

1.4. Unmanned Aerial Vehicle

Unmanned aerial vehicles (UAV), also called as pilotless aircraft, remotely piloted vehicle, remotely piloted aircraft, remotely operated aircraft, and simply drones, are controlled remotely by human operators or are in some part autonomous and guided by a computer program.⁸⁹ Drones were originally developed for intelligence purposes, but are also widely used for targeted attacks and now more than 40 States have the technology.⁹⁰ Since the use of drones is growing every day, it is important to stop on the question about their status under the present problem and under international law and determine how different are the regulations for UAV from the regulation for aircraft and if it has influence on obligation to use transponders.

⁸⁹ M. Wagner. Unmanned Aerial Vehicles. Max Planck Encyclopedia of Public International Law, September 2014, para. 1.

⁹⁰ P. Alston. Human Rights Council. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN General Assembly 28 May 2010; Accessible at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> (16.04.2018), para. 27.

The use of UAVs in military operations has grown ever since they were first used.⁹¹ UAVs are used in military primarily for two reasons: for surveillance and intelligence purposes, and as weapons platforms.⁹² UN has even used the UAVs in peacekeeping operations.⁹³ The use of drones is generally legal under international law.⁹⁴ Taking into account that Intelligence gathering in EEZ needs a consent from coastal State, then it might not be necessary to sign a special treaty to make intelligence gathering drones to wear a transponder, since the coastal State can regulate the drone's navigation in the EEZ to some extent.

Article 8 of the Chicago Convention explains the regulation about pilotless aircraft and gives an obligation to ask prior permission to overfly the territory of another State, also, the UAV must avoid causing a threat to civil aviation. UAV are currently mostly used for military purposes and while they are often equipped with devices for surveillance or combat, their overflight is already prohibited under Chicago Convention Article 3(c).⁹⁵ Use of surveillance drones in the EEZ can also be a violation of UNCLOS, since surveillance activities are prohibited without the consent of the coastal State.⁹⁶ Therefore, the coastal State has a right to regulate the navigation of surveillance drones to some extent.

It is believed that if an unmanned drone should enjoy navigational rights, it will be bound by the conditions associated with those rights.⁹⁷ The basic idea of the rule in customary law is that passage must not be prejudicial to the peace, good order, and security of the coastal State.⁹⁸ Passage of a foreign ship is considered to violate this principle of freedom of navigation,⁹⁹ if it is carrying out research or survey activities.¹⁰⁰ Furthermore, peacetime intelligence gathering inside the territory of another state is considered unlawful *per se*.¹⁰¹

⁹¹ Wagner, *op. cit.*, para. 11.

⁹² *Ibid.*, para. 11.

⁹³ *Ibid.*, para. 12.

⁹⁴ *Ibid.*, para. 12.

⁹⁵ Milde, *op. cit.*, p. 43.

⁹⁶ UNCLOS Art. 245 and Art. 246(2).

⁹⁷ M. N. Schmitt and D. S. Goddard. International law and the military use of unmanned maritime systems. 98 International Review of the Red Cross 2016, p. 578.

⁹⁸ K. Hakapää. Innocent Passage. Max Planck Encyclopedia of Public International Law 2013, para. 47.

⁹⁹ UNCLOS Art 19(1), passage is innocent when it is not prejudicial to the peace, good order or security of the coastal State.

¹⁰⁰ UNCLOS, Art. 19(2)(j).

¹⁰¹ Hakapää, *op. cit.*, p. 181, p. 226.

According to UNCLOS Article 245, a coastal State has the exclusive right to regulate, authorize and conduct Marine scientific research in their territorial sea and it shall be conducted only with the express consent of the coastal State. Even though, the rights of a coastal State are not as strong in the EEZ, they still have control on intelligence activities. According to Article 246(2) of UNCLOS, there has to be a consent from coastal State for conducting research in the EEZ and continental shelf. Therefore, because it is difficult to identify when the UAV performs intelligence gathering and when not, foreign intelligence UAV needs a permission from the coastal State to fly over the EEZ.

However, is there a right to use force against a surveillance drone and should it be treated differently than piloted aircraft? When it comes to armed conflicts, then shooting down a drone can be considered less horrible action than shooting down an aircraft simply because the loss of human lives is less tolerated than loss of a machine or equipment. However, it is not simple to debate that international law would give different protection to aircraft considering their registration and to human life regardless of nationality.¹⁰²

While the coastal State has some control over the navigation and overflight of intelligence UAV, when the UAVs are used as weapon platforms or in targeted attacks, they might have the same regulation regarding navigation as other military aircraft and warships and coastal State does not have as much abilities to regulate their navigation. However, when UAV is used for military purposes, they must consider that according to UNCLOS Article 301 States must refrain from any threat of use of force against any State while exercising their rights and performing their duties. It is also noted in the Preamble of UNCLOS that the convention will promote the peaceful uses of the seas and oceans.

While the coastal State has a right to approve or disapprove the navigation of an intelligence gathering UAV in the EEZ, the legal regime for manned military aircraft is most likely out of the reach of a coastal State to regulate on its own. What exactly are the rights and obligations of a coastal State whose EEZ has been used for freedom of overflight and what rights and obligations do other States have who are using this freedom? The next chapter of this paper will analyze these questions.

¹⁰² Milde, *op. cit.*, p. 57.

II RIGHTS AND OBLIGATIONS OF STATES UNDER INTERNATIONAL LAW REGARDING THE FREEDOM OF OVERFLIGHT

States have different rights and obligations under customary international law, UNCLOS, and other international instruments that may affect the States while exercising the freedom of overflight and the coastal States potential rights to regulate other State's aircraft while using that freedom. During UNCLOS negotiations, the States worked towards the balance between the rights and interests of a coastal State on one side, that included the resources and security interests, and of the rights and duties of other States and the international community as a whole on the other side that included the navigation rights.¹⁰³

The rights and obligations of States with regard to aircraft in the airspace above the EEZ are rather obliquely referred to in UNCLOS and it gives only somewhat guidance about the rights of third States *vis-à-vis* the aviation jurisdiction of the coastal State in the EEZ.¹⁰⁴

For determining the legality and possibility of the establishment of a potential treaty obligation for military aircraft to use activated transponders is allowed under international law, relevant part of State's rights and obligations under international law will be analyzed in present chapter more closely.

¹⁰³ S. Rosenne, J. Gebhard. Conferences on the Law of the Sea. Max Planck Encyclopedia of Public International Law, May 2008, para. 38.

¹⁰⁴ Hailbronner, *op. cit.*, p. 503.

2.1. Rights of a State under international law

2.1.1. Sovereignty of the sea and airspace

The concept of sovereignty is the foundation of international air law.¹⁰⁵ Question about the obligation to use activated transponders is connected to the sovereignty of States that are parties to the conflict. On one hand, a military aircraft of one State uses its sovereign right to fly over the EEZ while having the sovereign right of its flag State not to use a transponder when the States has not accepted this obligation under international law, and on the other hand, the other State uses its sovereign right to give laws regulating the obligation for aircraft to give prior notification when approaching the State airspace.

The principle of State sovereignty has been important in many disciplines, including international law and international relations, already in time of the Westphalian treaty in 1648.¹⁰⁶ The concept of territorial sovereignty, although, is a modern one and distinguishes the international dimension of sovereignty from domestic sovereignty.¹⁰⁷ In the international sphere, the activities by sovereigns to keep the safety of the community include actions that may overlap and possibly infringe upon the sovereignty of other communities.¹⁰⁸ As the same way the freedom of overflight used improperly can cause a threat to others who enjoy that freedom.

According to Black's Law Dictionary, the sovereign power is „the international independence of a [S]tate, combined with the right and power of regulating its internal affairs without foreign dictation.”¹⁰⁹ The Chicago convention does not apply to military aircraft, as it is excluded in Article 3. The members of the Chicago convention have used their sovereign right to take the obligation for their State aircraft to guarantee the safety of civil aircraft while flying. Although, state aircraft have to consider with the navigation safety rules in order to guarantee the safe

¹⁰⁵ L. Tomas. Air Law. Max Planck Encyclopedia of Public International Law, August 2008, para. 2.

¹⁰⁶ P. Piirimäe. The Westphalian myth and the idea of external sovereignty – H. Kalmo & Quentin Skinner (ed.) Sovereignty in Fragments: The Past, Present and Future of a Contested Concept. Cambridge: Cambridge University Press 2010, p. 64.

¹⁰⁷ *Ibid.*, p. 65.

¹⁰⁸ *Ibid.*, p. 66.

¹⁰⁹ The Law Dictionary. Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. What is SOVEREIGNTY? Accessible at: <https://thelawdictionary.org/sovereignty/> (12.03.2018).

flight of civil aircraft, as it is set under international law. In the meaning of State sovereignty, it is important to note that States are sovereign to regulate the navigation rules on their own, however, only on their own sovereign territory.

Under international law, sovereignty can be understood as a higher normative with a mission to restrain States subjective politics and therefore the concept of sovereignty is equated with the set of rights and obligations granted to States.¹¹⁰ In the context of this thesis, sovereignty has importance in two aspects, first, because of the sovereignty States have over its airspace, and second, because of the sovereign right of each State to choose which treaty to sign and what obligations to take on itself.

Sovereignty represents the ability to make authoritative decisions¹¹¹ and therefore is important to take into consideration whenever arguing over the possibility of signing a multilateral treaty about limiting State's own rights and obligations. While it is important for the States to keep the right for freedom of overflight, there has to be a general understanding if the obligation to use activated transponders is a limitation to this freedom, and when yes, then is it justified under international law.

There is an obligation under international law to respect the territorial sovereignty of another State. This was also stressed in the Corfu Channel case, where the International Court of Justice (ICJ) underlined that respect for territorial sovereignty is the essential foundation of international relations between independent States.¹¹² From the Corfu case it was clear that the territorial sovereignty is so important that it must be respected even when the violation is made in good intentions.¹¹³ It is not a clear parallel to make when claiming that the failure to use an activated transponder would be disrespectful to the territorial sovereignty of the coastal State, but it is not an unrealistic thought either, because it is disrespectful for other aircraft.

