Of neighbours and shared upper airspaces: the role of South Africa in the management of the upper airspaces of the Kingdoms of Lesotho and Swaziland

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Abstract

The International Civil Aviation Organisation (ICAO) has been intensifying efforts to improve aviation safety in the past few years. One of the ways it sought to do this was to encourage states to move towards a more harmonised system of upper airspace management. This has also influenced the operations of regional blocs such as the Southern African Development Community (SADC), the East African Community (EAC), and the Common Market for Southern and Eastern Africa (COMESA). The efforts to gradually build towards a single African upper airspace management system is preceded at the domestic level by bilateral arrangements between member states of The ICAO in terms of which some states delegate the monitoring and management of their upper airspaces to a third, more capable state. This paper assesses the compliance of both Lesotho and Swaziland with the ICAO's recommendations under its Universal Safety Oversight Audit Programme (USOAP) programme. It thus focuses on the delegation of the upper airspace management of two southern African states, namely Lesotho and Swaziland to South Africa as a response to the recommendations contained in the USOAP Report. The paper will assess how these agreements were entered into between the three countries, and how they add to or frustrate the efforts at the SADC level of doing away with territorial or nationally regulated upper airspaces and introducing a single sky controlled from a central point rather than from different states. This article limits itself to civil aviation only.

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BACKGROUND

The territory of a state comprises its physical landmass, its adjacent waters up to a set limit, and its airspace up to a determined lateral and vertical level. There has not always been agreement on the territorial exclusivity over airspace, and early ideas about sovereignty over such an intangible thing were easily dismissed.[1] The prevailing idea originally was that the airspace was an entirely free continuum much like the high seas.[2] The position taken by Hugo de Groot might have had a considerable influence on this approach. Grotius's assertion was that since the air is not capable of being trapped, it is beyond everyone's claim.[3]

At the opposite end of the spectrum were proponents of a new form of sovereignty over airspace, and they propounded a theory of limited sovereignty over national airspaces, subject to innocent passage of foreign civil aircraft.[4] Thus of the many ideas canvassed during this period, two principal theories stood out. One held that the air is free and therefore no individual state has authority over it,[5] except when necessary for self-preservation. The other held that the individual states indeed had a right of sovereignty over the airspace above their soil.[6]

As human flight advanced in the modern era, the debate was finally settled by the Paris Convention on the Regulation of Aerial Navigation of 1919

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1 See Wensveen & Wells *Air transportation: a management perspective* (2007) 460, who assert that as the airplane developed during the first decade of the 20th century, the sovereignty of airspace above nations became an issue.

2 Dugard *Public international law: a South African perspective* (2011) 394.

3 See generally Oduntan *Sovereignty and jurisdiction in airspace and outer space: legal criteria for spatial determination* (2012) 58.

4 The year 1910 saw the first international air law conference, and signalled a global attempt to create a regulatory regime for civil aviation. This conference did not, however, succeed in adopting a convention due to disagreement amongst participating states on whether they should offer equal treatment to foreign and national aircraft with respect to freedom of overflight. See Freer 'An aborted take-off for internationalism: 1903–1919' (1986) 41/4 *ICAO Bulletin* 23 26.

5 The idea that a state has territorial rights above the earth pre-dates the history of human flight. For example in Roman law, there were specifications on how high buildings could be erected, and there were other regulations to control the use of lower airspace whenever deemed necessary. The airspace over public highways and over sacred grounds was kept open by edicts of the Roman emperors. See Oduntan *Sovereignty and jurisdiction in airspace and outer space: legal criteria for spatial determination* (2012) 58.

6 Wensveen & Wells *Air transportation: a management perspective* (2007) 460.

which provided that every state had complete and exclusive sovereignty over the airspace above its territory.[7]

The Paris Convention was preceded by an earlier conference in 1910 which failed to result in a convention.[8] At the 1910 conference, the French proposal was to regard the airspace as relatively free and accessible, except to the extent necessary for states to protect the safety and property of their residents. This proposition was vehemently opposed by Germany and Britain, who were in favour of full national control over the air. Although Germany was much milder in its approach, which envisaged the national state being at liberty to allow or not to allow foreign aircraft to overfly its territory, Britain adopted a more stringent regime. The only system of checks and balances the Germans proposed, was that the restrictions that applied to foreign aircraft must be applied equally to domestic aircraft. The British, however, favoured a system in which each nation regulated its airspace as it saw fit, without any obligation to treat foreign and domestic aircraft equally. This led to the conference ending in an impasse as far as drafting of a convention was concerned. Instead several principles were adopted.[9]

These same principles were incorporated into the Paris Convention some nine years later. The position adopted in the Paris Convention, that a state has exclusive jurisdiction over the airspace above its territory, was further affirmed by the Chicago Convention on International Civil Aviation

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7 Article 1 of the Paris Convention on the Regulation of Aerial Navigation of 1919. The end of the First World War presented the world with an opportunity to embrace aviation as an integral tool for development. The war had, however, revealed both the pros and cons of this new frontier. The long-range transportation of goods and persons as well as the advantages of aviation to the safety and security of states stood out as a key consideration for states. Aviation was not without the potential of having a deleterious impact, and it is this possibility that rallied states together to regulate civil aviation from as early as 1919. Initially twenty-seven states signed the newly drafted Convention on 13 October 1919. This new Convention, which was produced with texts in French, English and Italian contained forty-three articles that dealt with all the technical, operational and organisational aspects of civil aviation. There is general acceptance that the year 1919 marks the birth of modern day aviation. See 'The postal history of The ICAO'available at: http://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm (last accessed 25 September 2013).

8 Banner *Who owns the sky? The struggle to control airspace from the Wright Brothers on* (2009) 62.

9 Dube 'Towards a single African sky: challenges and prospects' (2015) 23/2 *African Journal of International and Comparative Law* 250 –272, 251.

(Chicago Convention).[10] The Chicago Convention was signed by 52 states on 7 December 1944 and came into force some three years later on 4 April 1947.[11] The Convention established rules for airspace, aircraft registration and safety, and details the rights of the signatories in relation to air travel; it also exempts air fuels from tax. The Convention provided for the sovereignty of airspace above the territory of each state, together with five freedoms (later expanded to nine by the addition of four unofficial freedoms) which govern the freedom of states to operate air transport flights (including the carriage of passengers, cargo and mail) across, into and within the airspace of other states.[12] Only the first two of these freedoms apply automatically to signatory states, the remainder being subject to national agreement.[13]

The Chicago Convention, apart from affirming exclusivity of jurisdiction over airspaces,[14] further expressly broadened rights of a state over its airspace to include the air above its territorial waters.[15] The Convention also introduced the nine freedoms of flight mentioned above, which guaranteed the usage of foreign states' airspaces for civil aviation purposes.[16] Whilst recognising the exclusive sovereignty of states over their airspaces,[17] the

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10 The International Civil Aviation Organisation (ICAO) was also established by this convention. The three territories under investigation are all parties to the Chicago Convention.

11 See Skybrary 'Chicago Convention', available at: http://www.skybrary.aero/index.php/Chicago_Convention (last accessed 22 July 2015).

12 See International Civil Aviation Organisation 'Freedoms of the air', available at http://www.icao.int/Pages/freedomsAir.aspx (last accessed 22 July 2015).

13 The Freedoms apply to air travel by an airline in one country that desires to operate in a second country. These were first created in the 1940s, there were five main Freedoms that have since unofficially expanded to nine.

14 Article 1 of the Chicago Convention.

15 Article 2 of the Chicago Convention.

16 The Chicago Convention broadened the rights of states into nine broad categories, *viz*: (1) right to overfly a foreign country without landing; (2) right to refuel or carry out maintenance in a foreign country; (3) right to fly from one's own country to another; (4) Right to fly from a foreign country to one's own; (5) right to fly between two foreign countries during flights which begin or end in one's own; (6) right to fly from one foreign country to another one while stopping in one's own country; (7) right to fly between two foreign countries while not offering flights to one's own country; (8) right to fly between two or more airports in a foreign country while continuing service to one's own country; and (9) right to fly inside a foreign country without continuing service to one's own country.

17 Article 1 Chicago Convention. The Convention clearly stipulates in article 3 that it shall apply only to civil aircraft, and not state aircraft. State aircraft include aircraft used for policing and customs purposes and military aircraft.

Chicago Convention further places an obligation on member states to provide certain facilities in their territories, *viz* airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation.[18] The Chicago Convention also established an oversight body, the ICAO,[19] which is a specialised agency of the United Nations and offers guidance on civil aviation matters globally. The ICAO came into being on 4 April 1947 and was initially known as the Provisional International Civil Aviation Organisation (PICAO).[20] In October of the same year, the ICAO became a specialised agency of the United Nations linked to the Economic and Social Council (ECOSOC).[21] As stated in the Convention, the purpose of the ICAO is to promote cooperation between nations in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. By 1944 when the ICAO replaced the PICAO, the membership of the organisation had grown to fifty-two states, an improvement from the Paris Convention's twenty-seven states, twenty-five years earlier in 1919. Today the ICAO's membership stands at 191 states. The ICAO's main plenary organ, the Assembly, meets every three years and elects the organisation's governing body, which is called the Council. A maximum of thirty-six countries sit on the Council which is a permanent body, and is responsible to the Assembly.[22] States serve on the Council for three years. In the election, adequate representation is given to states of chief importance in air transport; states not otherwise included but which make the largest contribution to the provision of facilities for international civil air navigation, and states not otherwise included whose designation will ensure that all major geographic areas of the world are represented on the Council.[23]

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18 Article 28 of the Chicago Convention.

19 See http://www.asil.org/rio/icao.html (last accessed 23 September 2013).

20 See UNESCO 'ICAO – origins and process of creation' available at: http://www.unesco.org/archives/sio/Eng/presentation_print.php?idOrg=1015 (last accessed 22 July 2015).

