Protection of aviation security through the establishment of prohibited airspace

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2 The Interpretation of Provisions Concerning Prohibited Airspace in the Chicago Convention

1 Preliminary remarks

The downing of civil aircraft, flights MH17 and PS752, prompt the international community to inquire about the law about prohibited airspace and its role in protecting aviation safety and security.[1] Airspace restrictions invariably limit the free and unhampered use of airspace, so that the establishment as such is subject to strict scrutiny. For this purpose, this chapter will undertake a normative analysis and provide case studies on Chicago Convention's provisions on prohibited airspace. The normative analysis begins with a textual interpretation, followed by examining the context, object and purpose, in accordance with Article 31 of the VCLT. In addition, pursuant to Article 32 of the VCLT, this chapter turns to the preparatory work of the Chicago Convention and the circumstances of its conclusion to confirm or determine the meaning resulting from the application of Article 31 of the VCLT.

2 Analysis of the terms of Article 9 of the Chicago Convention

The starting point of the research on prohibited airspace will begin with the Chicago Convention. This section analyzes Article 9 of the Chicago Convention which recognizes a Contracting State's right to establish prohibited airspace over its sovereign territory.

2.1 The text of Article 9 of the Chicago Convention

Article 9 of the Chicago Convention sets out 'who', 'when' and 'how' to restrict or prohibit aircraft from flying over a territory. Article 9 of the Chicago Convention reads:

a) Each contracting State *may*, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying *over* certain

1 See for instance, Atlantic Council, "Iran plane tragedies proves lessons of MH17 have not been learned". https://www.atlanticcouncil.org/blogs/ukrainealert/iran-plane-tragedy-proves-lessons-of-mh17-have-not-been-learned/, last accessed June 22, 2020.

areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.

b) Each contracting State *reserves also the right*, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying *over* the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.

c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs (a) or (b) above to effect a landing as soon as practicable thereafter at designated airport within its territory.[2]

Article 9 of the Chicago Convention prescribes that a Contracting State may restrict or prohibit flying over its territory for reasons of military necessity, public safety, exceptional circumstances and emergencies. However, these normative elements are not defined in the Chicago Convention or by ICAO regulations; thus they are open to interpretations.

The interpretation of these terms is not easy, because a treaty is always a record of disagreements, and negotiators may probably select words capable of reflecting different meanings to different readers;[3] at the same time, these terms are often used in other documents.[4] Notwithstanding the difficulty, pursuant to Articles 31 and 32 of VCLT,[5] this chapter seeks to interpret Article 9; specifically, the following sections adopts textual interpretation – explore the ordinary meanings of the terms in their context in light of Chicago Convention's objects and purposes; this process is facilitated by the documentary evidence of the drafting of the Chicago Convention and subsequent practices of ICAO Member States.

2 Article 9 of the Chicago Convention (emphasis added).

3 See Gardiner, R. *Treaty interpretation*, OUP 2008, p. 29.

4 Such as "military necessity" in international humanitarian law. Dunbar N.C.H., "The Significance of Military Necessity in the Law of War", in Juridical Review, Vol. 67/2, 1955, pp. 201-212.

5 On the methodology of treaty interpretation, see Chapter I, Section 1.

2.2 The right to prohibit flights over sovereign territory

2.2.1 Territorial sovereignty in relation to jurisdiction

Article 9 of the Chicago Convention prescribes rules for Contracting State to follow when establishing a prohibited or restricted airspace over "its territory". This emphasis on territory prompts this study to examine Articles 1 and 2 of the Chicago Convention because the two articles address the sovereignty a Contracting State has with respect to its territory. Articles 1 and 2 of the Chicago Convention form the context for interpreting Article 9.

According to Article 1 of the Chicago Convention, every State has complete and exclusive sovereignty over the airspace above its territory.[6] Airspace sovereignty is delimited *ratione loci* in respect of the space above national territories.[7] Each Contracting State is expected to be able to exercise control over all that takes place within its territories, and is responsible for safety oversight within its territory.[8] Namely, based on territorial sovereignty, a Contracting State is to exercise its exclusive jurisdiction for all matters within its sovereign territory.[9] The legal competence of a State to restrict or prohibit overflights over designated areas or its entire national territory is an aspect of the complete and exclusive sovereignty of a State.[10] It follows from Articles 1 and 2 of the Chicago Convention that a State has the exclusive power to close the airspace over its territory, including deciding on prohibited airspace, subject to the conditions in Article 9.

Although oftentimes territorial jurisdiction is sustained by territorial sovereignty, Prof. Cheng clarified that the jurisdiction may also be established through treaties,[11] or derived from the occupation of territories;[12] and there is hierarchy between these jurisdictional bases.[13] This chapter focuses on territorial jurisdiction that derived from territorial sovereignty – a Contracting

6 Article 1 of the Chicago Convention. See Chapter I, Section 2.3.

7 Cheng, B., "The Extra-Terrestrial Application of International Law", Current Legal Problems, Volume 18, Issue 1, 1 January 1965, pp. 132.

8 *Huang,* p. 15. *Cheng, ibid.,* p. 110.

9 M. D. Evans, *International Law*, OUP 2014, 309. *Oppenheim's International Law,* Vol. I, Peace, 9th ed., edited by Sir Robert Jennings and Sir Arthur Watts, Longman 1992, p. 456. ('*Oppenheim's International Law*')

10 *Milde,* p. 47. Kaiser, S.A., 'Legal Considerations about the Loss of Malaysia Airlines Flight MH 17 in Eastern Ukraine'. *Air & Space Law* 40, no. 2 (2015), p. 114.

11 Cheng, B., "The Extra-Terrestrial Application of International Law",135. See regional agreements on airspace delegation in Chapter III.