¹¹⁰ H. Kalmo and Q. Skinner. *The sovereign State: a genealogy* – H. Kalmo and Q. Skinner (ed). *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*. Cambridge: Cambridge University Press 2010, p. 4.

¹¹¹ ICISS. *The Responsibility to protect*. Report of the International Commission on Intervention and State Sovereignty, p. 12; Accessible at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (12.03.2018).

¹¹² *Corfu Channel Case (United Kingdom vs Albania)* International Court of Justice, Judgement on Merits, 9.11.1949, p. 35.

¹¹³ *Ibid.*, p. 35.

Territorial sovereignty is also emphasized in UNCLOS Article 2 that is about the legal status of the territorial sea and basically establishes that States have sovereignty over their territorial sea and this sovereignty extends to the airspace over the territorial sea. Accordingly, the importance of the territorial sovereignty has been clear and well-established in international society and from that concept airspace sovereignty evolved as well.

The ICJ stated in the Nicaragua case that the ‘unauthorized overflight of a State’s territory by aircraft belonging to or under the control of the government of another state’ directly infringes the territorial sovereignty of the overflown State.¹¹⁴ This is a general observation and should be tempered by noting that if such an incursion had been caused by navigational error or other intentional circumstances, its wrongfulness could have been precluded on the grounds of distress or *force majeure*¹¹⁵ that is explained in Draft Articles on State Responsibility. While as intense act as the unlawful overflight of a State territory is a direct violation of its territorial sovereignty, it is unlikely that a simple act as failure to use activated transponders in the EEZ could be considered as a minor violation or even as a threat to territorial sovereignty of the coastal State.

The sovereignty of the sea is one of the three cornerstones of international law of the sea, next to freedom of the sea and the common heritage of mankind.¹¹⁶ Historically, the concept of sovereignty over the sea, however, composes of two primary rights that are related to navigation and fishing.¹¹⁷ Accordingly, as it is a part of the freedom of the sea, the freedom of navigation is a part of the sovereignty of the sea and represents an important part of international law of the sea. The extent of sovereignty over the sea depends on the coastal State’s needs and capacity of control over it.¹¹⁸ However, the extent of territorial sea can also affect State’s capacity. The capacity to have control over the sea could be the reason that affected some States to claim a

¹¹⁴ Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). International Court of Justice, 27.06.1986, para. 251.

¹¹⁵ Mačák, *op. cit.*; ILC Draft Articles on State Responsibility, commentary to Article 23, para. 5., fn. 351.

¹¹⁶ T. Scovazzi. The Origin of the Theory of Sovereignty of the Sea – L. del Castillo (ed.). Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea. Leiden: Koninklijke Brill NV 2015, p. 49.

¹¹⁷ *Ibid.*, p. 50.

¹¹⁸ *Ibid.*, p. 57.

narrower territorial sea than 12 nm. The geographical position also has an impact, for example, Jordan's claim for the territorial sea is only 3 nm wide.¹¹⁹

One of the principle of public international air law recognizes each State's absolute sovereignty over the air above its territory and territorial waters and this includes the right to impose its jurisdiction over such airspace.¹²⁰ Hence, all States may require any foreign aircraft in its airspace, even if only for a brief transit, to comply with their air transport regulations, *inter alia* for those concerning navigation.¹²¹ It would be reasonable to presume, that an aircraft has to follow those rules that also regulate the procedure of entering the air space. While State relies on the sovereignty, it has to follow the international treaty obligations it has assumed in the interest of safe air transport.¹²²

Sovereignty of airspace was first settled in Paris Conference where the Paris Convention was drafted. The outcome of the Convention showed an active backing for complete and exclusive sovereignty of the air space.¹²³ According to current public law regulations, the part of the air space above a particular State's land and sea territory is considered to be seen as that State's air space¹²⁴ and that State has exclusive power over it. The meaning of sovereignty of airspace that was established in the Paris Convention was relied on when drafting future conventions as well.

The Chicago Convention continued to emphasize the importance of air sovereignty and used the first article from the Paris Convention almost as it was: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."¹²⁵

¹¹⁹ Table of claims to maritime jurisdiction (as at 15 July 2011). United Nations, August 2010; Accessible at: http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf (16.04.2018).

¹²⁰ Hailbronner, *op. cit.*, p. 490.

¹²¹ *Ibid.*, p. 490.

¹²² *Ibid.*, p. 490.

¹²³ A. Engvers. The Principle of Sovereignty in the Air. To what extent can it be upheld against aerial intruders? University of Lund: Marter's Thesis 2001, p. 11.

¹²⁴ *Ibid.*, p. 4.

¹²⁵ *Ibid.*, p. 16.

States are prohibited to have any rights in the airspace other than their own, because of the formal eminence of the principle of sovereignty.¹²⁶ States have no right to set regulations in the sovereign territory of another State.

During armed conflicts in the beginning of the 20th century, the question about airspace sovereignty became important. If a neutral State allows a belligerent to enter the neutral airspace and conduct intelligence operations or combat operations against their opponent, then it might have an effect on the neutrality of the neutral State in the eyes of other belligerents and the international community.¹²⁷ Because of the previously described possibility, neutral States took a position that they had complete sovereignty over their airspace and that entry by a belligerent aircraft would be a violation of their neutrality, and also of their sovereignty.¹²⁸ The decisions of neutral States thus had a great impact on the development of international law in these matters, since it was also decided by the neutral States that they had a right to prevent the entry of a belligerent aircraft, even with the use of force, if necessary.¹²⁹ Furthermore, it was often considered that force could be used without prior warning.¹³⁰ This reflects the States understanding about how important the territorial sovereignty really was.

The actions in the time of conflict had an impact on the regulations there were developed after it. Customary law in regard to sovereignty of airspace arose from the treatment of belligerent aircraft by neutrals during World War I¹³¹ when it reflected the concern of the world for seeking protection from hostile intrusions.¹³² Military aircraft were not allowed to enter foreign airspace without express consent,¹³³ already in the beginning of the development of international aviation law, since it was seen as a threat to national security and the State had also sovereign power to decide who to let into its sovereign territory.

The letter list shows that overall the freedom of overflight was accepted already between the two World Wars even though it had different approaches in the limits of it. It also shows that

¹²⁶ *Ibid.*, p. 20.

¹²⁷ Major J. T. II. Phelps. Aerial intrusions by civil and military aircraft in time of peace. 107 *Military Law Review* 1985, p. 268.

¹²⁸ *Ibid.*, p. 268.

¹²⁹ *Ibid.*, p. 268.

¹³⁰ *Ibid.*, p. 271.

¹³¹ *Ibid.*, p. 269.

¹³² *Ibid.*, p. 270.

¹³³ *Ibid.*, p. 270.

there has always been different attitude towards civil and military aircraft in regard of the freedom of overflight.

Current regulations in public international law foresee that the part of the airspace that is above State's land and sea territory is considered as that State's airspace.¹³⁴ The airspace over the territorial sea is thus the airspace of the coastal State. States have complete, exclusive and all-encompassing sovereignty in their airspace.¹³⁵ According to this approach, the right for a coastal State to decide over the legislation regarding the military aircraft, is limited to its territory.

The previously named fact that States have sovereignty only over their territory is another clear proof that States must cooperate when creating an obligation for the safety in the whole region and over the territorial waters of the Baltic Sea. It is one of the cases, the complete and exclusive sovereignty should be left beside either through voluntariness or duress¹³⁶ and to make a compromise between the sovereignty of the airspace and the safety of aviation, naming the safety of aviation navigation as the more important. This again reflects one of the parts of State sovereignty, that States have a right to decide which treaty obligations to take.

2.1.2. The principle of free consent

International law is based on the consent of the States. When talking about establishing an international obligation, it is not possible to overlook at the principle of free consent. Vienna Convention on Law of Treaties reflects the customary law in this matter while stating that: "Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized"¹³⁷ As already mentioned in previous subchapter, States have a sovereign right to choose which treaties they wish to sign and that gives them a choice to choose which international obligations to take.

¹³⁴ Engvers, *op. cit.*, p. 4.

¹³⁵ Milde, *op. cit.*, p. 43.

¹³⁶ Engvers, *op. cit.*, p. 19.

¹³⁷ Vienna Convention on the Law of Treaties. Vienna: 23.05.1969, e.i.f. 27.01.1980, Preambula.

The consent of States plays a central role in developing international legal obligations.¹³⁸ As the Permanent Court of International Justice stated already in the Lotus case:

“The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these CO-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.”¹³⁹

States own free will to take obligations under international law is therefore a very important aspect to consider while analyzing the legality of a potential treaty obligation. A treaty obligation is binding to a State only when it has given its consent.¹⁴⁰ In case of multilateral agreements there are both an individual and a collective dimension in creating a binding treaty obligation.¹⁴¹ Therefore, in order to create a legally binding international obligation for military aircraft to fly with activated transponder over the Baltic Sea and to make it efficient enough to serve its purpose of safety of aerial navigation, all States in the Baltic Sea area must give their consent to sign the treaty that establishes the obligation.

2.1.3. State's right to create security or air defence identification zones

Another one of State's rights is a right under UNCLOS to establish air defence zones to ensure their rights over the marine resources in the EEZ and for other reasons allowed under UNCLOS. Numerous national claims to non-contiguous, but adjacent, zones for special purposes were produced by States in the 20th century.¹⁴² Maritime identification zones, air defence zones and security zones have different name and purpose, but the basic idea behind them is similar – to create a certain area beyond the territorial sea that has limitations to navigation for other State's

¹³⁸ J. Brunnée. Consent. Max Planck Encyclopedia of Public International Law, October 2010, para. 1.

¹³⁹ The Case of the S.S. "Lotus" (France v. Turkey). Permanent Court of International Justice, Publications of The Permanent Court of International Justice, Series A.-No. 70, 07.09.1927, p. 18.

¹⁴⁰ Brunnée 2010, *op. cit.*, para. 5.

¹⁴¹ *Ibid.*, para. 7.