21 Meyer & Oster *Deregulation and the future of intercity passenger travel* (1987) 272.

22 Williams *The information systems of international inter-governmental organizations: a reference guide* (1998) 87.

23 See the ICAO Council, available at: http://www.icao.int/about-icao/pages/council.aspx (last accessed 22 July 2015).

SOVEREIGNTY IN AIRSPACE REGULATION – STILL A CONTROVERSIAL CONCEPT

The concept of sovereignty is a not an easy one to define or comprehend. However, it is trite that this concept is central to the existence of states and is also fundamental to international relations. Sovereignty is a manifestation of the exclusive, supreme and inalienable legal authority of states to exercise power within their area of governance. Sovereignty is often exercised to the exclusion of all other states,[24] and permits a state to possess and exercise legislative, executive and judicial powers over subjects within its territory. In other words, it allows a state to make rules on how its territory will be treated and how individuals and other entities will conduct themselves whilst they are within its territory or whilst they maintain a connection with the state. It further allows a state to enforce those rules. In relation to airspace, the state enjoys exclusive jurisdiction over the airspace directly above its territory as an incident of sovereignty.[25] It is worth noting that the customary status of national airspace was confirmed in conventional international law.[26] Today, even the ICAO's interventions are guided by the legal position that state sovereignty is a fundamental principle of international law.[27]

The concept of sovereignty can be traced back to the Treaty of Westphalia (1648). Westphalian sovereignty is widely regarded as indivisible. In other words, there can only be a single sovereign or ultimate authority within a political community.[28] This view is echoed by other theorists, such as Hugo Grotius in *De Jure Belli ac Pacis* (1652) who asserted that, 'sovereignty is a unity, in itself indivisible'.[29] A rigid application of this principle would,

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24 This is premised on the sovereign equality of states recognised by art 2(2) of the Charter of the United Nations.

25 This idea, which is still pervasively strong in many countries flows from the early legal developments in the regulation of upper airspace, such as the 1913 International Law Association's Resolution on the Law of the Air, which in article 1 declared that, 'the right of every [s]tate to enact such prohibitions, restrictions and regulations as it may think proper in regard to the passage of aircraft through the airspace above its territory and territorial waters'. See Kish & Turns (eds) *International law and espionage* (1995) 98.

26 *Ibid*.

27 International Civil Aviation Organisation Working Paper 'Worldwide Air Transport Conference' Sixth Meeting, Montreal 18 to 22 March 2013, ATConf/6–WP/80 1.

28 Lake 'Delegating divisible sovereignty: some conceptual issues' 1, prepared for the Workshop on 'Delegating sovereignty: Constitutional and Political Perspectives' Duke University Law School, (3–4 March 2006) available at: https://law.duke.edu/publiclaw/pdf/workshop06sp/lake.pdf (last accessed 8 April 2015).

29 *Ibid*.

however, negatively affect commercial aviation and inter-state relations. This is because any political action of a state has repercussions on a global scale, both political and economic. A strict interpretation of the principle of sovereignty would thus go against the current trends of globalisation and increased cooperation amongst states. Due to these developments and newer arrangements in international relations, the concept of sovereignty has shifted from the rigid Westphalian approach, a trait Koul Deng refers to as the metamorphosing character of the concept of sovereignty.[30]

The ICAO also notes that if sovereignty is understood rigidly in a political sense, this would hamper the development of the global institutional environment.[31] This is because the delivery of cross-border services is still compatible with the notion of state sovereignty. The ICAO's answer to the contested notion of sovereignty is that whilst sovereignty cannot be delegated, the responsibility for the performance of functional responsibilities, such as the provision of air navigation services, can be delegated to third states. Such delegation allows the delegating state to retain complete freedom to designate a third party service provider, which could be national or foreign.[32] The delegation to a foreign organisation is not perceived as an abdication of sovereignty, but rather as an act of sovereignty in itself.[33]

Airspace regulation today therefore is an incident of state sovereignty and is regulated by states themselves under the guidance of the ICAO within the framework of the Chicago Convention and the ICAO Standards and Recommended Practices (SARPs).[34]

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30 Deng 'The evolving concept and institution of sovereignty: Challenges and opportunities' June (2010) 28 *AISA Policy Brief* 3.

31 International Civil Aviation Organisation 'Worldwide Air Transport Conference', Working Paper, Sixth Meeting, Montreal 18–22 March 2013 *ATConf/6–WP/80* 1.

32 *Id* at 2.

33 *Ibid*.

34 The SARPs are contained in the Annexes to the Chicago Convention. They regulate issues of safety and security, regularity and efficiency of air navigation and are a highly useful and flexible tool for achieving a high degree of uniformity in regulations to facilitate air navigation. See Benko & Schrogl (eds) *Space law: current problems and perspectives for future regulation* (2005) 195.

THE ICAO'S ROLE IN GLOBAL AIR TRAFFIC MANAGEMENT – DOES RELIANCE ON SOFT LAW HAMPER OR ADVANCE AVIATION SAFETY?

The ICAO resolutions are soft law.[35] Generally speaking, soft law is relatively fast to create but its main undoing is that it is non-binding,[36] raising doubts as to its effectiveness for regulation of interstate relations, particularly in times of crises.[37] However, its effectiveness in the area of aviation regulation and airspace regulation might differ slightly, given that this area involves technical issues. For instance, Kirchner posits that the character of soft law as lacking enforceability does not necessarily affirm that soft law is useless.[38] Soft law instruments can serve to provide indicators of emerging trends in international *opinio juris*,[39] and this would be a reflection of new concerns for the international community.[40] *Opinio juris* is the belief in the legally binding nature of a particular practice amongst states,[41] and for customary international law to emerge, *opinio juris* must be accompanied by settled practice. In other words, there must be evidence of states acting in accordance with that belief. Arajarvi notes that in the area of human rights for instance, the confluence of *opinio juris* and soft law can help transform soft law rules into positive and binding customary international law rules. He gives the example of how undertones of normative considerations imported into *opinio juris* coupled with support derived from various instruments, statements and decisions can lead to the development of positive rules of customary international law even when practice may follow only after the fact.[42]

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35 See Assembly Resolution A37/19 (2007), para 13. See also Tunteng (ed) 'Legal Analysis on the Inclusion of Civil Aviation in the European Union Emissions Trading System' Centre for International Sustainable Development Law (May 2012) 17 available at: http://cisdl.org/public/docs/news/CISDL_EU_ETS_Expansion_Legal_Brief.pdf (last accessed 22 July 2015).

36 Abeyratne *Strategic issues in air transport: legal, economic and technical aspects* (2012) 16. Abeyratne affirms the point that soft law is not law in the sense of enforceability.

37 Kirchner 'Effective law-making in times of global crises' (2010) 2 *Goettingen Journal of International Law* 267–292, 269.

38 *Id* at 276. Kirchner notes the success of soft law in the stellar performance of the Organisation for Security and Cooperation in Europe.

39 Dixon *Textbook on International Law (*6ed 2007) 47. See also Cassese *International Law* (2 ed 2005) 160.

40 *Ibid*.

41 Arajarvi 'Changing customary international law and the fluid nature of *opinio juris*', available at: http://law.duke.edu/cicl/pdf/opiniojuris/panel_6-arajarvi-changing_customary_international_law_and_the_fluid_nature_of_opinio_juris.pdf (last accessed 1 April 2015) 1.

42 *Id* at 10.

Soft law can also facilitate consensus, which is hard to obtain using hard law. For instance, when new rules first emerge, states may in principle be in agreement with those new legal postulations, but may not yet be willing to be bound by them. Soft law thus allows states to adopt and test new rules, before they become binding.[43]

The ICAO produces various forms of soft law, including norms expressed in obligatory language.[44] The ICAO's legal outputs include resolutions of the Assembly, declarations of the Assembly and standards, such as the SARPs. According to White, the legal outputs of an organisation like the ICAO are characterised as soft law, which is understood as normative instruments containing principles, norms, standards, or other statements of expected behaviour as opposed to hard law.[45] De Freitas asserts that soft law is largely believed to be unenforceable. According to Meyer, soft law is favoured because it creates flexibility, allowing legal rules to evolve more easily in response to political realities. As such it is thought to be difficult to enforce [46] and its efficacy is often questioned, this line of thinking is flawed.[47] This is because the efficacy of the ICAO's regulatory scheme does not depend on the compulsory or non-compulsory nature of its enactments. Instead it depends on a broad range of issues, including the following: (I) the technical nature of the ICAO regulatory regime; (ii) the underlying safety concerns; (iii) the participatory mechanisms for IATA as the airlines' representative

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43 Kirchner n 37 above at 276.

44 Dunoff & Pollack *Interdisciplinary perspectives on international law and international relations: the state of the art* (2013) 274. These authors define soft law as norms that are formally non-binding but habitually obeyed.

45 White *The law of international organisations* (2005) 159.

46 Meyer 'Soft law as delegation' (2009) 32/3 *Fordham International Law Journal* 887–942, 897.

47 De Freitas 'From participation towards compliance: The role of private actors in the making of SARPs by the ICAO' available at: http://www.iilj.org/gal/documents/defreitasICAO.pdf (last accessed 13 April 2015).

organisation;[48] (iv) the high proceduralisation; and (v) the existence of oversight mechanisms.[49]

Soft law has been and continues to be central to the ICAO's activities in transforming the aviation industry in general, and the air navigation services industry in particular. Over the past decade,[50] airspace management in the civil aviation sector has taken a much more regional-oriented approach,[51] advocating for harmonised airspaces,[52] and a departure from the current approach where airspace calibration is based on national geographic boundaries.[53] This ties in well with the concept of divisible sovereignty and promotes regionalisation efforts currently underway in the African

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48 In 1919 six European airlines founded the International Air Traffic Association (IATA) in The Hague, Netherlands, to help airlines standardise their paperwork and passenger tickets and also help airlines compare technical procedures. The modern IATA (International Air Transport Association), founded in 1945 in Havana, Cuba, is the successor to the International Air Traffic Association. See The Postal History of ICAO, available at: http://www.icao.int/secretariat/PostalHistory/1919_the_paris_convention.htm (last accessed 25 September 2013).

49 De Freitas 'From participation towards compliance: The role of private actors in the making of SARPs by ICAO' available at: http://www.iilj.org/gal/documents/defreitasICAO.pdf (last accessed 13 April 2015).