12 Cheng, *ibid.,* 135. About disputed territories and war zones, see Chapter V of this study.

13 Professor Bin Cheng posits that there is a clear hierarchy between jurisdiction in the order territorial, quasi-territorial and personal, and the more important ones can override the less important ones. See Bin Cheng, Article VI of the 1967 Space Treaty Revisited: "International Responsibility," "National Activities," and "The Appropriate State", *J. Space Law* 26 (1998) p. 25.

State's exclusive right and jurisdiction to establish a prohibited area over its territory. Later chapters explore jurisdiction for establishing prohibited airspace in delegated airspace and conflict zones.

2.2.2 *The use of the term "may"*

Corresponding to Articles 1 and 2 of the Chicago Convention, Article 9(b) uses the wording "reserves the *right*" to expressly underline the exclusive right to close airspace for public safety, exceptional circumstances, and emergency. In comparison, Article 9(a) prescribes that a Contracting State "may" restrict or prohibit the flight of aircraft. In legal text, the word "*may*" usually relates to permission or authorization,[14] demonstrating a State's right in managing its airspace.[15]

This section argues that the use of "may" in Article 9(a) implies qualifications for a Contracting State's right to establish prohibited airspace over its sovereign airspace. The word "may" is less explicit or certain in expressing the meaning of granting a legal right than would the phrases "reserve the right" or "entitled to".[16] The drafting committee at the Chicago Conference deliberately rejected expressions such as "reserve the right" or "be entitled to", which are more affirmative than the word "may", for Article 9(a)[17] to

14 Coates, J., *The Semantics of Modal Auxiliaries*. Croom Helm 1983, pp. 21-23. Besides the deontic meaning, the word "may" also has two other meanings: (i) epistemic meaning, concerning the speaker or drafter's degree of knowledge regarding a proposition, and the proposition is frequently associated with the idea of possibility or probability; and (ii) dynamic meaning, referring to the uses of modal verbs for the purpose of expressing ability and disposition, and cannot be categorized as deontic modality or epistemic modality. Other auxiliary words have a more definite words, such as *shall* is used to impose an obligation; *must* is chosen to strongly denote to an obligation, and *should* is used in international conventions with moral and ethical tones. See Gotti M., Semantic and Pragmatic Values of Shall and Will in Early Modern English Statutes,. in Gotti/Dossena (eds.) *Modality in Specialized Texts*, Peter Lang,2001, p. 122. Williams, C., 2005. *Tradition and change in legal English: verbal constructions in prescriptive texts,* Peter Lang 2005, p. 124. See also Article 3*bis* of the Chicago Convention reads: "The contracting States recognize that every State *must* refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."

15 ICAO, Air Navigation Commission, 189th Session, Minutes of the Seventh Meeting, AN Min. 189-7, 28/3/12, para. 16.

16 Black's Law Dictionary, (8th ed., 2004), p. 3106.

17 As to the preparatory work of the regulations on airspace closure, the US, UK and Canadian Delegations prepared draft conventions for international civil aviation and mostly guided the deliberations on prohibited airspace in 1944. The Canadian Revised Preliminary Draft of an International Air Convention adopted the word "entitled" in the provision for prohibited areas in airspace, which is more direct in expressing a legal right. The US draft uses *may* instead of entitled to. The Proceedings of the Chicago Conference did not explain why the US draft was preferred over the Canadian draft, or others, or why delegates chose

leave room for imposing conditions for the exercise of this right. In harmony with the somehow permissive "may", working on the US proposal,[18] drafters added a qualification to this right, that is, "so as not to interfere unnecessarily with air navigation". The requirements in Article 9(a)[19] are to prevent Contracting States from using prohibited airspace(s) as a means of blocking foreign scheduled international air service.[20] That is to say, the word "may" expresses the right to establish a prohibited area in Article 9(a), and at the same time, the exercise of this right is subject to the qualifications deliberately put in by the drafting committee.[21]

The right to establish prohibited airspace, although being qualified, is still a right;[22] the terms in Article 9(a), due to their ordinary meanings, do not impose any obligation to close airspace(s) on Contracting States. The Chicago Convention does not prescribe an obligation to prohibit traffic for the protection of international civil aviation against security risks.[23] Taking into account ICAO Member States' practices, no Annex to the Chicago Convention,

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may instead of be entitled to. See the United States Proposal of a Convention on Air navigation – Document 16; Canadian Revised Preliminary Draft of an International Air Convention – Document 50; United Kingdom Proposal of Amendment of Document 16 – Document 350; United Kingdom Proposal of a Substitute for Article 10 (c) of Document 16 – Document 353; and See Appendix 1, List of Documents Issued at the Conference, in *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), 1367. See Document 372, Verbatim Minutes of Joint Plenary Meeting of Committees I, III, and IV, November 22, in *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 456.

18 The prototype of Article 9 is the Article 10 in US proposal. Its Article 10(a) reads as follows: "Article 10, (a) Each member Contracting State may, for military reasons, or in the interest of public safety, prohibit uniformly the aircraft of the other Contracting States from flying over certain areas of its territory of reasonable extent, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other Contracting States likewise engaged. List and descriptions of the areas above which air traffic is thus prohibited in the territory of a Contracting State, as well as any subsequent alterations therein, will be communicated as soon as possible to the other Contracting States and the Executive Council." See Document 16, United States Proposal for a Convention on Air Navigation, in *Proceedings of the International Civil Aviation Conference,* (United States Government Printing Office, Washington, 1948), pp. 557-558.

19 See Section 2.5 of this chapter.

20 Cheng, B., *The Law of International Air Transport,* Stevens 1962, pp. 120-124.

21 Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary,* Springe 2014, pp. 13-45. See Sections 2.5 & 2.6 of this chapter.