¹⁴² J. R. Crawford. Brownlie's Principles of Public International Law. 8th Edition. Oxford: Oxford University Press 2012, p. 279.

vessels and aircraft for security or other reasons. Therefore, in this paper these zones will be considered as air defence identification zones (ADIZ).

It is arguable whether establishing an ADIZ beyond the territorial sea of a coastal State is permissible as long as it does not have an influence on commercial navigation.¹⁴³ Establishing an ADIZ for the purposes of identifying vessels and aircraft, however, has gained acceptance according to the State practice and reflect the common interest of States in enhancing maritime domain awareness.¹⁴⁴

Innocent passage was already included in a convention in 1919 when the Paris Convention adopted this right that was clearly limiting the force of the absolute principle of sovereignty.¹⁴⁵ Back then, the right of innocent passage was restricted to state aircraft and scheduled air services above prohibited areas, however these services were referred to as bilateral agreements at the time.¹⁴⁶ Later, the Chicago Convention brought out some clear specific attributes of that sovereignty.¹⁴⁷ Article 2 of the Convention reiterates the generally recognized principle of sovereignty over the airspace above the territorial sea,¹⁴⁸ making it possible for the coastal State to create ADIZ in its territorial sea.

If a State declares an ADIZ, it usually asks aircraft to identify itself and to give the State information on its flight plan.¹⁴⁹ This could lead to the possibility for the coastal State to obligate military aircraft to use activated transponders in some specific zones they foresee it, however, this would not solve the problem in the whole Baltic Sea. The establishment of an ADIZ can be justified with security considerations when the coastal State needs to protect itself from a sudden attack from a high speed aircraft and thus it is understood that the limitation of the freedom of navigation as a freedom of the high seas is not justified when the aircraft flies in lateral passage and does not represent an immediate threat to the security of the coastal

¹⁴³ N. Klein. *Maritime Security and the Law of the Sea*. New York: Oxford University Press 2011, p. 58.

¹⁴⁴ *Ibid.*, p. 60.

¹⁴⁵ Engvers, *op. cit.*, p. 20.

¹⁴⁶ *Ibid.*, p. 20.

¹⁴⁷ Milde, *op. cit.*, p. 43.

¹⁴⁸ Hailbronner, *op. cit.*, p. 494.

¹⁴⁹ N. Ronzitti. Part II Maritime Security Law, 18 Military uses of the Sea – D. Attard, M. Fitzmaurice, N. Martinez, *et. al.* (ed.). *The IMLI Manual on International Maritime Law: Volume III: Marine Environmental Law and International Maritime Security Law*. Oxford: Oxford University Press 2016, p. 564, para. 18.12.

State.¹⁵⁰ When a foreign military aircraft flies directly towards the coastal State without having a permission for it, it can be seen as a threat in obvious reasons.

While these special ADIZ represent claims to extra-territorial jurisdiction they are not necessarily in conflict with general international law and these zones can even be created with a convention by several States as a cooperation.¹⁵¹ However, in case these zones include the application of powers of punishment or prevention towards foreign vessels or aircraft, such zones could be incompatible with the status of waters beyond the limit of the territorial sea.¹⁵² Under the application of punishment is meant the right and possibility to perform law enforcement in cases of violations. Even if such rights would be discussed on for including in a treaty, it gives States power outside their territory and this is against the principle of territorial sovereignty.

However, on the other hand, if the declaration of declaring an ADIZ does not include any kind of enforcement, there seems to be no reason to declare the zone at all.¹⁵³ The purpose of creating an ADIZ is to stop any aircraft, foreign and domestic, to enter the zone and without enforcement measures, it would be difficult to meet this purpose. The exercising of lawful policing would also guarantee the legality of these zones.¹⁵⁴

The latter enforcement requirement is fulfilled by the UN. The freedom of overflight can be restricted in a certain area also by a no-fly order issued by the UN Security Council.¹⁵⁵ These orders may prohibit States to use parts of or the whole of their airspace above their own territory in case of an armed conflict or for reasons of humanitarian intervention for the purposes of preventing or diminishing aggression.¹⁵⁶ With the permission of the UN Security Council the UN military aircraft can enforce the no-fly orders,¹⁵⁷ guaranteeing the exercising of lawful policing on those areas.

¹⁵⁰ *Ibid.*, p. 564, para. 18.12.

¹⁵¹ Crawford, *op. cit.*, p. 280.

¹⁵² *Ibid.*, p. 280.

¹⁵³ Klein, *op. cit.*, p. 59.

¹⁵⁴ *Ibid.*, p. 59.

¹⁵⁵ Engvers, *op. cit.*, p. 21.

¹⁵⁶ *Ibid.*, p. 21.

¹⁵⁷ *Ibid.*, p. 21.

There are number of States, including Canada, France, Japan, the United States of America, and Republic of Korea, that have established standing ADIZ.¹⁵⁸ However, there is no treaty provisions that regulate the establishment or operating of these zones *per se* and these unilateral claims indicate that the right to declare an ADIZ may be recognized as a right under customary international law.¹⁵⁹

It is difficult to see how creating such defence zones in the Baltic Sea area solely on the purpose of safety of navigation would be possible and reasonable. Most likely they would not help to solve the problem with non-activated transponders, on the contrary, it could create more tensions between the States. However, States have more rights under international law that could give them right to regulate the freedom of overflight and they will be analyzed in the next subchapter.

2.1.4. Other State's rights under international law regarding the freedom of overflight

By the expansion of maritime zones, the principle of the freedom of navigation has been limited,¹⁶⁰ by giving coastal States jurisdiction to limit the navigation of other States in the EEZ in certain conditions. As a result of the Third Conference on the Law of the Sea, new maritime zones, including the EEZ, were agreed on. States were able to make compromises on different rights and obligations regarding those zones. Some consider the EEZ as an evolving concept where the rights and jurisdictions of States are only partly fixed by conventions.¹⁶¹

According to UNCLOS Article 56, the coastal State enjoys sovereign rights in the EEZ only for managing the natural resources,¹⁶² jurisdiction regarding the establishment of artificial islands, installations and structures¹⁶³ and "other rights and duties provided for in this Convention."¹⁶⁴ Article 58(1) refers that those other rights are connected to lawful uses of the sea that are related to the operation of ships, aircraft and submarine cables and pipelines.

¹⁵⁸ J. A. Roach. Air Defence Identification Zones. Max Planck Encyclopedia of Public International Law, March 2017, para. 6.

¹⁵⁹ *Ibid.*, para. 6.

¹⁶⁰ M. A. Becker. The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea. – 46 Harvard International Law Journal, 2005(1), p. 171.

¹⁶¹ Hailbronner, *op. cit.*, p. 505.

¹⁶² UNCLOS, Art 56(1)(a).

¹⁶³ UNCLOS, Art 56(1)(b).

¹⁶⁴ UNCLOS, Art 56(1)(c).

However, it would be early to conclude that since State's rights in the EEZ are connected to the operation of aircraft then it includes the coastal States right to regulate the use of transponders or the obligation for other States to use them either.

UNCLOS commentaries clears the issue by two different approaches. Firstly, Article 58 establishes the rights and duties of States other than the coastal State and have due regard to the rights and duties of the coastal States in the EEZ.¹⁶⁵ Secondly, at the time of the third session of the conference, paragraph 4 of Article 58 suggests that the States must comply with laws and regulations of the coastal States that are adopted under the UNCLOS and it does not include the security interests of the coastal States.¹⁶⁶ The use of activated transponders, however, is not a security interest of a single coastal State, but affects the safety of all civil and military aviation and all States.

At first glance it seems that the coastal State's rights in the EEZ are mostly concerned about the environmental safety, natural resources in seabed and subsoil, artificial structures and not about navigation, but to guarantee the safety of those areas, some restrictions to navigation may be set.

According to the commentaries of UNCLOS, the purpose of Article 56 is to point out the general nature of the rights, jurisdiction and duties that the States have in the EEZ.¹⁶⁷ Coastal State jurisdiction in the EEZ covers activities that are regulated under the so called "other rights" in Article 56, those are about marine pollution, scientific research, offshore installations and drilling activities, fishing activities, submarine cables and pipelines, and also navigation.¹⁶⁸ Accordingly, States do have jurisdiction over navigation and overflight in the EEZ in some extent.

The coastal State has immense jurisdiction in regulating the navigation in the territorial sea, but in only certain domains in the EEZ. The United States of America considers, for example, that the EEZ regime set in UNCLOS does not permit the States to limit non-resource related activities in the EEZ at all, including such activities as task force maneuvering, flight

¹⁶⁵ UNCLOS Commentary. Vol. II 1993, *op. cit.*, p. 556, para. 58.1.

¹⁶⁶ *Ibid.*, p. 560, para. 58.4.

¹⁶⁷ *Ibid.*, p. 525, para. 56.1.

¹⁶⁸ *Ibid.*, p. 525, para. 56.2.

operations, and military exercises.¹⁶⁹ However, the United States of America is not even a party to UNCLOS and may not use the treaty provisions for its self-interest.

It should be considered if establishing a contiguous zone would give a State more rights to limit the freedom of navigation and overflight. UNCLOS Article 33 gives coastal State a right to create special zone contiguous to its territorial sea, where the State can exercise control over the sea area up to 24 nautical miles as measure from the baselines where the territorial sea is measured. However, UNCLOS Article 33(1)(a) allows the coastal State to take measures in the continuous zone only regarding customs, fiscal, immigration or sanitary laws, so the coastal State does not have any direct rights regarding the limitation of navigation for other State's vessels or aircraft. When the primary purpose of a coastal State's regulation is connected to the areas pointed out in Article 33(1)(a), limitations to navigation could potentially be made, but they cannot be the primary purpose of the regulations. Since international airspace starts from right after the territorial sea, then regardless if the State has claimed a contiguous zone, the legal aspects of the freedom of overflight are the same in the contiguous zone as in whole extent of the EEZ.

UNCLOS does not plainly stipulate what legal regime should be applied with regard to activities that are not unequivocally regulated under Article 56(1)(a).¹⁷⁰ Also, altogether it is not clear whether the list of a coastal state's jurisdictional rights with regard to the uses mentioned in Article 56(1)(b) can be taken as an exhaustive enumeration, making possible any other exercise of jurisdiction in the EEZ.¹⁷¹ Since Article 56(1)(c) gives the coastal State jurisdiction over "other rights and duties provided for in this Convention," it rather seems that the list in previous provision is not exhaustive.