50 The single European sky (SES) is currently being analysed by ICAO as a possible benchmark for use in other homogenous regions or at the global level. See Recommendation 44 of the ANConf.12.IP.018.6.1.en.pdf, available at: www.icao.int/Meetings/anconf12/IPs/ANConf.12.IP.018.6.1.en.pdf (last accessed 16 June 2014).

51 See Turner 'Landmark deal harmonises African skies' available at: http://www.airtrafficmanagement.net/2013/05/landmark-deal-harmonises-african-skies/ (last accessed 15 June 2014). See also Peretz , Faruqi & Kisanga (eds) *Small states in the global economy: background papers presented to the Commonwealth Secretariat/World Bank Joint Task Force on Small States* (2001) 520.

52 See ATNS-SWACAA Joint Media Statement, available at: http://www.atns.co.za/PDF/MediaCentre/2013/2013%20MEDIA%20RELEASE%20SWAZILAND%20MoU.pdf (last accessed 16 June 2014). The parties also indicated in their agreement that notwithstanding the provisions of the MoU, South Africa remained committed to promoting the Southern African Development Community (SADC) Upper Airspace Control Centre (UACC), and had already made a significant contribution to regional cooperation with its other regional partners. The UACC will allow for the provision of air traffic services at regional level, based on the ICAO African Indian Ocean (AFI) Implementation Plan and CNS and ATM's highest standards.

53 See also Lewis & Witkowsky *Transforming air traffic management: beyond evolution* (2004) 17. See also recent regional efforts by the tripartite East African Community, Southern African Development Community and Community of East and Southern Africa towards the development of a seamless upper airspace across the three sub-regions. The main aim is to enhance efficiency and bring down navigational costs, and improve civilian safety. See COMESA-EAC-SADC Tripartite, available at www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/infrastructure (last accessed 16 June 2014).

continent.[54] The shift towards harmonisation of national airspaces came through the 2003 Resolution of the ICAO's Eleventh Air Navigation Conference which endorsed the development of a globally harmonised and seamless air navigation system that would enhance safety, reduce congestion, delays and flight times, and lessen the effect of aviation on the environment.[55] This was in line with the ICAO's primary objective of ensuring the safe and efficient performance of the global Air Navigation System. However, the fact that ICAO SARPs are soft law and thus difficult to enforce raises the question of their effectiveness in real life application. The cases of Lesotho and Swaziland thus provide a suitable test bed for these soft rules.

DOMESTIC REGULATION OF UPPER AIRSPACE IN THE THREE TERRITORIES: SOUTH AFRICA, LESOTHO AND SWAZILAND

Having settled the principal debate around sovereignty over the airspace directly above national territory, states began the mammoth task of developing new rules of international law to govern how these rights would be exercised over airspace. This was essential in cases of overlapping claims of sovereignty.[56] The territories of South Africa, Lesotho and Swaziland have each been responsible for their own airspaces, save for search and rescue services. South Africa being dominant economically and technologically, has always provided these services to Lesotho and Swaziland,[57] hence

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54 Dube n 9 above at 261.

55 See Assembly Resolution 37–11, Performance-based navigation global goals http://www.icao.int/safety/pbn/PBN%20references/Assembly%20Resolution%2037-11_%20PBN%20global%20goals.pdf (last accessed 16 June 2014).

56 Overlapping airspaces continue to be a problem even today. An interesting example would be Israel's continued exercise of sovereignty of the airspace above Palestinian enclosures. See the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip (1995). It stipulates that all aviation activity or use of the airspace by any aerial vehicle in the West Bank and the Gaza Strip shall require prior approval of Israel. See also Clarno *The empire's new walls Sovereignty, neo-liberalism, and the production of space in post-apartheid South Africa and post-Oslo Palestine/Israel,* (2009) Unpublished PhD Thesis, University of Michigan, 271, who asserts that Israeli authorities have consistently emphasised Israeli control over Palestinian airspace as a condition for Palestinian statehood through the years.

57 See: http://www.gov.za/j-radebe-opening-aeronautical-rescue-co-ordination-centre (last accessed 22 July 2015).

the international sentiment that the three states should work towards harmonising their respective upper airspaces for the sake of aviation safety.[58]

Of the three territories, South Africa is far better equipped and capable of managing the sum of the combined upper airspaces.[59] Not only does South Africa have the necessary technology to undertake such a task, it also possesses the necessary political will. South Africa also has the advantage that it has been involved in aviation for over 100 years, whilst its neighbours only embarked on aviation-related activities from around the late 1960s. It is not clear when exactly aviation began in South Africa, since there are conflicting reports about claims of aviation achievements dating back to the late 1800s.[60] There are unconfirmed reports that the first heavier than air flight took place in 1870 in Karkloof, KwaZulu-Natal when John Household launched a glider from the top of a 300 metre precipice. It achieved a height of fifty to eighty metres and flew for about one kilometre.[61] However, there seems to be consensus on reports that indicate that South Africa was active in aviation by the year 1910. South Africa's aviation legal framework is also far more advanced than that of either Lesotho or Swaziland and this can be explained by the number of years South Africa has been involved in aviation. This can also be seen in the recommendations made by the ICAO in its 2007 audit report.[62]

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58 See South African Civil Aviation Authority, Aeronautical Information Circular 41–8 of 1 May 2015; available at: http://www.caa.co.za/Aeronautical%20Information%20Circulars/10.2.pdf (last accessed 22 July 2015).

59 The advanced Air Traffic Flow Management (ATFM) system deployed by South Africa's ATNS was named by Jane's Airport Review as the winner of the 2010 Enabling Technology Award for contribution to enhanced capacity and safety. The ATFM system, provided by Thales and Metron Aviation, is deployed at ATNS' Central Airspace Management Unit (CAMU) which is established at the Johannesburg ATC Centre, and provides a system-wide view for managing the entire region, approximately ten per cent of the global airspace. See http://www.atns.com/press-release-2010/sas-air-traffic-flow-management-system (last accessed 20 June 2014).

60 See 'History of aviation in South Africa' available at: www.sapfa.org.za/history/history-avaition-sa (last accessed 2 July 2014).

61 Swinnich 'History without evidence is myth: JG Household and claims of flight in 1870s Africa' (2003) 25/1 *National Soaring Museum Historical Journal* 10–16, 10.

62 ICAO Universal Safety Oversight Audit Programme, 'Final Report on the Safety Oversight Audit of the Civil Aviation System of the Republic of South Africa, 5–16 July 2007, available at: http://cfapp.icao.int/fsix/AuditReps/CSAfinal/South_Africa_Final_Audit_Report.pdf (last accessed 7 July 2014).

The large expanse of the South African airspace, which envelopes the respective airspaces of the two kingdoms also makes South Africa a better candidate for delegated management. For all three territories, flight above 1500ft is subjected to some level of control, and must comply with the regulations, such as the semi-circular rule.[63] Given the size of the two kingdoms, insisting on direct oversight of their airspaces could in the long run lead to navigation nightmares for pilots, given the short space of time that aircraft overflying their territories spend in their airspaces. If not harmonised, this could affect aircraft which need to initiate descent for aerodromes in South Africa soon after flying over the airspaces of these kingdoms.

In the broader global arrangements, the three territories fall within the African and Indian Ocean Region (AFI Region), within which there has been a move towards encouraging states with adjacent airspaces to engage in harmonised management.[64] This is in line with the broader goals of the Southern African Development Community (SADC) and the Community of Eastern and Southern Africa (COMESA) in terms of which the three regions intend to introduce a harmonised single regional sky. This would be a prelude to the envisaged single African sky.

Airspace for the purposes of civil aviation needs to be distinguished from outer space, which is relevant for astronomical purposes. Airspace refers to the space above the surface of the earth and below the outer airspace. The South African Space Affairs Act defines outer airspace as the space above the surface of the earth from a height at which it is in practice possible to operate an object in an orbit around the earth.[65] The upper airspace being referred to in this article is the airspace beginning from the surface of the earth up to a height where an aircraft is no longer able to derive support from the atmosphere. The South African National Space Agency Act[66] also defines space as the area beyond the earth's measurable atmosphere. The air above the surface is for both weather and aviation purposes divided into

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63 The semi-circular rule in aviation was designed to ensure vertical separation of aircraft flying at or above 1 500 ft above ground level in uncontrolled airspace, depending on the direction of flight.

64 All three states fall within the AFI Region.

65 See section 1(xiv) of the South African Space Affairs Act 84 of 1993.

66 South African National Space Agency Act No 36 of 2008.

three main sectors, the lower atmosphere called the troposphere;[67] followed by the stratosphere[68] and lastly, the ionosphere.[69]

The airspace around the globe (both lower and upper airspace) is for aviation purposes divided into two main categories, controlled and uncontrolled airspace. In controlled airspace the aircraft in the air or on the ground receive air traffic services from an air navigation service provider in accordance with the airspace classification. In uncontrolled airspace all aircraft are responsible for their own separation in accordance with the general rules.[70]

The entire airspace under a state's jurisdiction is divided into one or more exclusive regions, referred to as Flight Information Regions (FIRs). South Africa's airspace currently consists of six FIRs, namely, Johannesburg, Cape Town, Durban, Bloemfontein, Port Elizabeth and Johannesburg Oceanic. Each state is required to determine within various FIRs, those portions of airspace and those airports where air traffic services are to be provided. The state is also required to arrange for the provision of such services in these airspaces and at these airports. In practice, the state establishes portions of airspace around airports where air traffic services are to be provided, as well as air routes between the various airports. Normally, these portions of airspace are referred to as controlled airspace.[71] The ICAO Regional Meetings determine the boundaries of the FIRs in order to allocate

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67 The troposphere, the layer nearest the surface of the earth, extends up to about nine to ten-and-a-half miles (up to sixteen km) at the equator and six to seven miles (up to twelve km) at the poles. It is the layer in which weather phenomena occur, and it is the field of operation for conventional aviation. The troposphere contains three-fourths of all the air surrounding the earth.