22 ICAO, Air Navigation Commission, 189th Session, Minutes of the Seventh Meeting, 8 March 2012, AN Min 189-7, para. 16: In relation to the development by States of plans for the flexible use of the airspace, …. Article 9 (Prohibited areas) of the Chicago Convention indicated a State could restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory. It was felt that the recommendation ICAO can only "urge" States to develop and implement clear plans.

23 Kaiser, S.A., 'Legal Considerations about the Loss of Malaysia Airlines Flight MH 17 in Eastern Ukraine', (2015), 40 Air and Space Law, Issue 2, p. 115.

or ICAO Assembly Resolution[24] contains any provisions that confirm a commitment of Contracting States to their responsibility for the introduction of timely and appropriate restrictions for civil aircraft flights in their national and delegated airspace.[25] Therefore, the conditions in Article 9 of the Chicago Convention have to be interpreted in a way that they qualify a Contracting State's competence in establishing prohibited airspace(s); Article 9 does not impose an *obligation* on Contracting States to establish prohibited airspace(s).

2.2.3 *The definitions of prohibited and restricted area*

Having explained that the wording of Article 9 of the Chicago Convention expresses a Contracting State's right to establish prohibited airspaces *over* its territory, it is not difficult to highlight that a prohibited/restricted airspace is about *overflight* only, namely, prohibiting or restricting the transit rights of civil aircraft. In this connection, the ICAO definition of the term "prohibited area" merits attention in Annex 2 to the Chicago Convention.[26]

> Prohibited area is an airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is prohibited.[27]
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> Restricted area is an airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is restricted in accordance with certain specified conditions.[28]

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24 ICAO Assembly "…Urges all Contracting States to strictly comply with the provisions of the Convention on International Civil Aviation, its Annexes and its related procedures, in order to prevent a recurrence of such potentially hazardous activities (a rockets lunching)" (Resolution À32-6). In addition, ICAO's Contracting States recognize that "…the safety of international civil aviation is the responsibility of Member States both collectively and individually…" (A37-1), while "…the ultimate responsibility to ensure both the safety and security of civil aviation rests with Member States…" (A38-15, App. E).

25 ICAO, Risk Assessment of Operations Over Airspace Affected by Armed Conflict – Responsibility of States For Ensuring The Flight Safety of Civil Aircraft within Their National And Delegated Airspace over Armed Conflict Zones or Zones Of Military Exercises, C-WP/14227, 20/10/14, para. 1.4.

26 Over the high seas, another interesting concept always appears in conjunction with prohibited or restricted airspace – 'danger areas.' *Milde*, 47. The juxtaposition of concepts of prohibited/restricted areas, danger areas, and FIR (flight information region) is further presented in Chapter III.

27 Annex 2, Rules of the Air, 10th ed., July 2005, p. 1-5 ('Annex 2'). Restricted areas are generally established when the risk level involved in the activities conducted within the area is such that it can no longer be left to the discretion of individual pilots whether or not they want to expose themselves to such risk. In many cases the activities within a restricted area are not permanently present, it is therefore of particular importance that the times when these areas are actually required be closely surveyed and monitored. See ICAO Doc 9426, Air Traffic Services Planning Manual (1992), Chapter 3, para. 3.3.2.5.

28 Annex 2, p. 1-5. See ICAO Doc 9426, Air Traffic Services Planning Manual (1992), Chapter 3, para. 3.3.2.6.

The ICAO definitions use the terminology of "*flight* of aircraft"; arguably, *flight* covers *over*flight and flight *into* or *out*, meaning flight transiting, entering and exiting airspace. ICAO definitions refer to broader situations than prohibited airspace under Article 9 of the Chicago Convention. The words "flying over" Article 9 of the Chicago Convention refer to transit rights.[29] Article 9 is to provide a potent instrument to prohibit or restrict the *transit* rights of aircraft. If a Contracting State prohibits or restricts scheduled air service *into* a territory,[30] that State is not exercising the right under Article 9, but rather a right to require permission or authorization under Article 6 of the Chicago Convention.[31] Article 6 of the Chicago Convention set the foundation to exchange traffic rights in bilateral air agreements.[32] The definitions by ICAO, with references to "flight of aircraft" could mean both "entry" and "overflight" of aircraft, covering situations under both Articles 6 and 9 of the Chicago Convention. This study, nonetheless, uses prohibited/restricted areas in the sense of prohibiting overflight, concerning the transit right only. Prohibited area and prohibited airspace are used interchangeably throughout this study.

The definitions of prohibited and restricted areas used in this study are the following:

> Prohibited area is an airspace of defined dimensions, above the land areas or territorial waters of a State, within which the *over*flight of aircraft is prohibited.[33]

> Restricted area is an airspace of defined dimensions, above the land areas or territorial waters of a State, within which the *over*flight of aircraft is restricted in accordance with certain specified conditions.

In addition, ICAO definitions put an emphasis on the location of a prohibited area. Prohibited airspace must be set up above the land areas and territorial waters of a State,[34] that is, within a State's territory as defined in Article 2 of the Chicago Convention.[35] The rationale is relevant to the scope of territorial jurisdiction, which is elaborated in section 2.3 of this chapter.

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29 The first and second freedoms. *Milde,* pp. 16 & 93.

30 For instance, the widespread airspace restrictions due to COVID-19 in 2020. See more in Section 2.4 of this chapter.

31 Article 6 of the Chicago Convention: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."

32 *Milde,* p. 111. Commercial traffic rights allow commercial international services between countries (third, and fourth Freedom rights, as well as fifth Freedom rights, between intermediate points and points beyond and sixth Freedom rights to/from behind points).