It is evident that there is imbalance between the rights of a coastal State and the rights of other States, because only the freedoms of navigation and overflight limit the sovereignty of a coastal State effectively.¹⁷² However, the rights of a coastal State are not absolute, since UNCLOS Articles 55, 56(2), and 58 expressly provides the due regard to other rights and duties of other States.¹⁷³ Accordingly, all States have an obligation to respect other State's rights and duties

¹⁶⁹ Doran, *op. cit.*, p. 341.

¹⁷⁰ Hailbronner, *op. cit.*, p. 503.

¹⁷¹ *Ibid.*, p. 503.

¹⁷² D. Attard, M. Fitzmaurice, N. A. Martínez Gutiérrez (ed). The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea. Oxford: Oxford University Press 2014, p. 192.

¹⁷³ Andreone, *op. cit.*, p. 165.

when using the sea. This obligation and others will be analyzed more closely in the next subchapter.

2.2. Obligations of a State under international law

2.2.1. Obligation to due take account of the rights and duties of other States

The obligation that has an effect on State sovereignty is the obligation to due take account of the rights and duties of other States. While there is not much to discuss about, it is still important to bring out one of the basic obligations that UNCLOS foresees for States and it has a wider effect on potential future treaties than it might seem. The basic idea behind this obligation is that States must respect other State's rights and duties under UNCLOS while they are using their own.

Articles 56 and 58 of UNCLOS impose mutually the obligation of the coastal State to due take into account the rights and duties of other States and also that other States must take into account the rights and duties of the coastal State.¹⁷⁴ The idea behind UNCLOS is that the assignment of resources to the coastal State should not prejudice the participation of other States to still use that area and continue to enjoy the freedom of navigation and overflight.¹⁷⁵ Articles 56 and 58 reflect the compromise between the naval powers who stood for the freedom of navigation and overflight and the coastal States who wanted a more extensive jurisdiction over the marine resources.

2.2.2. Obligation to identify yourself when approaching the border of another State

The obligation to due take into account the rights and obligations of a coastal State leads to a milder form of the same obligation that reflects in the obligation to have respect for the coastal State. The obligation to identify itself is indirectly regulated under international law while Article 58(3) provides States with an obligation to comply with the laws and regulations

¹⁷⁴ Attard, Fitzmaurice, Martínez Gutiérrez, *op. cit.*, pp. 191-192.

¹⁷⁵ *Ibid.*, p. 192.

adopted by the coastal State.¹⁷⁶ Although, Article 58(3) does not enlarge the regulatory authority of the coastal State nor limits the freedom of other States,¹⁷⁷ States can rely on this provision to establish an obligation under national law to identify itself to vessels and aircraft that approach the coast. This gives importance to the potential treaty between States to regulate the freedom of overflight and its limitations for safety in a more specific way.

State may give an obligation for the aircraft to identify itself before approaching its airspace, although, it has some infirmities. When States may require the approaching military aircraft to identify itself, it is troublesome to see how enforcement measures, like interception of foreign aircraft that are passing through restricted zones, and prosecution of their pilots for not following a prescribed route or to file flight plans, can be defended under customary international law.¹⁷⁸ This problem would again be solved with the treaty between States that puts an obligation to use activated transponders, so there is no need to ask an aircraft to identify itself again when approaching the coastal State and the enforcement measures might not be even needed.

2.2.3. Other State's obligations under international law

Following the belief that the State is made for people and not the opposite, the State has an obligation to protect its citizens. The protection of a state's vital security interests against imminent dangers requiring immediate reaction, however, is a matter not regulated by the Convention and, therefore, not included in the scope of mere "flag state duties," precluding a state from taking enforcement action in its airspace.¹⁷⁹ The danger to vital security interests must be evident, leaving a coastal state no other choice than immediate action if irreparable damage is to be avoided.¹⁸⁰

The responsibility to protect principle was first presented in the report made by the International Commission on Intervention and State Sovereignty, according to their report *The Responsibility to Protect*, sovereignty gave a State the right to control its affairs, and also

¹⁷⁶ UNCLOS, Art 58(3).

¹⁷⁷ Hailbronner, *op. cit.*, p. 506.

¹⁷⁸ *Ibid.*, p. 518.

¹⁷⁹ *Ibid.*, p. 500.

¹⁸⁰ *Ibid.*, p. 500.

conferred that the State has primary responsibility for protecting the people within its borders.¹⁸¹ Accordingly, a State has to protect its citizens that are traveling on a civil aircraft that might be collided with a military aircraft that has not activated its transponders and thus is “invisible” for that civil aircraft. A State has an obligation under international law to take measures for protecting the civilian aviation as well as possible.

States also have to use the sea in peaceful purposes and this applies also in the EEZ.¹⁸² The general obligation comes from UNCLOS Article 301 that puts States an obligation to refrain from the use of force against any State while exercising rights and performing duties under UNCLOS. Therefore, States have an obligation to guarantee that military aircraft under their command are not posing a threat to the territorial integrity or political independence of the coastal State.

The rights and restrictions about the freedom of navigation may also appear in other sources than UNCLOS, for example, in the resolutions of the United Nations Security Council. When the Security Council Resolution S/RES/1540, arguably, allows States to limit the transit of weapons of mass destruction and some States take that as an authorization to establish legislation for limiting the innocent passage and freedom of overflight regime,¹⁸³ it is very questionable. States cannot unilaterally limit the freedom of navigation and overflight in the EEZ either.

Innocent passage is considered to be prejudicial to the peace, good order, or security of the coastal state if a ship engages in the launching, landing, or taking on board of any aircraft, as set in Article 19(2)(e).¹⁸⁴ Therefore, the aircraft should have a prior permission from the coastal State to fly over the territorial sea. Innocent passage does not embrace the right of overflight thus, the passage of aircraft will be subject to the coastal state's consent.¹⁸⁵ Even more,

¹⁸¹ Outreach program on the Rwanda genocide and the United Nations. The Responsibility to Protect. Background note. March 2012, p. 1; Accessible at: <http://www.un.org/en/preventgenocide/rwanda/pdf/bgresponsibility.pdf> (14.03.2018).

¹⁸² A. J. Hoffmann. Freedom of Navigation. Max Planck Encyclopedia of Public International Law, April 2011, para. 19.

¹⁸³ Wolfrüm, *op. cit.*, p. 91.

¹⁸⁴ Hailbronner, *op. cit.*, p. 494.

¹⁸⁵ *Ibid.*, p. 493.

recognition of a 200-mile exclusive economic zone could imply authority over movement of aircraft with restrictions in respect to overflight.¹⁸⁶

In any event, when it comes to State's obligations, State responsibility has to be considered. Customary law rules of State responsibility are reflected in Draft Articles of Responsibility of States for Internationally Wrongful Acts.¹⁸⁷ If a State violates its obligation under international law, it is conducting an internationally wrongful act and is responsible for those actions.¹⁸⁸

UNCLOS has an Article that allows the State's to change the regulations of UNCLOS by *inter se* agreements, however, it is prohibited to conclude those treaties in some certain areas. If freedom of navigation and overflight belongs with those restricted areas, will be analyzed as follows.

2.4. UNCLOS Art 311(3) limitations to create treaty obligations

The Baltic Sea meets the definition of a semi-enclosed sea in Article 122 of UNCLOS, under what is meant a "sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States." UNCLOS has a certain obligation for the coastal States that are located around such seas: an obligation to cooperate with each other while exercising their rights and performing their duties under UNCLOS.¹⁸⁹ However, Article 123 that establishes that obligation has specifications about what areas exactly should the States cooperate at and those are about marine resources,¹⁹⁰ marine environment,¹⁹¹ and the Area.¹⁹²

According to UNCLOS commentaries, proposals were made for maintaining the freedom of navigation and overflight in the closed or semi-closed seas and in straits connecting those seas

¹⁸⁶ Hailbronner, *op. cit.*, p. 493

¹⁸⁷ International Law Commission. Responsibility of States for Internationally Wrongful Acts. UN General Assembly 2001.

¹⁸⁸ *Ibid*, Articles 1 and 2.

¹⁸⁹ UNCLOS, Art. 123.

¹⁹⁰ UNCLOS, Art. 123(a).

¹⁹¹ UNCLOS, Art. 123(b).

¹⁹² UNCLOS, Art. 123(c).

with open ocean.¹⁹³ However, these proposals were not accepted.¹⁹⁴ Consequently, there is no obligation for the States surrounding a semi-enclosed sea to cooperate about other rights and obligations that arise from UNCLOS, including the freedom of navigation and overflight, so it cannot be used as justification for signing a treaty about limiting the freedom of overflight. Furthermore, Article 311(3) can even be an explicit prohibition for a cooperation to limit that freedom.

Since the obligation to use activated transponders is seen as a limitation to the freedom of navigation and overflight that is a right provided in UNCLOS, Article 311 could be the biggest obstacle to set that kind of a limitation with a treaty. While the Article allows to sign treaties to modify the provisions of UNCLOS when it has effect only on themselves¹⁹⁵, there are several strict conditions to consider. Firstly, article 311(2) considers the treaties that have been signed before the completion of UNCLOS, appointing that:

“This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

Furthermore, paragraph 3 of Article 311 establishes concrete limits to future treaties that may be concluded to restrict the rights and obligations from UNCLOS, stating that:

“Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.”

The purpose of Article 311 is to determine the relations between UNCLOS and international agreements that are made for dealing with the same issues as in the UNCLOS.¹⁹⁶ While the goal

¹⁹³ UNCLOS Commentaries, Vol. III, 1995, *op. cit.*, p. 363, para. 123.6 and 123.7.

¹⁹⁴ *Ibid.*, p. 363, para. 123.7.

¹⁹⁵ UNCLOS, Art. 311(2).