68 Most of the rest of the air in the atmosphere is contained in the stratosphere. It is above the weather and is reached only by the most advanced aircraft and research balloons. Its upper limit is about twenty-five miles (it ranges from sixteen to fifty km above the surface of the earth). The troposphere and stratosphere contain about 99.7 per cent of the air.

69 The ionosphere occupies the same region of the atmosphere as the mesosphere. The mesosphere occupies the space between fifty km and eighty km above the surface, and thereafter the ionosphere begins, with limits going up to 600km. See Weather and Climate at: http://www.weather-climate.org.uk/02.php (last accessed 9 July 2014).

70 See http://gov-zas.websiteinprogress.co.za/documents/green-paper-national-policy-airports-and-airspace-management (last accessed 16 June 2014).

71 South African Green Paper on National Policy on Airports and Airspace Management (June 1997), available at: http://gov-zas.websiteinprogress.co.za/documents/green-paper-national-policy-airports-and-airspace-management#airspace%20matters (last accessed 16 June 2014).

responsibility for the provision of air traffic services to specific states. Both Lesotho and Swaziland do not have their own FIRs,[72] instead their airspaces fall within the Johannesburg FIR.[73] The two countries only regulate their lower airspaces, which runs from ground level up to Flight Level 195 for Swaziland.

THE INTERTWINED ECONOMIC AND POLITICAL HISTORIES OF THE THREE TERRITORIES

The emergence of the Basotho as a nation occurred around 1818 when King Moshoeshoe (1786 –1870) formed alliances with an amalgam of clans and chiefdoms of southern Sotho people who had settled in the area which is presently the northern and eastern Free State and western Lesotho. These clans had occupied this land from around the year 1400.[74] The Kingdom of Lesotho had its fair share of colonial invasions, as it did experience some territorial wars between itself and the Dutch over what would later become the Orange Free State (present day Free State Province of South Africa).[75] Because of these invasions, King Moshoeshoe would later seek the protection of the British against the Voortrekkers. Thus by way of proclamation, Lesotho became a British Protectorate on 12 March 1868.[76] Lesotho (or Basutoland as the colonialists referred to it then) was later annexed into the Cape Colony in 1871. This move was of little significance as Basutoland remained a High Commission territory. It was eventually transferred to the jurisdiction of the British High Commissioner in South Africa in 1910. After obtaining independence from the British in 1966, the country was plunged into political disarray from the 1970s until 1990, when there was a return to the monarchy style of government. Today Lesotho is headed by King Letsie

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72 See ICAO, Current FIR Status: Lesotho, available at: http://www.icao.int/safety/FITS/Lists/Current%20FIR%20Status/DispForm.aspx?ID=162&ContentTypeId=0x010052E9663F7BEC124F98A382A2B443E7C2 (last accessed 16 June 2014).

73 See ICAO, Current FIR Status: Swaziland, available at: http://www.icao.int/safety/FITS/Lists/Current%20FIR%20Status/DispForm.aspx?ID=339&ContentTypeId=0x010052E9663F7BEC124F98A382A2B443E7C2 (last accessed 16 June 2014).

74 Emergence of Lesotho, available at: http://www.lesothoemb-usa.gov.ls/about/default.php (last accessed 19 May 2014).

75 Lesotho, available at: http://www.sahistory.org.za/places/lesotho (last accessed 21 May 2014).

76 *Ibid*.

III, a constitutional monarch.[77] In terms of its landmass, Lesotho is completely surrounded by South Africa.

Like Lesotho, the Kingdom of Swaziland is also landlocked. It is nestled between South Africa in the southern, western and northern sectors, and Mozambique in the eastern quadrant. The country's total landmass is roughly the size of the Gauteng Province. It obtained independence from the British in 1968,[78] after a few years of limited self-rule. It is currently headed by a monarch,[79] whose office is recognised and protected constitutionally.[80]

South Africa has been a dominant feature in the affairs of the two kingdoms. Swaziland and Lesotho each receive disproportionate amounts of their annual Gross Domestic Product (GDP) directly from South Africa. The two states also rely profoundly on their powerful neighbour for imported supplies such as food, fuel, goods and services.[81] South Africa also acts as a conduit for a majority of air transportation of goods to and from the two kingdoms and the rest of the world. The two are reliant on South Africa's air, rail, marine and road infrastructure for the upkeep of their economies.[82]

Even though the two kingdoms had a rocky relationship with apartheid South Africa, the latter was obliged to support them through proceeds from the Southern African Customs Union (SACU) formed in 1910.[83] The SACU

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77 See 'The Monarchy' available at: http://www.gov.ls/king/default.php (last accessed 16 June 2014). See also s 44 of the Lesotho Constitution.

78 See generally Dube 'Domestic application of international human rights norms in forced eviction cases in Africa' in Killander (ed) *Human rights litigation and the domestication of human rights standards in sub-Saharan Africa* AHRAJ Casebook Series Vol 2 (2007) 121.

79 Dube 'Does SADC provide a remedy for a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 4 *SADC Law Journal* 259 –278, 269.

80 Section 4 of the Swaziland Constitution of 2005 establishes the offices of the King and the *iNgwenyama.* The office of the King is an executive office, under which he acts at the head of state. When acting as *iNgwenyama*, the King is operating under the customary powers as a leader of the Swazi nation. The constitution protects both these offices, occupied by one person, known as both the King and *iNgwenyama*. The current leader of Swaziland is King Mswati III.

81 See: http://sacsis.org.za/site/article/1335 (last accessed 22 July 2015).

82 See: PwC South Africa 'Africa gearing up – future prospects in Africa for the transportation and logistics industry' (2013) 71; available at: http://www.pwc.co.za/en_ZA/za/assets/pdf/africa-gearing-up.pdf (last accessed 22 July 2015).

83 See: http://sacsis.org.za/site/article/1335 (last accessed 22 July 2015).

agreement obliges South Africa to pay the smaller landlocked states a disproportionate amount of their total income earned through collection of customs and excise revenue. SACU receipts for both kingdoms amount to around sixty per cent.[84] When Swaziland faced an economic crisis in 2010, South Africa came to the kingdom's rescue by offering a R2 billion loan.[85]

The bedrock of today's South African economy stands on over one hundred years of migrant labour, which was supplied by the territories of Lesotho, Swaziland, Mozambique, Zimbabwe, Zambia and Malawi to mainly the mines and farms.[86] The economic, political and aviation sectors of these three territories have enjoyed a symbiotic relationship for over a century. These have also been buttressed by strong historical and cultural ties between these three territories. It therefore stands to reason that there would be cooperation and assistance in the aviation sector as well.

The South African aviation legal framework – setting the trend for the region

At the end of the 1980s, there were approximately 150 licenced public-use airports in South Africa. Most of these were owned at the municipal level. The South African government owned nine public-use airports which included three major international airports at Johannesburg, Cape Town and Durban. The Bantustan governments also owned fourteen provincial public-use airports upon the creation of these apartheid-era entities.[87] Since the government directly owned these major airports, it was also the main provider of air traffic and navigation services. In the 1990s the Airports Company South Africa (ACSA) was established by an Act of Parliament,[88] and it took over from the Department of Transport (DoT), which until then had managed all the major airports in South Africa. In July 1992, the government of South Africa embarked upon a restructuring of its air traffic

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84 African Economic Outlook 'Lesotho' (2012) 2; available at: http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Lesotho%20Full%20PDF%20Country%20Note.pdf (last accessed 22 July 2015).

85 See: http://www.safpi.org/news/article/2013/current-political-situation-swaziland-dirco-briefing (last accessed 22 July 2015).

86 See Swazi kings and Greek titans: Implications for regionalism, available at http://sacsis.org.za/site/article/721.1 (last accessed 2 July 2014).

87 South African Green Paper on National Policy on Airports and Airspace Management (June 1997), available at http://gov-zas.websiteinprogress.co.za/documents/green-paper-national-policy-airports-and-airspace-management#airspace%20matters (last accessed 16 June 2014).

88 The Airports Company South Africa Act 44 of 1993.

navigation services. The aim was to commercialise this sector, to allow the government to provide such services on a commercial user-pay basis. This necessitated the transfer of responsibility from the DoT to a newly established entity, the Air Traffic and Navigation Services Company Limited (ATNS).[89] Unlike ACSA which is privatised, ATNS has remained a fully government-owned public utility. Since 1997, ATNS has become a dominant player in the SADC on air traffic services, and is currently responsible for ten per cent of the world's airspace.[90]

ATNS's regulation of both South African airspace and parts of SADC airspace has allowed the company to regulate and collect charges for aircraft using South African airspace as well as to collect user fees in respect of the upper airspaces of states that are regulated by South Africa. Within South Africa, ATNS' collection of user charges comprises of en-route (area) charges, approach charges (these apply only to ACSA airports), aerodrome charges (also apply to ACSA airports only) and Terminal Control Area (TMA) access charges.