33 Annex 2, p. 1-5.

34 ICAO Doc 9426, Air Traffic Services Planning Manual (1992), Chapter 3, para. 3.3.2.2.

35 See Section 2.3 of this chapter.

2.2.4 *Summary on a Contracting State's right to establish prohibited airspace*

A Contracting State's right to prohibit or restrict air traffic over its sovereign territory derives from territorial sovereignty. Article 9 uses the words "may" in subparagraph (a) and 'reserve the right' in subparagraph (b) to confirm that right and, at the same time, prescribes conditions to qualify that right. By way of comparison, the right to establish a prohibited area expressed by the word "may" is not as affirmative as the phrases r*eserve the right* or *entitled to*, so Article 9 (a) prescribed additional requirements as to prohibited airspace's location and extent whereas Article 9(b) did not. Furthermore, considering that Article 9 of the Chicago Convention aims at prohibiting/restricting *overflight*, this section proposes that definitions of prohibited and restricted areas should focus on the element of overflight.

2.3 The meaning of "its territory"

2.3.1 *Territorial sea*

Article 9 allows a Contracting State to establish prohibited or restricted areas "over its territory". A Contracting State's territory is defined in Article 2 of the Chicago Convention. As clarified in Chapter I, "territory" in the Chicago Convention means the land areas and territorial waters adjacent thereto under the sovereignty.[36] Land areas under sovereignty are relatively easy to ascertain because countries hold boundaries among themselves, although there exist undetermined territories.[37] Compared to land areas, it is more complicated with "territorial waters adjacent thereto under the sovereignty". The term "territorial water" in the Chicago Convention does not have the same meaning as the term "territorial sea" as often mentioned in the law of the sea.[38] Rather,

36 See J. Ming, *The US/China Aviation Collision Incident at Hainan in April 2001 – China's Perspective*, 51 Zeitschrift für Luft- und Weltraumrecht (2002), p. 557; M. Franklin, *Sovereignty and the Chicago Convention: English Court of Appeal Rules on the Northern Cyprus Question*, XXXVI (2) Air and Space Law (2011), 109-110; M. *Chatzipanagiotis, Establishing Direct International Flights to and from Northern Cyprus*, 60(3) Zeitschrift für Luft- und Weltraumrecht (2011), p. 478.

37 See further in Section 3.3 of Chapter IV.

38 According to UNCLOS, Article 3, territorial sea does not encompass contiguous zones, exclusive economic zones (EEZ) or the water above the continental shelf. See also Pablo Mendes de Leon and E.J. Molenaar, 'Still a Mile too Far? International Law Implications of the Location of an Airport in the Sea', 14 *Leiden Journal of International Law* (2001), pp. 234-245.

for States who have adhered to both the Chicago Convention and UNCLOS,[39] "territorial waters under the sovereignty" include not only the territorial sea, but also internal waters, international straits, and archipelagic waters.[40]

The *territorial sea*, according to UNCLOS, is the sea area which a coastal State can claim up to twelve nautical miles from the baseline.[41] Territorial sea is under the sovereignty of a coastal State, and UNCLOS provisions on the territorial sea are "fully co-extensive and compatible" with Article 2 of the Chicago Convention.[42] UNCLOS does not change the *status quo* in air law with respect to territorial waters.

2.3.2 *International straits*

Due to establishment of the 12-mile territorial sea, many straits fall within the territorial sea of the coastal States, which leads to the 'territorialisation' of international straits.[43] UNCLOS requires States bordering the international straits not to hamper transit passage and must give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge.[44]

In particular, UNCLOS regulates the transit right of aircraft over international straits. Contracting States of UNCLOS agreed that aircraft's transit is unimpeded through international traits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone".[45] Due to fact that many Contracting

39 1833 U.N.T.S. 397, done in Montego Bay on 10 December 1982 and enter into force on 16 November 1994. UNCLOS not only represents a codification of existing conventional and customary international law of the sea, but in numerous fields adopts the "progressive development" of international law, pursuant to Article 13, paragraph 1 a) of the UN Charter. It reads: "1. The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;…" The convention has been ratified by 168 parties, which includes 167 states (164 United Nations member states plus the UN Observer state Palestine, as well as the Cook Islands and Niue) and the European Union. An additional 14 UN member states have signed, but not ratified the convention. See https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

40 Y Tanaka, *The International Law of the Sea,* 2nd ed., CUP 2012, p. 8.

41 According to Article 2, paragraph 2 of the UNCLOS, coastal States are entitled to exercise full sovereignty over their territorial sea, whose breadth does not exceed 12 nautical miles, measured from baselines determined under the UNCLOS.

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

43 Y Tanaka, *The International Law of the Sea,* 2nd ed., CUP 2012, p. 97.

44 UNCLOS, Art. 44.

45 UNCLOS, Arts. 37 &38.

States of UNCLOS are also Member States of ICAO,[46] ICAO decided to address the impact of the application the UNCLOS to the air. In 1987, at the 26th Session of ICAO Legal Committee, the Secretariat study pointed out that the States bordering straits used for international navigation exercise its sovereignty or jurisdiction subject to UNCLOS, and "in no circumstances can the States bordering such straits *suspend* or limit the right of transit passage, nor can they require the application of their own rules of the air".[47] No State filed an objection to this statement.[48] A prohibited area, if established over international straits, would compromise the transit rights enjoyed by aircraft in international straits.[49] Therefore, a Contracting State's competence, the scope of which is the jurisdiction, to restrict air traffic over international straits is compromised by the unimpeded transit right of foreign aircraft. That is to say, a coastal State cannot establish a prohibited area over international straits, even if part of the international strait is within its territorial sea.