¹⁹⁶ A. Proelss. United Nations Convention on the Law of the Sea: A Commentary. Portland: Hart Publishing 2017, p. 2010, para. 1.

of the provision is to prevent future conflict between the UNCLOS and international agreements, Article 311 clarifies, to what extent is derogation from the rights and obligations from UNCLOS allowed.¹⁹⁷ The third paragraph of Article 311 regulates the overall permissibility of *inter se* agreements.¹⁹⁸ While Art 311(3) commonly allows modifications or suspensions, it sets the same conditions as in the Vienna Convention on the Law of Treaties Articles 41(1)(b) and 58(1)(b).¹⁹⁹ Accordingly, multilateral treaty between the parties of the convention is not prohibited when the modification (Article 41(1)(b)) or suspension (Article 58(1)(b)) in question is not prohibited by the convention itself.

UNCLOS nor its commentaries have no reference to the fact that the freedom of navigation is an unlimited right. However, it is said that no State may validly purport to subject the superjacent airspace beyond the outer limits of the territorial sea to its sovereignty.²⁰⁰ This rule comes from Article 89 of UNCLOS, but it applies to the EEZ also.²⁰¹ Therefore, it is vital to evaluate, if giving an obligation to use activated transponders is a way coastal State establishes its jurisdiction over the EEZ or is it just a measure of safety that is agreed by all neighboring States and does not directly limit the freedom of overflight.

The International Regulations for Preventing Collisions at Sea applies in the high seas²⁰² establishing rules for vessels for avoiding collisions at sea. It foresees different light and sound signals to avoid collisions.²⁰³ The purpose of these measures is clearly to make vessels visible to each other. Accordingly, making an aircraft visible for others does not limit the freedom of navigation, but fulfils the obligation to due regard other States rights while performing yours. Therefore, the use of transponders is a method to promote the safety of navigation and helps to avoid collisions, the same way as the International Maritime Organization has established such measures for vessels. If All in all, establishing a treaty obligation to use activated transponders does not modify or suspend the effective execution of the freedom of overflight and is not prohibited under UNCLOS.

¹⁹⁷ *Ibid.*, p. 2010, para. 1.

¹⁹⁸ *Ibid.*, p. 2015, para. 14.

¹⁹⁹ Proelss, *op. cit.*, p. 2015, para. 14.

²⁰⁰ UNCLOS Commentaries, Vol. III, 1995, *op. cit.*, p. 81, para. 87.9(d).

²⁰¹ *Ibid.*, p. 81, para. 87.9(d).

²⁰² The International Regulations for Preventing Collisions at Sea, Rule 1(a).

²⁰³ *Ibid.*, Part C and D.

Paragraphs 3, 4 and 6 of Article 311 give States a possibility to conclude treaties with two or more members that could modify or suspend the operation of provisions of UNCLOS.²⁰⁴ However, those treaties are allowed only under strict conditions, namely, that such treaties must not include provisions derogation that is incompatible with the effective execution of the object and purpose of UNCLOS, must not affect the application of the basic principles manifested in UNCLOS, are not allowed to make changes to the basic principle about the common heritage of mankind, and must not have an effect to the rights and duties that other States have under UNCLOS.²⁰⁵ Furthermore, according to the commentaries of UNCLOS, the wording of paragraph 2 of Article 311 was offered to consider previous treaties that have been made about freedom of navigation and overflight, the Chicago convention for example,²⁰⁶ which suggests that States did consider it possible to modify or suspend the freedom of navigation and overflight with other treaty than UNCLOS itself.

The rights and obligations in the UNCLOS commentaries about Article 311 are only referring to the common heritage, the Area, marine environment protection, and other resources related areas, like the fishing.²⁰⁷ UNCLOS Article 311(3) prohibits the derogation from the basic principles of the convention, however, there is no exhaustive list of those basic principles.²⁰⁸

According to Article 136 of UNCLOS, common heritage of mankind is the Area and its resources. The lawful performance of the freedom of overflight does not have an effect on the Area nor to its resources, so this part of the rule is not prohibiting the States to sign a transponders related treaty.

The freedom of the high seas is considered as one of the basic principles.²⁰⁹ Innocent passage regime, however, does not necessarily qualify as the basic principle.²¹⁰ It has been argued that the navigation freedoms States have in the high seas are not equal to the navigation rights in the EEZ, because of the coastal State's abilities to put restrictions on their performance under

²⁰⁴ R. R. Churchill. The 1982 United Nations Convention on the Law of the Sea – D. R. Rothwell, A. G. O. Elferink, K. N. Scott, *et. al.* The Oxford Handbook of the Law of the Sea. Oxford: Oxford University Press 2015, p. 36.

²⁰⁵ *Ibid.*, pp. 36-37.

²⁰⁶ M. H. Nordquist, S. Rosenne, L. B. Sohn. (ed). United Nations Convention on the Law of the Sea 1982: A Commentary. Vol. V. Dordrecht/Boston/London: Martinus Nijhoff Publishers 1989, pp. 238-239, para. 311.6.

²⁰⁷ Proelss, *op. cit.*, p. 2010, para. 1.

²⁰⁸ *Ibid.*, p. 2015, para. 14.

²⁰⁹ Rosenne, Gebhard, *op. cit.*, para. 38.

²¹⁰ Proelss, *op. cit.*, pp. 2015-2016, para. 14.

UNCLOS.²¹¹ When innocent passage, that is a customary law rule, is not one of the basic principles of UNCLOS, then it is difficult to argue that the freedom of overflight is. Therefore, the limitation of the freedom of overflight with an *inter se* treaty is not prohibited under UNCLOS rules.

However, since innocent passage cannot be suspended for third States by an *inter se* agreement, States could limit the innocent passage between each other, but this does not have an effect on other States.²¹² However, since the Baltic Sea is a semi-closed sea, there are no military aircraft from other States that would have a legitimate reason to fly in that area. Even if the NATO forces who are performing the air-policing in the Baltic States, they do it on the basis of a treaty and it is potentially possible to include the obligation to use activated transponders in that treaty.

While Article 311 specifically states that international agreements that have different rules than those in UNCLOS are not legally binding to those States that are not members to the agreement, it is considered that the role of Article 311 is only clarifying in the that aspect, since the customary law rule reflected in the Vienna Convention on the Law of treaties Article 34, *pacta tertiis nec nocent nec prosunt*, prevails in any event.²¹³ Therefore, when the States in the Baltic Sea area would conclude a treaty obligation for military aircraft to use activated transponders while flying in the Baltic Sea area, this obligation would not be effective to other State's military aircraft, both, because of Article 311(3) and because of customary law.

Inter se agreements that are in breach of UNCLOS Art 311(3) remain valid and effective, regardless of the fact that they are illegal, since the law of treaties nor Article 311 itself give any indication that the validity of these agreements would be affected when they are in contradiction to the rules set in Art 311.²¹⁴ However, they may give rise to claims for responsibility for illegal acts.²¹⁵

Taking it all into account, there is no clear evidence that freedom of overflight belongs under those exceptions that are listed in UNCLOS Article 311(3) that are prohibited to change with a multilateral treaty. Therefore, UNCLOS itself does not literally prohibit the establishment of a

²¹¹ Attard, Fitzmaurice, Martínez Gutiérrez, *op. cit.*, p. 192.

²¹² Proelss, *op. cit.*, p. 2016, para. 14.

²¹³ *Ibid.*, p. 2010, para. 1.

²¹⁴ *Ibid.*, p. 2016, para. 16.

²¹⁵ *Ibid.*, p. 2016, para. 16.

treaty obligation for military aircraft to use transponders. States can try to negotiate over the details of the treaty on their own, but they can potentially also use the help of international organizations they are member to. The next subchapter helps to choose which international organization would be the most suitable for that.

2.5. Regulations of international organizations

Since most of the States around the Baltic Sea are members of the European Union (EU), it would be correct to see the regulations that apply in the region. Many States have included the EU regulations in their national acts.

UNCLOS is binding to the members and institutions of the EU, however it influences the legislation of the EU mostly concerning the fisheries and the protection of marine environment.²¹⁶ Therefore, for the purpose of present research it is not reasonable to specifically analyze those regulations in more detail.

It could be assumed, that if NATO, European Union, EASA or EUROCONTROL would establish an obligation for its members States to start using activated transponders on their military aircraft, then the situation would get better in the Baltic Sea region. However, Sweden, Finland and Russia are not part of the organization and Russia is not part of any of them. European Union cannot help either, because the Treaty on the Functioning of the European Union²¹⁷ explicitly excludes military and security matters.²¹⁸ While most of the reports are about Russian aircraft, actions inside the organization would not solve the problem.

The highest expectations can be put to the European Organization for the Safety of Air Navigation, the EUROCONTROL that is an intergovernmental organization with 41 Member

²¹⁶ R. Long. The European Union and Law of the Sea Convention at the Age of 30 – David Freestone (ed.) The 1982 Law of the Sea Convention at 30: Success, Challenges and New Agendas. Leiden/Boston: Martinus Nijhoff Publishers 2013, p. 39.

²¹⁷ Treaty on the Functioning of the European Union. Lisbon 13.12.2007, e.i.f. 1.12.2009.

²¹⁸ S. Andries. European Organization for the Safety of Air Navigation (EUROCONTROL). Max Planck Encyclopedia of Public International Law, September 2017, para. 24.

States including all of the States in the Baltic Sea area, except for Russian Federation.²¹⁹ The terminology used in the convention the EUROCONTROL is based on and in Chicago convention have strong similarities.²²⁰ However, opposite to ICAO, EUROCONTROL does not deal with only about civil aviation matters.

There are civil and military representatives of member States in the Permanent Commission of the supranational organization and its decisions are binding to the member States.²²¹ High-level military officials of the member States can advise on issues about civil-military interface by explaining the specific needs of military aviation.²²² EUROCONTROL is a highly efficient civil-military organization where civil-military matters have been fully integrated to all required levels of the organization.²²³ If an international organization could help to solve the problem with non-activated transponders in the Baltic Sea Region, EUROCONTROL should be the first who to turn to.