Over and above these two major service providers in the South African aviation industry, the South African Civil Aviation Authority (SACAA) also merits mention. The SACAA was established by the South African Civil Aviation Authority Act, and its mission includes the regulation of aviation safety and security through oversight in line with international standards, and to minimise the impact of the aviation industry on the environment. Section 3 of the South African Civil Aviation Authority Act states that the objectives of the SACAA are 'to control and regulate civil aviation in the Republic (of South Africa) and to oversee the functioning and development of the civil aviation industry, and in particular, to control, regulate and promote civil aviation safety and security.[91]

Apart from the legislation cited above, South Africa has a range of other regulatory instruments for the aviation sector, comprising of legislation, regulations and technical standards. These include the International Air Services Act 60 of 1993; the South African Airways Act 5 of 2007; the South African Civil Aviation Authority Levies Act 41 of 1998; the South African Express Act 34 of 2007; the South African Maritime and Aeronauti-

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89 ATNS was established by the Air Traffic and Navigation Services Act 45 of 1993.
90 See ATNS available at www.atns.co.za (last accessed 9 July 2014).
91 South African Civil Aviation Authority Act 40 of 1998.

cal Search and Rescue Act 44 of 2002; the Convention on the International Recognition of Rights in Aircraft Act 59 of 1993; the Convention on International Interests in Mobile Equipment Act 4 of 2007; the Civil Aviation Act 13 of 2009; the Carriage by Air Act 17 of 1946; the Airports Company Act 44 of 1993; the Air Traffic and Navigation Services Company Act 45 of 1993; and the Air Services Licensing Act 115 of 1990.[92]

South Africa is a dominant role player in the provision of navigation services both on the continent of Africa and in the globe. Further, South Africa has advanced considerably in developing its aviation safety regulatory framework as well as its aviation navigation infrastructure. This can in part be attributed to South Africa's willingness to comply with ICAO SARPs, even though classified as soft law. It can also be attributed to South Africa's concern for its own safety, and to protect itself from threats that could possibly flow from the poorly monitored upper airspaces of its two neighbours. The latter point would be in keeping with the freedom of the air as adopted by the Institute of International Law at Madrid in 1911, in which the rights of subjacent states to regulate aerial traffic in the interests of their own security and that of their inhabitants and their property was recognised.[93]

The aviation landscape and the legal framework in the Kingdom of Lesotho

Lesotho is a mountainous country with the eastern two thirds of its territory dominated by the Drakensberg and the Maluti mountain ranges. This renders access by road to most places virtually impossible. Hence the country has 43 airfields in total, a majority of which is uncontrolled.[94] The Aeronautical

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92 South Africa also has an extensive catalogue of regulations that are pertinent to aviation. These are: the Agreement entered into between ICASA and CAA; the Air Traffic Service Charges; the Airport Charges; the Airport Slot Coordination Regulations 2012; the Civil Aviation Aircraft Passenger Safety Charge Regulations 2011; the Company Airport Regulations, 1994; the Domestic Air Services Regulations, 1991; the International Air Services Regulations, 1994; the Mortgaging of Aircraft Regulations, 1997; the Weather Service Charges; the Civil Aviation Regulations, 2011; the Civil Aviation Regulations, 1997 (Repealed by 2011 Regulations). These are also buttressed by many technical standards that the Republic of South Africa has adopted.

93 Richards 'Sovereignty over the air' (lecture delivered at the University of Oxford on 26 October 1912, available at: https://archive.org/stream/sovereigntyovert032293mbp/sovereigntyovert032293mbp_djvu.txt (last accessed 5 April 2015).

94 Lesotho has a history of using most of these airstrips, especially before the quality of roads improved. The national airline, Lesotho Airways which was formed in 1967 had

Information Service (AIS) does, however, provide information for the entire Lesotho territory including uncontrolled airfields in terms of the Air Navigation Plan (ICAO-ANP). Lesotho's main international airport,[95] Maseru International Airport (also known as Moshoeshoe I International Airport),[96] is its main port of entry for air traffic.[97] The Moshoeshoe I International Airport is regulated by a private company called the Economic Regulation Group. It is responsible for air traffic services and airlines, and also advises the state on aviation policy, albeit from an economic stand point.[98] This anchor airport was built after what has now been classified as a military airport, the Mejametalana Airport also located in Maseru. The two airports are eighteen kilometres apart.

There are other regional airports that service the aviation sector in this tiny kingdom, however, they have special rules. For instance, both Mokhotlong and Qhaka's Nek Airports serve as international airports to a limited extent. These facilities are meant for international departures only. All arriving traffic must be from within Lesotho, unless special permission has been

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largely focused on weekly flights to Johannesburg, as well as operating regular flights to over 20 airports scattered throughout the nation. See Rosenberg & Wisfelder 2ed *Historical dictionary of Lesotho* (2013) 522.

95 Moshoeshoe I International Airport is situated twenty-two km south east of Maseru and is the main air transport gateway into the country. It was completed in 1985, and was constructed to accommodate large jet aircraft on regular services internationally, as well as domestic air traffic. It boasts a 3200m long runway, with an elevation of 1630 m above sea level. Approach lighting and the instrument landing system were rated in 1995 as Category I, which is appropriate for this type of airport to allow minimum visibility operation. However maintenance problems with the Very high frequency Omni Range (VOR) have meant that the instrument landing system has never been fully operational. See Civil Aviation Department, available at: http://www.gov.ls/mopwt/mptweb/departments/aviation.php (last accessed 16 June 2014).

96 *Ibid*. Moshoeshoe I International Airport was opened in 1985, at which time the national airline was also renamed as Air Lesotho. The national airline would later suspend its Johannesburg flights, which had become daily flights by then, giving the space up to South African Airways.

97 See Department of Civil Aviation, available at: http://lesothoembassy.de/DCAweb/sections/ais.htm (last accessed 20 May 2014). Moshoeshoe I International Airport is serviced by South African Airlink, the only scheduled services provider. It operates internationally between Maseru and Johannesburg, with three return flights per day, except for Sundays when only two return flights are operated. See Civil Aviation Department, available at: http://www.gov.ls/mopwt/mptweb/departments/aviation.php (last accessed 16 June 2014).

98 Department of Civil Aviation – Services, available at: http://lesothoembassy.de/DCAweb/about/services.htm (last accessed 19 May 2014).

obtained from the Director of Civil Aviation (DCA) by the operator. Both aerodromes are situated in the north-eastern border with South Africa and fall under the jurisdiction of Johannesburg East FIR.[99] Semonkong Airport is a strictly domestic aerodrome. Lesotho also boasts a number of rural aerodromes and private airstrips scattered throughout the mountainous kingdom.[100]

Lesotho's aviation legal framework consists of the Constitution of Lesotho of 1996 and the Aviation Act of 1975. The Draft Aviation Act of 2007 remains in draft form, and this effectively means Lesotho's aviation sector is still regulated by an outdated piece of legislation. This is likely to present problems, given the fact that almost four decades have elapsed since the Act first came into force. Technological advances and other developments in aviation may present the Kingdom of Lesotho with challenges that may not be easily resolved using the current legislation. For example, the DCA was established by the Ministry of Public Works and Transport without a clear legal basis. There is no clear delegation of authority by the Ministry of Public Works and Transport to the DCA, even though the DCA is charged with the coordination of ICAO-related matters in Lesotho.[101]

The Lesotho Aviation Act establishes criminal liability and fines for non-compliance with the Act or the Chicago Convention. It also provides for suspension of licences, certificates or ratings of offenders. It further empowers the minister responsible for aviation to make regulations. Although Lesotho is party to the Chicago Convention,[102] it has not yet ratified article 83*bis*.[103] This has not stopped Lesotho from engaging in

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99 FIRs extend from the surface of the earth upwards without an upper limit. See in this regard Lempp *The pilot's radio handbook* (14ed 2008) 21.

100 A total of twenty-seven of these airstrips are operated by the Department of Civil Aviation. However, due to rain damage in recent years, the number of usable facilities has dropped to twelve.

101 ICAO Universal Safety Oversight Audit Programme, Final Report on the Safety Oversight Audit of the Civil Aviation System of Lesotho June 2007.

102 Lesotho submitted its Notification of Adherence with this international instrument on 19 May 1975 and it came into force on 18 June 1975. Lesotho also lodged its acceptance of the International Air Transit Agreement on 2 October 1975.

103 Article 83 *bis* is an amendment to the Chicago Convention that became effective in June 1997. It authorises contracting states to make bilateral transfers of safety oversight responsibilities related to the lease, charters, and interchange of aircraft. It gives states a basis and legal framework for entering into bilateral agreements transferring responsibilities under arts 12 (Rules of the air), 30 (Aircraft Radio Equipment), 31 (Certificates of Airworthiness), and 32 (a) (licenses of Personnel). Article 83 *bis* allows placement of safety oversight responsibilities with the state that is in a better situation to

bilateral agreements with its neighbour South Africa for the provision of other aviation related services. As a result, Lesotho has delegated South Africa to take responsibility for the safety oversight of the Kingdom's upper airspace.[104]

Lesotho relies on South Africa for the maintenance of its aviation infrastructure, particularly navigation aids.[105] This is common in southern Africa, given South Africa's dominant position both economically and technologically. Routine flight inspections of all radio navigational aids are performed by South African aircraft in Lesotho and Swaziland as well.[106] Search and rescue services across the length and breadth of the Lesotho territory are also provided by South Africa,[107] pursuant to a treaty signed in 2005.[108]

The aviation landscape and the legal framework in the Kingdom of Swaziland

The aviation legal framework in Swaziland includes the Constitution of Swaziland,[109] the Civil Aviation Authority Act,[110] and the 2011

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discharge safety oversight.

104 An attempt to locate the agreement or memorandum that effectively delegated the management of Lesotho's upper airspace proved futile, save for confirmation from ATNS that indeed South Africa is currently managing the Kingdom's airspace pursuant to an act of delegation.

105 Currently, Lesotho airspace is situated within the Johannesburg FIR. Air traffic control is provided to both instrument flight rules (IFR) and visual flight rules (VFR) aircraft in the Maseru terminal control area and the aerodrome control zone by the Maseru approach control service and the Maseru aerodrome control tower at the Moshoeshoe I International Airport. Flight information service, area control service and alerting service are provided for all aircraft flying within the boundaries of the Kingdom of Lesotho by the Department of Civil Aviation, in accordance with the Johannesburg area control centre/flight information centre.

106 This is often done for the purpose of calibrating the Instrument Landing Systems (ILS) and the VHF Omni Range (VOR) beacons at aerodromes.

107 Rescue and Fire Fighting Services are rated as Category VI, which is the appropriate rating for this Airport. However, the Rescue and Fire Fighting Services have not been fully operational for the past eight years. See Civil Aviation Department, available at http://www.gov.ls/mopwt/mptweb/departments/aviation.php (last accessed 16 June 2014).

108 See the Agreement regarding the co-ordination of Search and Rescue Services, signed between Lesotho and South Africa on 22 July 2003 and came into force on the same day.