Nonetheless, taking a closer look, the ICJ discussed as *obiter dictum* that the passage right through international straits shall not be suspended in *peace* time.[50] Since the Chicago Convention is a part of the law of peace made on the assumption of peace conditions, it is not difficult to understand that the ICAO meeting proceedings, addressing peacetime aircraft operation, do not encourage to establish prohibited airspace over international straits. The ICAO Secretariat study did not specifically discuss transit rights over international straits in war.

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

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

48 See Comments from States, LC/26-WP/5-2 to 40, 4/2/87, ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implication, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments".

49 UNCLOS, Art. 38: "[A]ll ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics."

50 The *dictum* in the Corfu Channel judgment: "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in peacetime have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in times of peace." See ICJ Reports 1949, p. 22.

It is thus unclear whether a State can establish a prohibited area to suspend air traffic over an international strait in times of *war* or a declared *national emergency*. This issue of *war* and prohibited airspace will be presented in Chapter V.

2.3.3 *Internal waters*

According to UNCLOS, internal waters are those waters which lie landward of the baseline from which the territorial sea is measured.[51] States have the same sovereign jurisdiction over internal waters as they do over other territories.[52] Internal waters are also under a State's sovereignty.[53] The illustration of maritime zones is as follows.

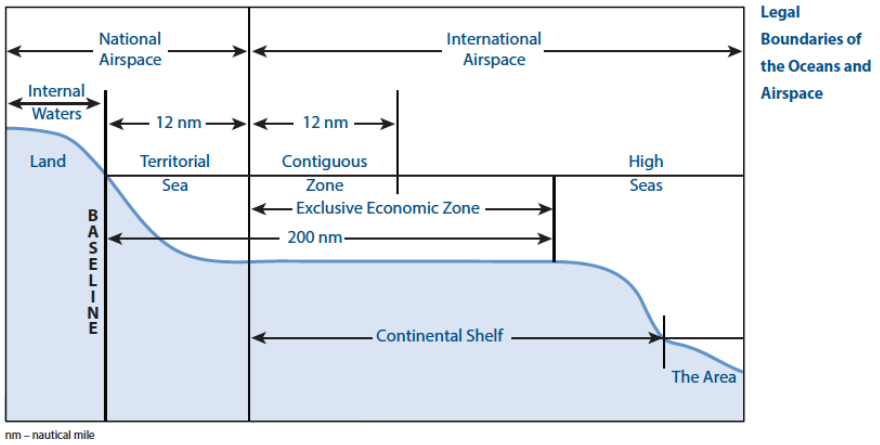

Figure 2: UNCLOS Maritime and Airspace Zones[54]

51 UNCLOS, Art. 8(1). Specifically, internal waters in a legal sense embrace (i) parts of the sea along the coast down to the low-water mark, (ii) ports and harbours, (iii) estuaries, (iv) landward waters from the closing line of bays, and (v) waters enclosed by straight baselines. On the other hand, internal waters in the law of the sea do not include waters within the land territory and land-locked waters or lakes. See G. Gidel, Le droit international public de la mer: le temps de paix, vol.1, Introduction, la haute mer (reprint, Paris, Duchemin, 1981), pp. 40–41; P. Vincent, Droit de la mer (Brussels, Larcier, 2008), p. 33.

52 Y Tanaka, *The International Law of the Sea*, 2nd ed., CUP 2012, pp. 77-78.

53 UNCLOS, Art.2.

54 Source: https://sites.tufts.edu/lawofthesea/chapter-two/, accessed 8 August 2019.

2.3.4 *Archipelagic waters*

Separately from the above, the term 'archipelagic waters' is a new concept created by UNCLOS.[55] Archipelagic waters are important for this study because they are part of the "territory" in the sense of Article 9 of the Chicago Convention. Archipelagic waters are the waters enclosed by the archipelagic baselines, that is the baselines of an archipelagic State.[56] The archipelagic waters are "enclosed by the archipelagic baselines, drawn by joining the outermost points of the outermost islands and drying reefs of the archipelago, regardless of their depth or distance from the coast".[57] The following chart shows the scope of archipelagic waters and an archipelagic State's territorial sea.

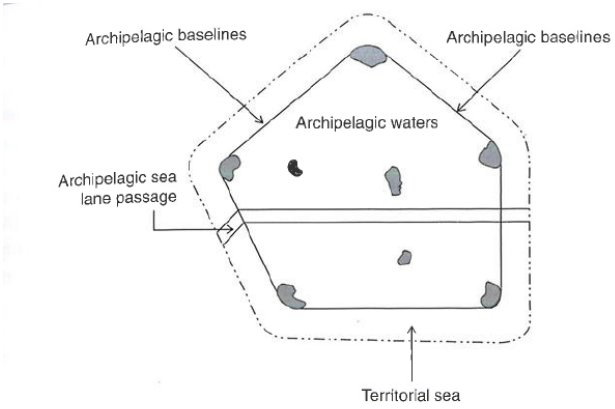

Figure 3: Archipelagic sea lane passage[58]

Article 49 of the UNCLOS prescribes that the sovereignty of an archipelagic State covers internal waters, archipelagic waters and extends to its territorial sea.[59] For example, the Republic of Trinidad and Tobago declares that as an archipelagic State its sovereignty extends to: (a) The archipelagic waters regardless of their depth or distance from the coast; and (b) The airspace over the archipelagic waters as well as their bed and subsoil and the resources both

55 UNCLOS, Article 46: "For the purposes of this Convention:
(a) "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands;
(b) "archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such."

56 UNCLOS, Article 47.

57 UNCLOS, Article 47.

58 Source: Y Tanaka, The International Law of the Sea, 2nd ed., Cambridge University Press 2012, p. 113.

59 UNCLOS, Article 48 &49.

living and non-living contained therein.[60] Since an archipelagic State enjoys sovereignty over archipelagic waters, the State should have the right to establish a prohibited area over its archipelagic waters.