Another efficient way to perform civil-military cooperation is to organize it with the help of the ICAO. Not that the ICAO would establish the regulations to the States itself, but by bringing all the States behind one table would already help the States to negotiate and find a solution. The ICAO has connections with most States of the world, since it has 192 members.²²⁴ Creating universal rules would be the easiest way to solve the situation, although, the negotiations might not be as simple as for the creation of a bilateral treaty.

The ICAO can also help to solve the situation with the transponders by updating the Chicago convention Article 3 considering the rules regarding State aircraft over the neutral waters, continuing cooperation in ICAO Baltic Sea Project Team and by supporting civil-military cooperation under the organization.

The Chicago Convention has excluded military aircraft, thus the regulation agreed on the convention does not apply to them. Article 3(a) and (b) give the limitation that the convention

²¹⁹ Eurocontrol. Who we are. Accessible at: <https://www.eurocontrol.int/articles/who-we-are> (07.03.2018).

²²⁰ Tomas 2008, *op. cit.*, para. 45.

²²¹ Andries, *op. cit.*, para. 13.

²²² *Ibid.*, para. 17.

²²³ *Ibid.*, para. 25.

²²⁴ About ICAO – ICAO. Accessible at: <https://www.icao.int/about-icao/Pages/default.aspx> (07.03.2018).

is applicable only to civil aircraft and not to state aircraft, and considers aircraft used in military, customs and police services as state aircraft. Accordingly, military aircraft belong under state aircraft and the rules from the Chicago convention do not apply to them.

To help solving the problem with non-activated transponders in the Baltic Sea area, it would be necessary to make a small change to this Article and make the regulations applicable to military aircraft that are flying over the EEZ. Since Article 3 divided State aircraft to those with different purpose, it should be analyzed if it is necessary to add the requirement to all State aircraft or only to military. This should be analyzed in the crafting of the annex with taking into account all of the positive sides and the threats that may emerge. Limits of this paper exclude the possibility to perform the analyze in this paper.

There is a Baltic Sea Project Team that was formed by The European Air Navigation Planning Group that was established by the Council of ICAO.²²⁵ The team was formed with the overarching aim of preventing aircraft collisions.²²⁶ The members of the team included States surrounding the Baltic Sea, i.e. Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russian Federation and Sweden, also ICAO, NATO, European Aviation Safety Agency (EASA) and EUROCONTROL.²²⁷

Their findings of the Baltic Sea Project Team concluded in March 2015 for the solutions were that there are three major ways to improve safety:

- the use of primary radar data by civil air navigation service providers;
- the provision of flight plans for military flights; and
- the establishment of radio contact with civil air navigation service providers by military aircraft.”²²⁸

As it seems, all of these three ways may require the civil-military cooperation. The ICAO has formed a paper about the civil-military cooperation about aviation navigation already in

²²⁵ Assembly – 39th Session Technical Commission. ICAO Working paper 18.07.2016, p. 3; Accessible at: https://www.icao.int/Meetings/a39/Documents/WP/wp_089_en.pdf (07.03.2018).

²²⁶ *Ibid.*, p. 2.

²²⁷ *Ibid.*, p. 3.

²²⁸ A. Woollin. Helping to keep Baltic high seas operations safe. Eurocontrol PMI Skyway Magazine 2016, p. 40; Accessible at: <https://www.eurocontrol.int/sites/default/files/content/documents/official-documents/skyway/articles/2016-winter-skyway-keep-baltic-high-seas-operations-safe.pdf> (07.03.2018)

2011.²²⁹ The document advises that States should take a balanced approach to airspace management, so it meets the needs of international traffic flows and national security.²³⁰ Using activated transponders on their military aircraft would be an action by the States to meet this advice.

Although, there are several options to deal with the problems that military aircraft create while flying without activated transponders, not all of them easy to use and might not even be reasonable. It is clear, that the best and safest results will be made with the cooperation of States in the Baltic Sea area, EUROCONTROL, EASA, ICAO, NATO and other relevant Parties. However, there are still some small regulations that could have an effect on the freedom of overflight that States could adopt on their national legislation. The aviation acts of the States in the Baltic Sea area are analyzed below.

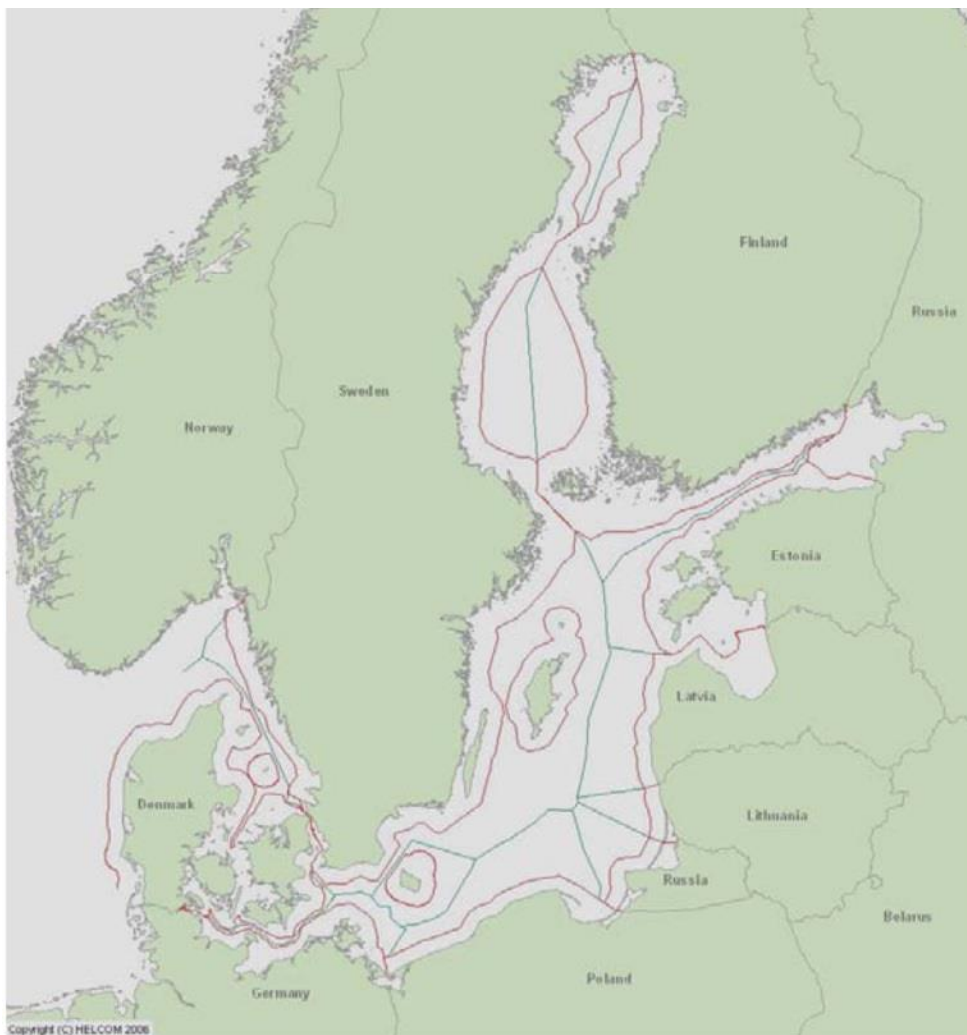
²²⁹ ICAO. Civil/Military Cooperation in Air Traffic Management. Accessible at: https://www.icao.int/apac/meetings/2012_cmc/cir330_en.pdf (07.03.2018).

²³⁰ *Ibid.*, p. (v).

III STATE'S RIGHTS AND OBLIGATIONS UNDER NATIONAL LAW OF THE STATES IN THE BALTIC SEA REGION

Baltic Sea is a semi-closed sea with a narrow EEZ in the middle (Annex 1). Coastal States of the Baltic Sea are Estonia, Latvia, Lithuania, Poland, Germany, Denmark, Sweden, Finland, and Russia.²³¹

Annex 1. Territorial sea and EEZ in the Baltic Sea.



Source: Latvian Ministry of Defence Concerned Re Russia's Missile Tests in Latvia's Exclusive Economic Zone. Mining Awareness, 06.04.2018; Accessible at: https://miningawareness.wordpress.com/2018/04/06/latvian-ministry-of-defence-concerned-re-russias-missile-tests-in-latvias-exclusive-economic-zone/img_0497/ (22.04.2018).

²³¹ Division for Ocean Affairs and the Law of the Sea. Coastal States of the Baltic Sea. Maritime Space: Maritime Zones and Maritime Delimitation, United Nations, 26.04.2002; Accessible at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/baltic_sea.htm (22.04.2018).

The legal nature of EEZ is reaffirmed within the context of national legislation.²³² It has been observed that the rights of the coastal State have been emphasized in many legislations while the reference to obligations of the coastal State has mainly remained exceptional, also, there is usually not much about the corresponding rights that other States might have.²³³ Many States have put effort on interpreting the provisions of UNCLOS in the light of the interest of their State, however, these interpretations have usually been about the marine resources.²³⁴ How and if the coastal States of the Baltic Sea have regulated their aviation regulations about foreign military aircraft, will be analyzed as follows.

3.1. Regulations about air navigation safety violations

Only Estonia has made failure to use an activated transponder a violation of law under their Aviation Act, this cannot be found in other State's aviation regulations. According to Estonian Aviation Law²³⁵ § 60²⁸ that failure to use a transponder in the controlled airspace can lead to a fine that may be up to 13 000 euros for a legal person. Another question is how to ensure the law enforcement in this matter when the aircraft refuses to land or belongs to another State who refuses to pay the fine. There was a provision that allowed the grounding of an aircraft in the event of failure to comply with safety requirements, but the provision was declared as invalid from March 2018.

Latvia²³⁶ has also a more specific rule about navigation safety, however, they consider the failure to follow the flight plan as a violation. The Latvian Law on Aviation²³⁷ Section 49 puts an obligation to the aircraft crew to take all necessary measures to restore the flight in accordance to the flight plan, if the aircraft has made an unauthorized flight into the territory of Latvia. There is no fine established in the Act for this kind of violation. Again, a regulation that

²³² F. O. Vicuna. State Practice and National Legislation Relating to the Exclusive Economic Zone, the Continental Shelf and Straits Used for International Navigation: Basic Trends – R. Wolfrum (ed). Law of the Sea at the Crossroads: The Continuing Search for a Universally Accepted Regime. Berlin: Duncker & Humblot 1991, p. 360.