109 The Constitution of Swaziland Act 1 of 2005 was signed by the king in July and came into force in February of the following year. The Constitution determines the boundaries of the Kingdom of Swaziland and provides in section 1(2) that, 'The territory of Swaziland comprises all the land that immediately before the 6th September 1968 comprised the former Protected State of Swaziland together with such additional land as may from time to time be declared to form part of Swaziland in accordance with international law'. Whilst the focus of the supreme law is on land and is silent on the

Regulations.[111] Having been a British protectorate from 1902 to 1968,[112] Swaziland became party to the Chicago Convention after the British government signed on its behalf.[113] Unlike its counterpart Lesotho, Swaziland does have an autonomous civil aviation authority, aptly named the Swaziland Civil Aviation Authority (SWACAA).

Until recently, Swaziland had one international airport located in the hub of the tiny kingdom, the Matsapha International Airport. The newly completed King Mswati III International Airport will likely operate as Swaziland's second international aerodrome.[114] Both airports are administered and managed by SWACAA. There are several private airstrips throughout

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lateral limits of its sovereignty, the airspace above this landmass also forms part of the territory of Swaziland.

110 The Swaziland Civil Aviation Authority Act 10 of 2009, available at http://www.swacaa.co.sz/documents/CIVIL-AVIATION-AUTHORITY-ACT-2009.pdf (last accessed 10 June 2014).

111 The new regulations include: the Civil Aviation (Air Navigation Services) Regulations; the Civil Aviation (Aircraft Accident and Incident Investigation) Regulations; the Civil Aviation (Aerial Work) Regulations; the Civil Aviation (Aerodrome) Regulations; the Civil Aviation (Air Operator Certification and Administration) Regulations; the Civil Aviation (Aircraft Registration and Marking) Regulations; the Civil Aviation (Airworthiness) Regulations; the Civil Aviation (Approved Maintenance Organization) Regulation; the Civil Aviation (Approved Training Organization) Regulations; the Civil Aviation (Commercial Air Transportation by Foreign Operator) Regulations; the Civil Aviation (Instruments and Equipment) Regulations; the Civil Aviation (Operation of Aircraft) Regulations; the Civil Aviation (Parachute Operations) Regulations; the Civil Aviation (Personnel Licensing) Regulations; and the Civil Aviation (Rules of the Air and Air Traffic Control) Regulations. The Regulations can be accessed on the website of the SWACAA, available at: http://www.swacaa.co.sz/regulationandcompliance/regulation/index.php (last accessed 10 June 2014).

112 South Africa administered Swazi interests from 1894 to 1902. In 1902 the British assumed control, until limited self-rule was granted in the early 60s.

113 The Chicago Convention was signed on behalf of Swaziland by the United Kingdom on 7 December 1944, and in line with the principles of state succession under international law, Swaziland assumed all obligations when it attained independence in September 1968. It thus filed its instrument of notification of adherence on 14 February 1973 and came into force on 16 March 1973. Swaziland also lodged its notice of acceptance of the International Air Transit Agreement on 30 April 1973.

114 See King Mswati III International Airport, available at: http://www.swacaa.co.sz/airports/kingmswatiIII/ (last accessed 11 June 2014). The airport was initially known as Skhuphe Airport, and was renamed after its opening in 2014. The airport is tipped to be the Kingdom's major international hub with the capacity to accommodate large aircraft and long-haul flight operations that connect Swaziland directly with the world. The airport is designed to accommodate projected future air passenger and cargo demands for the region, and incorporates terminal buildings, a VIP passenger lounge, air navigation and ground handling equipment, and all associated airport operations equipment.

Swaziland, but a majority are either underused or have fallen into disrepair over the years. SWACAA only manages one private airstrip in the southern town of Nhlangano. The various companies running plantations in Swaziland, (sugar, citrus and timber plantations) have several airstrips that they manage. These private airstrips can only service domestic traffic, unless prior arrangements have been made with the authorities.

Swaziland is committed to effective regulation of its airspace. This it does not only through legislative enactments, but also through effective enforcement of its airspace law. Similar to South Africa,[115] a flight above fifty feet (fifteen metres) in Swaziland airspace is subject to control. According to SWACAA, any object flying above that threshold has to have proper clearance, otherwise the operator risks arrest and a fine of R500 000.[116] The case of a Swazi detective who was arrested and charged for operating a toy helicopter equipped with a video camera for purposes of gathering surveillance information similar to a drone is instructive.[117] South Africa also recently placed a moratorium on the operation of unmanned aerial systems (UAS) in South African airspace until the SACAA establishes a regulatory framework.[118]

THE ROLE OF THE ICAO IN THE CALL FOR IMPROVED UPPER AIRSPACE MANAGEMENT

All three states are party to the Chicago Convention through which the ICAO was set up.[119] The organisation has been very instrumental in developments that have taken place in the aviation sector in these three

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115 The SACAA Regulations limit the maximum height that a model aircraft may fly in the South African to 150 feet above ground level.

116 'Broomstick flying witches to be brought down in Swaziland' Times Live 13 May 2013 available at http://www.timeslive.co.za (last accessed 30 May 2014). The spokesperson of SWACAA was quoted saying that witches flying on broomsticks are similar to any heavier-than-air aircraft.

117 The private detective, Hunter Shongwe had piloted the gadget using a hand held remote control. The gadget which operates as a floating camera is capable of taking pictures of people and places without raising suspicion. He was arrested by officers from Serious Crimes Unit (Lukhozi) following allegations that he had contravened the Aviation Regulations in that he operated an aircraft without having obtained a licence.

118 See CAA Statement on Unmanned Aircraft Systems, issued 3 June 2014, available at: http://www.caa.co.za/Media%20Statements/2014/CAA%20Statement%20on%20Unmanned%20Aircraft%20Systems.pdf (last accessed 30 June 2014).

119 South African signed the convention on 4 June 1945 and lodged its instrument of ratification on 1 March 1947. The convention came into force on 4 April 1947. South Africa also signed the International Air Transit Agreement on 4 June 1945 and lodged its acceptance of the same agreement on 30 November 1945.

states. The ICAO promotes the safe and orderly development of civil aviation worldwide. It is responsible for developing international air transportation standards and regulations. It is the centrepiece for cooperation and interaction of all stakeholders in the field of civil aviation. In recent years, the ICAO has been the driving force behind a move to harmonise the upper airspaces of its members with a view to creating a seamless regional sky.

The ICAO Universal Safety Oversight Programme

The need to restructure Lesotho and Swaziland's aviation sectors and improve air traffic and airspace management began with an audit of these countries' aviation sectors under the ICAO Universal Safety Oversight Audit Programme (USOAP).[120] The audit was a product of the 32nd Session of the ICAO Assembly,[121] which authorised regular, mandatory, systematic and harmonised safety audits of all contracting states.[122] The objective of USOAP launched by the ICAO just before the turn of the millennium is to promote global aviation safety through auditing contracting states, on a regular basis. The aim of the audit would be to determine the capability of states for safety oversight by assessing the effective implementation of the critical elements of a safety oversight system and the status of states' implementation of safety-relevant ICAO SARPs, associated procedures, guidance material and safety related practices. The ICAO USOAP Programme's main objective is establishing and implementing an effective safety oversight system that would reflect the shared responsibility of the state and the broader aviation community. The programme therefore expects each ICAO member state to address all of the eight critical elements, which spans

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120 The country reports can be accessed generally at: http://www.icao.int/safety/cmaforum/Pages/default.aspx (last accessed 16 June 2014). For the Lesotho report, see ICAO Universal Safety Oversight Audit Programme, Final Report on the Safety Oversight Audit of the Civil Aviation System of Lesotho June 2007 1, available at: http://cfapp.icao.int/fsix/AuditReps/CSAfinal/Lesotho_Final_Audit_Report.pdf (last accessed 15 May 2014).

121 The 32nd Session adopted ICAO Assembly Resolution A32-11 which enabled the establishment of the ICAO Universal Safety Oversight Audit Programme (USOAP).

122 Safety Oversight Audit Programme, available at: http://www2.icao.int/EN/USOAP/Pages/Background.aspx (last accessed 15 May 2014). The USOAP was launched on 1 January 1999, pursuant to Assembly Resolution A32-11, and on the basis of the recommendations made by the Directors General of Civil Aviation (DGCA) Conference on a Global Strategy for Safety Oversight held in 1997. It is managed and run, since 1999, by the Safety Oversight Audit (SOA) Section in the Air Navigation Bureau. SOA is certified under ISO standard *Quality Management Systems – Requirements: ISO 9001:2000* since 16 October 2002.

the entire spectrum of a state's civil aviation oversight activities. These critical elements are: Legislation, Organisation, Licensing, Operations, Airworthiness, Accident Investigation, Air Navigation Services, and Aerodromes.

In its 2013 USOAP Report, the programme indicated an average global effective implementation (EI) of seventy per cent for legislation, 63 per cent for organisation, seventy-one per cent for licensing, sixty-six per cent for operations, seventy-two per cent for airworthiness, fifty-one per cent for accident investigation, fifty-three per cent for air navigation services, and fifty-eight per cent for aerodromes.[123] South Africa was listed as having a national EI of more than sixty-one per cent. The EI threshold utilised by the USOAP programme is rated zero per cent to 100 per cent, with zero per cent being 'not implemented' and 100 per cent being 'fully implemented'.

Unlike its predecessor, the USOAP programme is a mandatory programme, and it seeks to remedy the shortcomings of the voluntary safety oversight assessment programme which the ICAO had operated since 1995. The ICAO Assembly Resolution A32–11, adopted at the 35th Session, directed the ICAO to conduct regular, mandatory, systematic and harmonised safety audits of all contracting states, with the objective of enhancing safety but limited itself to the implementation the SARPs. Through the ICAO Assembly Resolution A35 –6 delivered in the 35th Session, the ICAO Assembly considered a proposal of the Council for the continuation and expansion of the USOAP programme as of 2005 and resolved that the Programme be expanded to cover all safety-related Annexes.

Hence Assembly Resolution A33 –8 was adopted at the 37th Session which directed the ICAO to continue the ICAO USOAP and to expand it to include audits of Annex 11 – Air Traffic Services, and Annex 14 — Aerodromes, as of 2004. The Resolution further instructed the Secretary General to undertake a study regarding the expansion of the USOAP programme to other safety-related fields, and in particular, on the conduct of audits of the core elements of Annex 13 – Aircraft Accident and Incident Investigation, as soon as possible, without significantly increasing the cost of the expansion.