Meanwhile, similar to international straits, aircraft enjoy the right of archipelagic sea lanes passage over archipelagic waters.[61] UNCLOS does not say the relationship between this passage right and the sovereignty of coastal States. A question thus arises - can an archipelagic State suspend a foreign aircraft's transit rights by way of setting up a prohibited area? That is to say, would this archipelagic sea lanes passage right compromise an archipelagic State's right to establish a prohibited area over archipelagic waters?

Neither UNCLOS nor the Chicago Convention expressly addresses the suspension of foreign aircraft's transit passage over areas of archipelagic waters: Article 52 of UNCLOS only says that an archipelagic State can suspend the innocent passage of foreign *ships* if such suspension is essential for the protection of its security.[62] The deletion of the term "aircraft" in the aforementioned Article 52, according to ICAO Secretariat's study, is because the Chicago Convention is the proper source of law on aircraft's archipelagic sea lanes passage.[63] ICAO further clarifies that foreign aircraft, while passing through archipelagic sea lanes, must observe the Rules of the Air established by ICAO.[64] Namely, with respect to civil flights over archipelagic waters, the Chicago Convention and ICAO regulations prevail over the UNCLOS.

Returning to the Chicago Convention, no provision supports an aircraft's passage right in the airspace above archipelagic waters. ICAO opined that since

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60 See the Republic of Trinidad and Tobago's Archipelagic Waters and Exclusive Economic Zone Act, 1986, Act No. 24 of 11 November, deposited with UN Office of Legal Affairs, available at: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TTO_1986_Act.pdf, last accessed May 29, 2020.

61 UNCLOS, Article 53, para. 1: "An archipelagic State may designate sea lanes and air routes thereabove, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea." ICAO implements this UNCLOS rule by prescribing that for purely practical reasons of coordination, the archipelagic States are expected to present their proposals on air routes to the Regional Air Navigation Conferences for the inclusion into the appropriate Regional Air Navigation Plan for eventual approval by the ICAO Council." See ICAO Legal Committee 33rd session's working paper, 'Proposal to Amend Article 2 of the Chicago Convention', presented by Indonesia, LC/33-WP/4-7, 17/4/08.

62 UNCLOS, Art. 52 (2).

63 ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implication, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'", LC/26-WP/5-1, 4/2/87, para. 10.

64 See UNCLOS Articles 54: "Articles 39, 40, 42 and 44 apply mutatis mutandis to archipelagic sea lanes passage." Therefore, the UNCLOS acknowledges that ICAO regulations apply to archipelagic sea lanes passage. ICAO Legal Committee 26th Session, "Consideration of the Report of the Rapporteur on 'United Nations Convention on the Law of the Sea – Implication, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments'", LC/26-WP/5-1, 4/2/87.

a State's sovereignty covers archipelagic waters, "its territory" in Article 2 of the Chicago Convention should include archipelagic waters.[65] An aircraft's archipelagic sea lanes passage right is subject to an archipelagic State's sovereignty.[66] Considering that there is no explicit rule saying that aircraft's archipelagic transit rights cannot be suspended, an archipelagic State may suspend the transit rights; it would be difficult to argue that such transit rights can defeat a State's sovereignty over its archipelagic waters. After all, international law has a long-established principle that whatever is not explicitly prohibited by international law is permitted, as was highlighted in the famous *Lotus* case.[67] A State can invoke the *Lotus* doctrine and sovereignty principle to justify its actions within its territory including archipelagic waters.[68] Therefore, this section contends that an archipelagic State may establish prohibited or restricted areas to suspend archipelagic transit rights, subject to the conditions in Article 9 of the Chicago Convention.

2.3.5 *Summary on the meaning of "territory"*

Reading Articles 1, 2, and 9 of the Chicago Convention together, the author concludes that a State has the right to restrict or prohibit flying over its territory. The exclusive jurisdiction to restrict or prohibit flying covers its entire territory: landmass, waters and seas under its sovereignty. Considering the evolving practices in the law of the sea, this section interprets the term "territorial waters" in Article 2 of the Chicago Convention as including 1) the territorial sea, 2) international straits; 3) internal waters and 4) archipelagic waters. Foreign aircraft enjoy transit rights over international straits and archipelagic waters. The transit rights over international straits are unimpeded in peacetime. A foreign aircraft's transit right over archipelagic waters is subject to the sovereignty of the archipelagic State. An archipelagic State can establish prohibited airspace over its archipelagic waters as long as conditions in Article 9 of the Chicago Convention are satisfied.

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65 *ibid.*

66 *ibid.*

67 The Case of the S.S. Lotus, 1927 PCIJ Series A, No. 10. Dupuy P., 'L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public (2000)', 297 Recueil des Cours (2002) 1, at 94. See also the overview in Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', 29 Michigan Journal of International Law (2007–2008) 71, at 72.

68 Caminos, H., & Cogliati-Bantz, V., *The Legal Regime of Straits: Contemporary Challenges and Solutions*. CUP 2014, pp. 227-230.

2.4 Conditions to establish prohibited airspace under Article 9 of the Chicago Convention

Article 9 prescribes the conditions or justifications for establishing prohibited airspace, such as "military necessity" and "public safety". Neither the Chicago Convention nor any of its Annexes provide detailed normative elaboration on the conditions that would necessitate the establishment of prohibited/restricted areas.[69] This section explores the textual meanings of these conditions in their context, in light of the Chicago Convention's objects and purposes and subsequent practices developed in the application of Article 9.