²³³ *Ibid*, p. 354.

²³⁴ *Ibid.*, p. 358.

²³⁵ Estonian Aviation Act. Adopted 17.02.1999, e.i.f. 01.09.1999.

²³⁶ The translation of Latvian Law on Aviation into English was valid 22.04.2014.–31.10.2014, therefore it was not possible to include the amendments adopted in 02.10.2014., 09.06.2016., 23.11.2017.

²³⁷ Latvian Law on Aviation. Adopted: 05.10.1994, e.i.f. 03.11.1994.

only the Latvians have established in the Baltic Sea area and other States do not have this specific rule in their national acts.

Other States in Baltic Sea region do not have a special provision about transponders or about failure to fly according to the flight plan, however, Finland and Sweden have some more general regulations about the navigation safety for aircraft in legal acts.

Section 4 of the Finnish Aviation Act regulates military aviation and allows the Government to make exceptions to military aviation, with consideration that it will not put the safety of civil aviation in danger. The Government of Finland has the right to restrict aviation in certain danger areas, like in the vicinity of nuclear power plants and areas essential for national defence.²³⁸ With latter provision Finland uses its right under international law to create air defence zones by confirming this right in national legislation and regulating the process.

Danish Air Navigation Act²³⁹ has separate part for military and other non-commercial State air traffic. This makes it the only State near the Baltic Sea who has pointed out the different regulation of civil and State aircraft in this simple way.

According to Danish Air Navigation Act § 154 the Minister of Defence has the right to decide to what extent the regulations on civil aviation are applicable to Danish military aircraft and otherwise in connection with military air traffic, however, the Minister needs to negotiate on the matter with the Minister of Transport, before implementing any different regulations from the act. The term “otherwise in connection with military air traffic” should refer to State aircraft while leaving a sufficiently broad interpretation opportunity whenever it might be necessary. Then again, § 155 of the Danish Air Navigation Act is about „Danish aircraft that are not military, but are exclusively used by the Danish [S]tate for non-commercial purposes.“ The difference between those two types of aircraft might be difficult to understand, but as they are put like this, Denmark differentiates between State aircraft in military purposes, and State

²³⁸ Finnish Aviation Act, Section 8(1).

²³⁹ Air Navigation Act of the Kingdom of Denmark. Consolidated Act no. 1036 of 28 August 2013. Accessible at: <https://selvbetjening.trafikstyrelsen.dk/civilluftfart/Dokumenter/English/Rules%20and%20Regulations/Air%20Navigation%20Act.pdf> (20.03.2018).

aircraft with non-military and non-commercial purposes. This approach is not used by any of the other States in the Baltic Sea area.

3.2. Regulation about safety of the State's airspace

All States in the Baltic Sea area have used their sovereign right to determine who and on which conditions has the permission to enter their airspace. Latvia has not clearly defined those rules in its Law on Aviation.

There is a regulation issued under the Estonian National Defence Act²⁴⁰, that regulates the permissions given to foreign military vessels and aircraft prior entering the Estonian territory that is called Procedure for the granting of clearance for a warship of a foreign state to enter the territorial and internal waters and for the granting of clearance for a national aircraft of a foreign state to enter the airspace.²⁴¹ According to § 2 of this regulation, the aircraft of a foreign State must have an air traffic control clearance as the basis on which it may enter the territory of Estonia. In addition to the obligation to ask permission before entering the airspace of Estonia, there are no other obligations put on foreign States under national legislation regarding the aviation for military aircraft.

Lithuanian Law on Aviation²⁴² Article 3(3) declares that the legal acts of other States apply to the aircraft of these States only when there is no conflict between them, otherwise the Lithuanian law will prevail. According to Article 14 of the latter law, the special regulations made for military air traffic is made while taking into account that it would not endanger the safety of civil aircraft. Concerning the latter, Lithuanian national laws do not have specific rules set for foreign military aircraft. Therefore, foreign military aircraft approaching the

²⁴⁰ Estonian National Defence Act. Adopted 11.02.2015, e.i.f. 01.01.2016.

²⁴¹ Procedure for the granting of clearance for a warship of a foreign state to enter the territorial and internal waters and for the granting of clearance for a national aircraft of a foreign state to enter the airspace. Government of the Republic of Estonia. Published: RT I, 02.02.2016, 2; Passed on 28 January 2016, e.i.f. 5 February 2016. Accessible at the page of the Ministry of Defence: <http://www.kaitseministeerium.ee/en/objectives-activities/flight-and-vessel-permits> (15.03.2018).

²⁴² Lithuanian Law on Aviation. 17.11.2000; Accessible at: <https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=18117libs&documentId=TAIS.226273&category=TAD> (23.03.2018).

airspace of Lithuania should rather rely on the principle of territorial sovereignty, general rules of international law, and agreements made between Lithuania and their country of origin.

Finnish Aviation Act²⁴³ is applicable within the territory of Finland, although, some sections apply outside the Finnish territory as well, as stated in Section 1(2). With this, Finland also gives importance to the State sovereignty principle. According to Section 7 of the Finnish Aviation Act, right to aviation within the Finnish territory is for those aircraft that have the nationality of Finland or another State who is acceded to the Chicago Convention, otherwise they need a special authorization issued by the Finnish Transport Safety Agency. This provision takes international treaties into considerations and gives an exemption to cases that go under international obligations binding on Finland.²⁴⁴

Swedish Aviation Act²⁴⁵ Chapter 14 Section 11 regulates the access by a foreign State aviation to Swedish territory and leaves the regulation for the Government or a public authority appointed by the Government to decide. There is not specified what kind of public authority should it be or what is the definition of a public authority in the context of this Act. Swedes also have an Ordinance²⁴⁶ that is given out under the Aviation Act. It regulates the navigation in restricted areas under Chapter 1 Section 5 and allows to prohibit the aviation in the area for up to two weeks. With this provision, Sweden has used its right under international law to create air defence zones where the navigation for foreign State civil and military aircraft is limited.

Denmark allows to use its territory by foreign military and State aircraft only after it gets a prior permission from the Minister of Defence, who again can give the permission only after negotiating with the Minister of Transport.²⁴⁷ With this procedure Denmark guarantees the safety of national security and safety of civil aviation. This procedure means the fulfilment of Danish obligation under international law to consider the safety of civil aviation when organizing the navigation for military aircraft. Other States considered in this paper do not have

²⁴³ Finnish Aviation Act. Adopted 1194/2009; Accessible at: <https://www.finlex.fi/fi/laki/kaannokset/2009/en20091194.pdf> (16.03.2018).

²⁴⁴ Finnish Aviation Act, Section 7.

²⁴⁵ Swedish Aviation Act. Adopted 2010:500, e.i.f. 01.09.2010; Accessible at: <https://transportstyrelsen.se/globalassets/global/regler/luftfart/regulations/swedish-aviation-act.pdf> (16.03.2018).

²⁴⁶ Swedish Aviation Ordinance. e.i.f. 01.09.2010; Accessible at: <https://transportstyrelsen.se/globalassets/global/regler/luftfart/regulations/swedish-aviation-ordinance.pdf> (16.03.2018).

²⁴⁷ Air Navigation Act of the Kingdom of Denmark, para. 156.

the procedure like that, at least established in as high level of legislation. For example, Estonian National Defence Act § 43(1) foresees that the permission should be granted by the minister responsible for the organization of national defence.

Article 79 paragraph 4²⁴⁸ of the Russian Air Code international flights of aircraft must be carried out on the basis of international agreements to which the Russian Federation is a party to, or with permissions issued according to the procedure established by the Government of the Russian Federation. According to Article 3 of the Russian Air Code, international agreements to which Russia is a party to shall prevail in case of there are overlapping provisions that differ from the Russian Air Code. If an international agreement to which the Russian Federation is a party to sets forth provisions which differ from the provisions of the Russian Air Code the provisions of the international agreement shall be applied. This provision is promising in regard to the potential treaty that could be made between the States in the Baltic Sea region. Although, this provision is most likely applicable to civil aircraft, it does not exclude a possibility for an international treaty that regulates the use of transponders for the military aircraft as well.

Latvia and Russia have special provisions that consider the sovereignty and safety of the State's airspace.

Section 49¹ of Latvian Law on Aviation reflects the fears risen after the 11 September 2001 attacks on the World Trade Center, while it allows the Minister of Defence to take decision on whether to take combat operation against an aircraft that is being used as a weapon for the destruction of people in the territory of Latvia. The purpose of this provision is to guarantee the safety of the State airspace. With this provision, Latvia emphasizes that, in some conditions in the consideration of the Minister of Defence, it has a right to take forceful measures against it, including the right to shoot down the aircraft that is violating their airspace.

Germany also has a provision in case an aircraft is intended to be used against human life and allows to use force against it as a last resort, however, in that provision the protected object is

²⁴⁸ Russian Air Code, Chapter 11, Art 79, para. 4; Accessible at: <http://www.aviaru.net/english/code/chapter11.shtml> (16.03.2018).

human life not the territory of the State.²⁴⁹ Other States have not included a provision about terrorism attacks conducted by an aircraft to their national legal acts.

In Article 1(1) of the Russian Air Code²⁵⁰ it is emphasized that “The Russian Federation shall have complete and exclusive sovereignty over the air space of the Russian Federation.” By this statement, the importance of territorial sovereignty is emphasized and the obligation to respect the territorial sovereignty is reminded to other States.

²⁴⁹ German Act on the Reorganisation of Aviation Security Tasks. Published 11.01.2005, Art. 1, Chapter 1, Section 14(3); Accessible at: <https://germanlawarchive.iuscomp.org/?p=735> (22.04.2018).

²⁵⁰ Aviation Code of the Russian Federation. Adopted 19.02.1997; Accessible at: <http://www.aviaru.net/english/code/> (16.03.2018).