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[123] ICAO Safety Report 2013, 7, available at: http://www.icao.int/safety/Documents/ICAO_2013-Safety-Report_FINAL.pdf (last accessed 7 July 2014).

It is evident from The ICAO's reports that the organisation treats its audit process as one that should benefit all member states. As a result, findings of the safety audits are shared with other states, and these contain summarised reports indicating the areas that need intervention as well as suggested corrective actions and the status of implementation.[124] The scope of the USOAP programme was incrementally expanded over the years to identify various aspects of aviation and to bring these within the ambit of the audit. The core areas audited by the USOAP programme are: primary aviation legislation and civil aviation regulations; civil aviation organisation; personnel licensing and training; aircraft operation; airworthiness of aircraft; aircraft accident and incident investigation; air navigation services; and aerodromes and ground aids.

Members of The ICAO felt they had the need to be involved in the safety audits since pilots who are trained in one territory fly to many destinations across the globe. In the process they either enter or fly over the airspaces of other sovereign states. States therefore had an interest in the assessment of the standards used.

In 2011, the USOAP programme evolved from a programme performing periodic audits to a new approach based on the concept of continuous monitoring. This systematic and more proactive risk based approach to the conduct of monitoring activities provides The ICAO with the ability to continue to perform audits as well as additional activities such as The ICAO Coordinated Validation Missions (ICVM). ICVMs help to validate the progress made by states in resolving safety deficiencies identified during USOAP audits.[125]

The USOAP relies on the willingness of member states to implement The ICAO resolutions for its success. Whether or not a member state complies with the resolutions of The ICAO and the outcome of the audit will to a large extent be influenced by a broad array of political, economic and other factors, as shall appear below.

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[124] Safety Oversight Audit Programme, available at: http://www2.icao.int/EN/USOAP/Pages/Background.aspx (last accessed 15 May 2014).

[125] See www.icao.int/safety/Pages/USOAP-Results.aspx (last accessed 16 June 2014).

Lesotho's implementation of the ICAO recommendations

As indicated above, the shortcomings in the Lesotho aviation sector were aptly identified in the ICAO USOAP audit. One of the recommendations made touched on the need to improve upper airspace management. This was in line with the position taken earlier by African states on the need to form functional groups of their FIRs in order to improve aviation safety. African states had already resolved that the formation of functional groups was a viable solution to achieve globalisation of FIRs in the AFI region pursuant to AFI/7Rec.5/1 relative to a cooperative approach to airspace management.[126] The African bloc suggested the merger of the airspaces of the following countries to form functional air blocks: Ghana and Nigeria, Namibia and Botswana, South Africa, Lesotho and Swaziland,[127] Zambia and Zimbabwe, Mozambique and Malawi, the Indian Ocean states, Kenya, Tanzania and Uganda, as well as Ethiopia, Eritrea and Djibouti. They also resolved that states would update each other periodically regarding their adjacent air traffic control coordination.[128]

The ICAO USOAP Report on Lesotho also identified a lack of equipment to enable the DCA to provide proper safety oversight of Lesotho's upper airspace.[129] It also recommended the amendment of existing legislation to strengthen the capacity of the aviation authority to deal with safety issues. To date, the 1975 Aviation Act remains in force, its shortcomings notwithstanding.

The age of the enabling legislation also poses other challenges such as fragmentation of roles. Currently there are three other authorities that deal with civil aviation matters in Lesotho. These are the Department of Water Affairs, which houses the meteorology department;[130] the Department of

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126 Airspace Management Task Force 2nd Meeting Report, Dakar 13 –14 June 2002, 4 available at: http://www.icao.int/WACAF/Documents/APIRG/Apirg14/asm-tf2_eng.pdf (last accessed 13 May 2014).

127 ATNS Annual Report 2004, 16 available at http://www.atns.co.za/annual-reports (last accessed 30 June 2014). ATNS revealed as early as 2004 that it was involved in the compilation of a proposal to harmonise CNS/ATM in Lesotho and South Africa. Again in its 2008 Annual Report, ATNS revealed that it was currently in discussion with Lesotho and Swaziland over the harmonisation of ATM/CNS to improve safety and reduce the overall cost of operation and maintenance of the facilities.

128 *Id* at 5.

129 See the ICAO Universal Safety Oversight Audit Programme, Final Report on the Safety Oversight Audit of the Civil Aviation System of Lesotho June 2007.

130 See Lesotho Meteorological Services, available at http://www.lesmet.org.ls/about-us (last accessed 11 June 2014). Lesotho's meteorology department was created in 1974. The

Lands, Surveys and Physical Planning; as well as Moshoeshoe I International Airport. Even though this is not necessarily a bad arrangement, the fact that no clear coordination exists between these three state functionaries may hamper growth in the aviation sector and even affect aviation safety. The USOAP audit also revealed that the DCA within the Ministry of Public Works and Transport is responsible for the coordination of all ICAO-related matters in Lesotho. However, Lesotho has not established coordination procedures between the DCA and other national authorities dealing with aviation matters, such as the Department of Water Affairs (Lesotho Meteorological Services) under the Ministry of Water, Energy and Mining), the Department of Lands, Surveys and Physical Planning (under the Ministry of Local Government), and the Lesotho Telecommunications Authority. Although the ICAO corrective action plan recommended that Lesotho should attend to these inadequacies, nothing has been done to date. The most prudent way to do this would have been to amend the enabling legislation to allow for a better, well-functioning DCA, or the establishment of a civil aviation authority with autonomy. The current arrangement means the DCA is entirely dependent on state budget allocations, and this negatively affects its ability to adequately fulfil its safety oversight responsibilities. Despite its glaring inadequacies, Lesotho is still using the Aviation Act of 1975.[131]

Swaziland's implementation of the ICAO recommendations

The ICAO USOAP audit of Swaziland was conducted in July 2007.[132] The audit revealed a very poor EI of a safety oversight system at 16,4 per cent, compared to South Africa's EI of sixty-one per cent.[133] This was followed up by an ICAO implementation assistance mission conducted by the Eastern

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Aeronautical Section of the Lesotho Meteorological Services is responsible for providing aeronautical weather reports (including hourly weather reports, pilot briefing and the terminal aerodrome forecasts for the take-off and landing of the planes at Moshoeshoe I International Airport). It is also the focal point for liaison with the Department of Civil Aviation and ICAO on matters pertaining to provision of meteorological services for air navigation.

131 *Ibid*.

132 See Implementation of ICAO Universal Safety Oversight Audit Programme (USOAP) Corrective Action Plan, Revised Plan of Action for Swaziland May 2013 available at: http://www.icao.int/safety/scan/PlansOfAction/Revised%20ICAO%20Plan%20of%20Action%20Swaziland%20May%202013.pdf, (last accessed 16 June 2014).

133 In its 2013 Revised ICAO Plan of Action, Swaziland undertook to enhance and sustain the state's safety oversight obligations in achieving an EI of 70 per cent by end of 2015 and to meet the high level safety targets. See ICAO USOAP, *ibid*. Corrective Action Plan, Revised Plan of Action for Swaziland May 2013, available at: http://www.icao.int/safety/scan/PlansOfAction/Revised%20ICAO%20Plan%20of%20Action%20Swaziland%20May%202013.pdf (last accessed 7 July 2014).

and Southern African (ESAF) Regional Office[134] in August 2011 which noted that Swaziland had made limited progress in the implementation of the ICAO accepted Corrective Action Plan. During the mission, Swaziland indicated that it had both the political will and commitment to working with the ICAO to resolve the safety deficiencies. The long term objective of the ICAO plan of action for Swaziland was for the country to focus on cooperation with the regional safety oversight organisation for SADC states; to enhance safety oversight; as well as to increase safety data or information exchange between SWACAA, other regional organisations and the ICAO.

Alive to its shortcomings in the management of its upper airspace, and in a clear demonstration of its political commitment to the ICAO plan of action, the Kingdom of Swaziland signed a memorandum of understanding (MoU) with South Africa in 2013 in terms of which the latter would assume responsibility of Swaziland's upper airspace. At the signing of the agreement Swaziland was represented by its civil aviation authority, SWACAA whilst South Africa was represented by its aviation navigation services provider, ATNS. This was regarded as a landmark agreement towards the harmonisation of African skies.[135] Such a move is very critical for aviation safety given that within ten minutes of taking off from either of Swaziland's international airports, an aircraft is in the airspace of either Mozambique or South Africa. This also affects aircraft overflying the territory at high altitude, which also have less than ten minutes to traverse through Swaziland airspace.

The MoU between South Africa and Swaziland emphasises that it remains the responsibilities of SWACAA to continue to provide the maintenance service of the ground equipment within the boundaries of Swaziland, which will support area control activities within the area of responsibility delegated to ATNS. It is also incumbent upon SWACAA to ensure that the necessary arrangements are in place to enable ATNS to provide air traffic services within Matsapha International Airport on behalf of the Kingdom of Swaziland. This is partly, as a result of the close proximity of the Maputo, Nelspruit and Matsapha Airports. It is expected that SWACAA's responsi-

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134 The ESAF is made up of twenty-four countries from southern and east Africa, and all three territories, Lesotho, South Africa and Swaziland are also affiliated. ESAF carries out liaison activities on behalf of the ESAF states and other global aviation stakeholders.

135 The agreement was signed on 10 May 2013 and can be viewed at: http://www.atns.co.za/PDF/MediaCentre/2013/2013%20MEDIA%20RELEASE%20SWAZILAND%20MoU.pdf (last accessed on 14 May 2014).

bility will also include the King Mswati III International Airport once it is fully operational.[136]

Both ATNS and SWACAA indicated that there would be a project management team which will hold internal meetings as and when required to assign actions, solve any problems and propose solutions, define specific activities, review the project schedule and formulate detailed aviation-related plans.