2.4.1 Military necessity

2.4.1.1 General remarks

The word "military necessity" in Article 9(a) of the Chicago Convention denotes a given course of action required for the accomplishment of a particular military goal, often used in international humanitarian law.[70] The first use of the term military necessity was first introduced to justify the limitless use of force, such as that prescribed in the doctrine of *Kriegsraison*.[71] Then in the 1940s, military necessity was invoked to permit a belligerent, subject to the laws of war,[72] to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.[73] This formulation was called the *Hostages* formulation,[74] and this interpretation subordinates necessity to law, but within the limits of law it permits the commander to discount civilian interests completely.[75]

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69 ICAO EUR Doc 019, Volcanic Ash Contingency Plan, European and North Atlantic Regions, July 2016.

70 See, e.g., Pietro Verri, Dictionary of the International Law of Armed Conflict, ICRC 1992, p. 75: "In its wider sense, necessity means doing what is necessary to achieve war aims."

71 The most famous expression of this conception of necessity as an extra-legal limit to the law is the Prussian military maxim 'Kriegsraison geht vor Kriegsmanier': the necessities of war (Kriegsraison) take precedence over the rules of war. See Luban D. (2013). "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, 26(2), pp. 315, 341. Johansen, S, *The Military Commander's Necessity: The Law of Armed Conflict and its Limits,* CUP 2019, Chapters 4 & 6.

72 On the laws of war, see Chapter V of this study.

73 *US v. List* (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, at 1253.

74 The post-war formula for military necessity appeared in the second round of Nuremberg trials, in the *Hostages* case: Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. See *US v. List* (American Military Tribunal, Nuremberg, 1948), 11 NMT 1230, at 1253.

75 Luban, D. (2013). "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, 26(2), pp. 315, 347.

More recently, a more humanitarian interpretation of military necessity demands to assess the relative weight attributed to military advantage,[76] against the non-military task of foreseeing and quantifying the future loss of civilian life and damage to civilian property.[77] According to this view, decision-makers should take into account the possible gain in protecting civilians in military activities.[78] In the assessment of military necessity, authorities should examine the proportionality between military advantage and harm to civilians.[79] That is to say, among options of the same marginal military advantage, the choice which offers more protection to civilians outweighs others.

Furthermore, military necessity is a situation-specific notion that does not involve any requirement of causation *sine qua non*.[80] That is to say, a measure of military necessity does not have to be the only available option. Decision makers can face a range of choices – some stand the greatest chance of success, whereas some are more resource-efficient.[81] This means even if there are alternatives to achieve a certain military goal, a State may still prohibit or restrict the use of its airspace on the grounds of military necessity.

2.4.1.2 The context of the Chicago Convention

Since the phrase "military necessity" has several connotations, it is not easy to ascertain its meaning in Article 9 of the Chicago Convention. Therefore, following the interpretation rules in Article 31 of the VCLT, this section explores the meaning of military necessity in the context of the Chicago Convention.

Speaking of the context of the Chicago Convention, it is necessary to note that the treaty was concluded to apply in peace time.[82] As aforementioned in Chapter I, the Chicago Convention is a treaty between friendly countries and is open to a 'club' of the Allies and neutral countries after World War II.

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76 Johansen, S, *The Military Commander's Necessity: The Law of Armed Conflict and its Limits,* CUP 2019, Chapter 15.

77 *ibid,* p. 405.

78 *ibid.*

79 Luban, D. (2013). "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, 26(2), p. 349.

80 Hayashi, N, *Military Necessity,* Leiden University PhD dissertation 2017, pp. 32-33. Luban, D. (2013). "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, 26(2), 315-349.

81 Hayashi, N, *Military Necessity,* Leiden University PhD dissertation 2017, pp. 32-33.

82 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 55: "The use of air … differs from the sea: that it is subject to the sovereignty of the nation over which it moves. Nations ought therefore to arrange among themselves for its use in that manner which will be of the greatest benefit to all humanity, wherever situated. …There can be no question of alienating or qualifying this sovereignty. But consistent with sovereignty, national ought to subscribe to those rules of *friendly intercourse* which shall operate between friendly states *in times of peace* to the end that air navigation shall be encouraged, and that communication and commerce may be fostered between all *peaceful* states."

In 1944, the US government extended an invitation to 55 friendly States[83] to attend an International Civil Aviation Conference in Chicago (hereafter the 'Chicago Conference').[84] While the Chicago Conference was in progress, the world was transitioning from war to peace. It was envisaged that after the war, a peaceful order will be established. This is evidenced by the *Canadian Revised Preliminary Draft of an International Air Convention*:

> [T]he treaty being negotiated at the Chicago conference was drafted with an assumption that *an overriding treaty of peace* will determine the obligations and rights of the defeated powers.[85]

To understand the meaning of "military necessity" in Article 9, it helps to explore how this phrase was added to Article 9 at the Chicago Conference. With respect to the drafting of a provision on prohibited airspace, the Chicago Conference first considered the issue with one article[86] but later end up with two articles – Article 9 on prohibited airspace and Article 89 on war and national emergency.[87] It was at the UK's motion[88] that the drafting committee restructured the rules and added Article 89 to requalify Article 9.[89] This approach followed the traditional division between the law of war and the law of peace: international conventions particularly those relating to commerce

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83 List of governments and authorities to whom invitations were extended: Afghanistan, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, UK, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Ireland, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Saudi Arabia, Spain, Sweden, Switzerland, Syria, Turkey, Union of South Africa, Union of Soviet Socialist Republics, Uruguay, Venezuela, Yugoslavia, Denmark, Thailand. See *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 13.

84 See *Invitation of the United States of America to the Conference,* in *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 11.

85 Reprinted from a pamphlet prepared for the Canadian Government, Ottawa, October 1944, by Edmond Cloutier, Printer to the King's Most Excellent Majesty, Ottawa, 1944. *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 570 (emphasis added).

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

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

88 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), Document 350, p. 693.