CONCLUSION

The purpose of this thesis was to find out if the establishment of a treaty obligation for military aircraft to fly with activated transponders over the Baltic Sea is allowed under international law. The need for it comes from the fact that for years military aircraft have caused a threat of collision with other aircraft in the Baltic Sea area, since they have not always used an activated transponder that would make them visible on the radars of civil aircraft. Since there is no obligation under international law for military aircraft to use activated transponders then it is not possible to discipline the violators under international law and the State responsibility either.

The main problem about the establishment of the obligation to use activated transponders is that the freedom of overflight in the EEZ is a customary law principle and it is questionable if coastal States have a right to set limits to that freedom. Also, UNCLOS Article 311(3) sets limits to signing *inter se* treaties to limit the principal freedoms that are provided by the convention.

There was three parts in this study that helped to find a solution to the problem. The first one gave the background to the problem and its current legal situation, clearing the limits of the freedom of overflight and showing the importance of transponders, also, the difference between civil and military aircraft's status and regulation under international law was analyzed. The study went on by analyzing the rights and obligations that States have under international law that have an effect on the freedom of overflight. More rights than obligations were found which also characterizes the current situation. Lastly, it was analyzed if coastal States of the Baltic Sea have already regulated the freedom of overflight for other States military aircraft in their national law.

The hypothesis of the study was that it is possible to establish a treaty obligation to make military aircraft fly with activated transponders in the EEZ. There are two main reasons for that. Firstly, there is no prohibition under international law that prohibits such a treaty, even UNCLOS Article 311(3) does not prohibit *inter se* treaties to regulate the safety of the freedom of overflight in the EEZ. Secondly, the freedom of overflight in the EEZ is not an unlimited

right. Furthermore, the obligation to use activated transponders does not represent a direct limitation to the freedom, but rather a safety measure. The practice of the States also refers to the legality of establishing safety measures to the navigation at seas. Accordingly, the hypothesis was confirmed.

The primary research question was: On which legal grounds would it be possible to establish an international obligation for military aircraft to fly with activated transponders over the Baltic Sea?

There is the Chicago convention that regulates international civil aviation, but explicitly excludes military aviation. One of the options would be to make an amendment to it, so it would apply to military aircraft also, but this is not recommended due to national security reasons of State. Another option is to sign an international treaty that would regulate the aviation navigation for military aircraft, at least in the problematic areas, and would guarantee the safe navigation of all aircraft at least in a certain area. Since it was found in the study that signing *inter se* treaties that regulate the modification or limitation of the freedom of overflight in the EEZ is not prohibited, the treaty between the coastal States of the Baltic Sea would be the best option to establish an obligation for the military aircraft to fly with activated transponders. However, there are two aspects to keep in mind.

Firstly, as it was confirmed by the study, the treaty can be made only with the consent of sovereign States. Therefore, even if there is no legal obstacle for creating the treaty obligation, the purpose of the obligation is ensured only when all of the coastal States of the Baltic Sea sign it, including Russian Federation. Secondly, it must be considered that the treaty would apply only to those States who have signed it. However, since the Baltic Sea is a semi-closed sea, there are no military aircraft from other States that would have a legitimate reason to fly in that area. Even if the NATO forces who are performing the air-policing in the Baltic States, they do it on the basis of a treaty and it is potentially possible to include the obligation to use activated transponders in that treaty.

Additionally, it was asked, if coastal States have a right to limit the freedom of overflight in the EEZ only for navigational safety purposes?

Analyzing UNCLOS, coastal States have sovereign rights in the EEZ concerning the management of natural resources, environmental protection, scientific research, and establishment of artificial islands. Coastal States do not have a direct right to limit the freedom of navigation in the EEZ, but when exercising rights over previously named areas, limits to navigation may occur. For example, in the same areas coastal States may establish air defence zones to restrict navigation in some certain areas. However, establishing those zones beyond the territorial sea can challenge the principle of State sovereignty, especially since the ADIZ implies that the State has to perform law enforcement outside its territory. All in all, the establishment of ADIZ in the Baltic Sea is not a solution to the non-activated transponders problem.

According to UNCLOS, the freedom of overflight is a right that can be use in the high seas and in the EEZ. There is no high seas in the Baltic Sea, so the question in the present case is limited to the EEZ that was unfortunately not established before the drafting of the Chicago Convention that is also limited to civil aircraft only. As a result, the freedom of overflight for military aircraft is only indirectly regulated in UNCLOS, but not in other conventions so far. It has been offered to make an amendment to the Chicago convention, so it would be applicable to military aircraft, however others do not recommend it due to State's national security reasons. Therefore, creating the obligation to use transponders with a new international treaty would be the best solution.

The obligation to use activated transponders can be seen as a limitation to the freedom of overflight. UNCLOS allows to make limitations to other State's rights in the EEZ only on certain conditions, mostly for guaranteeing the coastal State's exclusive rights to fisheries and other resources, also, in certain cases, when the State has created artificial islands, installations, and natural reserves. Exercising the rights efficiently enough over these areas could lead to the limitation of other State's navigational rights by the coastal State. The limitation of the freedom of overflight is not explicitly allowed under international law, since States have sovereign power only over their territory.

The status of civil and state aircraft has been different since the first codification of international aviation law rules. Even if the definition of a military aircraft can also be different depending

on their characteristics and on the purpose of their use, it is always considered to have the same rules as other state aircraft. These rules, however, as rare as they can be found at all, are mostly in negative and state what does not apply to them or what are they not allowed to do. Since there are no concrete regulations for military aircraft, there is also no obligation for them to use activated transponders. The failure to use activated transponders means that the military aircraft is not visible on civil radars and may lead to collisions with civil aircraft, as it has almost happened in the Baltic Sea area several times already.

The principle of territorial sovereignty effects international relations as well as international law. States have sovereign power over their territory and therefore they can decide who to allow on their territory. States also have sovereign power to decide which treaty to sign and which obligations to take on itself under international law. This right is called the principle of free consent and it has affected the development of international legal obligations. The prerequisite for the establishment of a treaty obligation to use activated transponders is, therefore, the free consent of all of the coastal States of the Baltic Sea.

In the EEZ, coastal States have jurisdiction in the areas that are primary connected to the marine resources, thus the primary purpose of the legislation a coastal State adopts cannot be the regulation of navigation. When States discussed over the establishment of the EEZ as a new zone, the marine powers were able to keep their high seas right of the freedom of navigation and overflight.

While the rights of coastal States and other States are different, they all are bound to the obligation to due take account of the rights and duties of other States. The obligation to use the sea in peaceful purposes applies also to all States, prohibiting the use or a threat of use of force against any State while exercising rights and performing duties under UNCLOS.

The biggest obstacle when considering the creation of a treaty obligation that could limit or modify a right that is provided under UNCLOS, is in UNCLOS Art 311(3). Article 311 determines the relations between UNCLOS and other international treaties and its paragraph 3 regulates the permissibility of *inter se* agreements. According to latter, States may conclude treaties over the matters in UNCLOS, when the treaty does not affect the execution of the object and purpose of and the application of the basic principles in UNCLOS, and if it does not affect the rights and obligations other States have under UNCLOS.

The rights and obligations that are referred to in Article 311 are connected to the common heritage of mankind, the Area, marine environmental protection, and resources related areas. Also, the freedom of overflight is not one of the basic principles of UNCLOS. Therefore, it was found that Article 311(3) does not prohibit the establishment of a treaty obligation that regulates the freedom of overflight in the EEZ.

States can draft the treaty with the help of international organizations. Since all of the States in the Baltic Sea region are members of the ICAO, the organization could help to bring the States together and by offering the peaceful means of solving the situation. However, ICAO regulates civil aviation only and it cannot give regulations for military aircraft. EUROCONTROL, on the other hand, has military representatives from the member States who can advise on the issues about civil-military interface. Unfortunately, the fact that Russian Federation is not a member to EUROCONTROL is a strong contra argument when considering using the help of international institutions to establish an obligation for military aircraft in the Baltic Sea area.

According to the national laws of States, aircraft have to identify themselves when approaching the State airspace. There is no such obligation under international law directly that would apply to military aircraft, only the obligation to respect the laws of the coastal State. An obligation to use an activated transponder that would be set in national laws of the States in the Baltic Sea area, would however not solve the problem concerning the threat of collision between civil aircraft and military aircraft that are not using activated transponders. First, because one State cannot put obligations to another State or an aircraft belonging to another State, and second, the threat would still remain active in the EEZ of the Baltic Sea.

While analyzing national legal acts of the States in the Baltic Sea area, the goal was to see if and how the aviation navigation was regulated for foreign State military aircraft. The subject of most legal acts was civil aircraft and those provisions that applied to military aircraft as well were brought out specifically. Hence the conclusion, that States have a special regulation for their own military aircraft and the aviation rules are distinguished already inside the States. Military aircraft from another State must usually ask for the approval of the State which territory it wishes to enter.

Overall, it was seen that even when States make exceptions for military aviation, then those exceptions must always guarantee the safety of civil air navigation. Even though, most of the

legislation is applicable only in the territory of the certain State who accepted the law, some parts of it are declared to apply even outside the territory. The States give importance to the territorial sovereignty however, it is stated in some of the Acts that they apply outside the State territory in certain conditions.

National defence acts of States in the Baltic Sea area do not regulate the navigational matters of foreign military aircraft. National aviation laws of the States in the Baltic Sea area do not exclude the possibility to sign a treaty to limit the freedom of overflight or to set measures for promoting navigational safety.

From the analysis of the thesis it clear that there is no legal obstacle to sign a treaty to obligate military aircraft to use activated transponders while they fly over the Baltic Sea. The coastal States of the Baltic Sea can and should sign the treaty to contribute to the safety of the aviation navigation in the region.

ABBREVIATIONS

ADIZ - Air defence identification zone

Chicago Convention - Chicago Convention on Civil Aviation

EEZ - Exclusive economic zone

EU - European Union

ICAO - International Civil Aviation Organization

ICJ - International Court of Justice

NATO - North Atlantic Treaty Organization

Paris Convention - Convention Relating to the Regulation of Aerial Navigation

UN - United Nations

UNCLOS - The United Nations Convention on the Law of the Sea

UAV - Unmanned aerial vehicles

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