The South Africa-Swaziland MoU was necessitated by the need for a better and easier management of air traffic in a safe and orderly manner in the sub-region of SADC. The SWACAA Director General of Civil Aviation Mr Solomon Dube indicated at the signing of the MoU that ATNS was better placed to manage the Kingdom's upper airspace since it has the equipment that could monitor aircraft as far as Mozambique extending beyond the Indian Ocean.[137]

The 2013 MoU was followed up by a second one in 2014, in terms of which ATNS would collect upper airspace tax on behalf of the Kingdom of Swaziland.[138] In delegating safety oversight of its airspace to ATNS, Swaziland did not necessarily relinquish its sovereignty. In fact, all the memoranda signed contain a rider that the agreements do not affect Swaziland's sovereignty.[139] Swaziland retains control of the lower airspace

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[136] At the time of its opening in 2014, over R3 billion had been spent on the airport, whose construction was mired with opposition from both proscribed political formations and workers' unions. See Simelane 'Swaziland's King Mswati Airport finally gets going' *Independent On Line* 9 October 2014 available at: http://www.iol.co.za/business/international/swaziland-s-king-mswati-airport-finally-gets-going-1.1762324#.VSpkytLqFdk (last accessed 13 March 2015).

[137] See SWACAA-ATNS Joint Media Statement, available at: http://www.atns.co.za/PDF/MediaCentre/2013/2013%20MEDIA%20RELEASE%20SWAZILAND%20MoU.pdf (last accessed on 14 May 2014).

[138] The MoU will also enable the Kingdom of Swaziland, through ATNS to collect airspace tax from aircraft overflying the kingdom, which has not been done since the 1960s when Matsapha International Airport was established. See Thembeka Dlamini, SD lost sizable cash over non-collection of airspace tax, available at: http://www.observer.org.sz/business/60852-swacaa-increases-airport-taxes-by-100.html (last accessed 16 June 2014). ATNS and SWACAA concluded another agreement in 2014, to facilitate the collection of upper airspace tax. See 'Latest agreement strengthens relations between ATNS and SWACAA', available at: http://www.atns.com/PDF/MediaCentre/2014/2014%20%20JOINT%20SWAZILAND%20ATNS%20MEDIA%20RELEASE.pdf (last accessed 16 June 2016).

[139] See Johannesburg Flight Information Region – Delegation of Swaziland Upper Airspace to South Africa, AIRAC AIP Suppl/5086/13 17 Oct 2013, para 2, available at:

from ground level to a specified upper limit. The clause indicating that Swaziland retains its sovereignty is in keeping with the concept of divisible sovereignty, in terms of which a state can safely relinquish certain aspects of its sovereignty to a third party. It is also in consonant with the ICAO's assertion that delegation is in fact an exercise of sovereignty, rather than an abdication. The ICAO believes that it is not sovereignty *per se* that is relinquished during an act of delegation of upper airspace safety oversight, but the responsibility of the state for the performance of functional responsibilities.

In an Aeronautical Information Publication (AIP) issued in October 2013, the South African CAA published procedures for descending, climbing, joining and overflying the Swaziland airspace.[140] The AIP acknowledged that the new integrated ICAO CNS/ATM system, in terms of which the ATNS/SWACAA 2013 MoU was concluded, has great potential benefits for the AFI region. It further acknowledged that it was in pursuit of the region's goal for a seamless sky that Swaziland delegated the management of its upper airspace to ATNS. It then set a general threshold of FL195 as the beginning of ATNS' authority over aircraft flying within Swaziland's upper airspace. Flights below FL195 remain the responsibility of Matsapha International Airport. The AIP also establishes specific procedures for aircraft departing from, flying to or flying over Swaziland airspace, and these are set to comply with the semi-circular rule.

The interventions of the ICAO in the Swaziland aviation sector are quite commendable and are already yielding positive results in terms of reviving this sector. The legal reforms that saw the enactment of the 2009 Aviation Act, the 2011 Regulations and the establishment of SWACAA as an autonomous entity can all be traced to the audit programme steered by the ICAO a few years earlier.[141] Although faced with the age old question of sovereignty,[142] Swaziland rose above those limitations by acknowledging its

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http://209.203.9.244/resource%20center/AIP%27s/2013/S086-13%20Delegation%20of%20Swaziland%20Airspace%20to%20South%20Africa.pdf (last accessed 12 June 2014).

140 *Id* at par 3.

141 Section 4(2) of the Swaziland Aviation Act provides that SWACAA shall be an independent body corporate, having perpetual succession and a common seal capable of suing and being sued in its name.

142 In early 2015, a private jet belonging to the king of Swaziland was impounded in Canada after a court issued an order in favour of a judgment creditor for settlement of R35 million, part of the R1.6bn a businessman claims the monarch owes him. During a

shortcomings, and delegating safety oversight to a third, more capable state. It is clear that Swaziland understood the need to adopt an approach to sovereignty that is consistent with present and future political, economic and social interests.

Therefore, in signing the initial MoU, both South Africa and Swaziland envisaged the conclusion of further agreements in the future. Indeed the 2014 MoU which allowed Swaziland to further delegate to ATNS the power to collect airspace tax from aircraft flying over Swaziland's upper airspace is instructive in this regard. This is just one of the economic benefits of a seamless upper airspace.[143]

This demonstrates that the success in the Swaziland case cannot, however, only be attributed to a sense of obligation on the part of the government, but also on commercial and economic considerations. This is because Swaziland stood to benefit from a properly monitored upper airspace, and an efficient revenue collection system. It was also catalysed by national security concerns, in the sense that before the ATNS/SWACAA MoU, Swaziland was unable to detect aircraft overflying its territory beyond certain flight levels. Delegation of upper airspace management to South Africa would thus make the Swaziland upper airspace secure due to continuous monitoring, whilst at the same time allowing South Africa to identify threats that could spill over into South African airspace.

CONCLUSION

As earlier indicated, the ICAO as a regulatory body can only recommend to states on how best they can reform their aviation sectors. The body does not have the power to compel states to comply, and most of its legal outputs qualify only as soft law. However, the recommendations and resolutions of The ICAO, as highlighted, can be indicative of emerging trends in the development of *opinio juris*, and as such can assist in these soft laws being transformed into hard law. This is a desirable approach, given that state consent is central to the creation of international law, and by the necessary extension affects compliance.

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parliamentary debate on the issue, members of parliament accused Canada of violating Swaziland's national sovereignty by confiscating what they regarded as a national asset. See Simelane 'King Mswati's jet held over debt' *Independent On Line* 29 March 2015, available at http://www.iol.co.za/news/africa/king-mswati-s-jet-held-over-debt-1.1838427#.VSoIbtLqFdk (last accessed 29 March 2015).

143 See sources n 138 above.

The Swaziland example proves that compliance with the recommendations of the ICAO directly affects both the SADC and COMESA efforts at improving aviation safety through harmonised upper airspaces in the AFI region. It is thus an example of the positive role that soft law can play in advancing the objectives of regional organisations such as SADC, and that compliance with soft law can also be influenced by other extraneous factors, such as national security and economic considerations. The subsequent MoU signed between ATNS and SWACAA in 2014 for the collection of upper airspace taxes, illustrates the centrality of financial considerations to the decision whether a state will readily delegate oversight of its upper airspace or not. This is indicative of the fact that soft law alone may not be very effective in regulating the harmonisation of upper airspaces.

The Lesotho situation, however, is not impressive. Despite the many deficiencies pointed out in the ICAO audit, Lesotho appears to have no political will to remedy same. A number of recommendations that were proffered by the ICAO Action Plan have remained unimplemented by the Government of Lesotho. The legal framework remains archaic and inadequate to address safety issues in the aviation sector.

Lesotho's failure to finalise the amendment of its Aviation Act is indicative of a lack of political will to implement not only the ICAO recommendations, but also an unwillingness to give effect to the regional aspirations of SADC to create a single African sky. It is indicative of the weakness of the soft law approach adopted by the ICAO, and how it can negatively impact on regional initiatives to improve air safety. This behaviour is alarming when contrasted with Lesotho's response to other non-obligatory mechanisms at the international level, particularly in the area of human rights, democratisation and governance. For instance, Lesotho has been cooperating fully with the UN's Universal Periodic Review Mechanism,[144] and the African Peer Review Mechanism.[145] Both mechanisms require political will on the part of a state fully to engage with the processes, since they are voluntary. That notwithstanding, Lesotho was one of a few SADC states actually to complete the APRM in 2009. Hence the conclusion that its failure to comply with ICAO resolutions can partly be attributed to lack of a political will.

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[144] See Universal Periodic Review – Lesotho available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/LSSession8.aspx (last accessed 12 April 2015).

[145] See Ministry of Foreign Affairs and International Relations 'About the APRM' available at: http://www.foreign.gov.ls/aprm/default.php (last accessed 10 March 2015).

Lesotho's attitude is diluting efforts by both the ICAO and SADC to improve aviation safety through a better-managed upper airspace. It is recommended that Lesotho should delegate its upper airspace to South Africa in a clear and transparent matter, through an instrument of delegation fashioned after the ATNS/SWACAA MoU (South African/Swaziland).

It is further recommended that Lesotho should engage with South Africa with a view to concluding an MoU for the collection of revenues for the use of its upper airspace, as this would be in the best interests of both countries. It is also recommended that Lesotho should embark on a process of amending its regulatory framework, especially the enactment of a new civil aviation law. Further, Lesotho should consider converting the DCA into an autonomous, well-funded civil aviation authority.

The role that South Africa is playing in both these territories and in Swaziland in particular, is critical to advancing aviation safety. The success of the South Africa/Swaziland arrangement is testament to the fact that indeed a harmonised upper airspace management system is pivotal to the growth of the aviation industry as well as the growth of national economies. It also demonstrates that where political will exists, and financial incentives exist, states can indeed overcome the concerns over sovereignty in relation to their airspaces. It is consequently recommended that South Africa, given the advantaged position it occupies both in terms of an advanced regulatory framework and a sound infrastructure, should continue to assist its neighbours in the sphere of aviation safety. This is critical, given that South Africa's own national security can easily be threatened if the upper airspaces of its neighbours are not properly monitored.