89 *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), p. 472. ICAO, Air Navigation Commission, 189th Session, *Minutes of the Seventh Meeting,* 8 March 2012, paras 10-12.

and communications are concluded having regard to normal peace condition;[90] and the situation of war will justify extraordinary self-preservation measures taken by a State.[91]

That is to say, war or national emergency brings about a special relationship between the belligerent State and enemy State or nationals, and permits the former to take all necessary measures in relation to the latter to prevent them from engaging in any activity harmful to the former's security.[92] If a State loses control of its territory and engages in war again, it resumes the freedom of action as belligerents.[93] The Chicago Convention would not affect a Contracting State's freedom as a belligerent to close airspace.[94] No provision in the Chicago Convention limits a State's freedom to close its airspace for self-preservation in war.[95] This chapter focuses on airspace closure as pre-

90 Joint dissenting judgment of Judges Anzilotti and Huber in the *Wimbledon Case* (1923), PCIJ: A 1, pp. 36-37: "In this respect, it must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention. This right possessed by all nations which is based on generally accepted usage, cannot lose its *raison d'être* simply because it may in some cases have been abused… The right of a State to adopt the course which it considers best suited to the exigencies of its security and the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulation cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation." See in Bin Cheng, *General Principles of Law As Applied By International Courts and Tribunals*, Stevens 1953, pp.55-56 (hereafter Bin Cheng, *Principles*).

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

92 Bin Cheng, *Principles*, p. 53.

93 In ICAO, it has been widely understood that aviation security instruments which criminalize certain acts are not applicable to the military activities in armed conflict. For instance, in a resolution adopted on 20 August 1973, the ICAO Council condemned Israel for violating Lebanon's sovereignty and for the diversion and seizure of a Lebanese civil aircraft, and considered that the actions by Israel "constitute a violation of the Chicago Convention", but did not refer to The Hague and Montreal Conventions. (For reference, see ICAO Doc 9225-LC/178, *International Conference on Air Law*, Rome, August–September 1973, Minutes and Documents (1978) at 385-386). Activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, are not governed by the Chicago Convention. See further elaboration in Chapter V of this study.

94 See Article 89 of the Chicago Convention, more in Chapter V of the study.

95 Bin Cheng, *International Air Transport*, Stevens 1962, p. 483. Self-preservation is described as a 'general principle of law recognized by civilised nations' as contemplated by Art. 38 (1) (c) ICJ Statute. Self-preservation is to justify a unilateral action taken in response to a situation of 'grave and imminent peril' affecting the 'essential interests' of the responding State, see Art. 25 (1) (a) and (b) UN ILC Articles on Responsibility of States for Internationally Wrongful Acts, and ICJ, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, p. 263. Meanwhile, a State's right to survival and right to resort to self-defence should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well

scribed in Article 9; the analysis on airspace closure in war is presented in Chapter V.

2.4.1.3 Contextual interpretation of military necessity in Article 9

Considering the context of the Chicago Convention being a treaty for peace times, military necessity in Article 9 does not cover actions in war or national emergency.[96] In Article 9, the phrase "military necessity", albeit being somehow counter-intuitive, the author argues that this phrase is to be read narrowly: excluding military activities in wartime.

The reason is as follows: prohibited airspace established *due to military necessity*, pursuant to Article 9, have to fulfill the conditions and requirements therein, such as the requirement of non-distinction.[97] On the contrary, Article 89 of the Chicago Convention says that the provisions of the Convention shall not affect the freedom to take actions in wartime.[98] Article 89 made it clear that, if a State engages in a war or declares national emergency, the said State resumes the freedom of action. The phrase "resume the freedom of action" in Article 89, arguably, means to regain the freedom to act in a way unaffected by the requirements in the Chicago Convention. That is to say, in wartime, conditions and requirements in Article 9 of the Chicago Convention do not prevent a Contracting State, for example, from making distinctions as to nationalities when establishing prohibited airspace.[99] In case a Contracting State is to establish prohibited areas *due to war or national emergency*, pursuant to Article 89, its freedom is not qualified by Article 9 of the Chicago Convention.[100]

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as with specific obligations under treaties and other undertakings.

96 See further elaboration in Chapter V, Section 2.2.1 of this study.

97 See Section 2.5 of this chapter.

98 In ICAO, it has been widely understood that aviation security instruments which criminalize certain acts are not applicable to the military activities in armed conflict. For instance, in a resolution adopted on 20 August 1973, the ICAO Council condemned Israel for violating Lebanon's sovereignty and for the diversion and seizure of a Lebanese civil aircraft, and considered that the actions by Israel "constitute a violation of the Chicago Convention", but did not refer to The Hague and Montreal Conventions. (For reference, see ICAO Doc 9225-LC/178, *International Conference on Air Law*, Rome, August–September 1973, Minutes and Documents (1978) at 385-386). Activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, are not governed by the Chicago Convention. See further elaboration in Chapter IV of this study.

99 Bin Cheng, International Air Transport, 483. Meanwhile, a State's right to survival and right to resort to self-defence should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which deal with special issues, such as nuclear weapons. See ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996. https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

100 See further in Chapter V, Section 2.4.2 on the closure of EU airspace against Russian aircraft.

Therefore, "military necessity" in Article 9 has to be interpreted as covering military activities in peacetime, such as training exercises, practice firing, testing of anti-aircraft missiles, or other planned operations under the State's control.[101] Article 9 of the Chicago Convention does not cover prohibited areas in wartime, and the conditions therein do not apply to wartime airspace restrictions. This interpretation is supported by preparatory work of the Chicago Convention where State representatives drafting the Chicago Convention acknowledged that the Chicago Convention is to regulate civil aviation in peacetime and activities during wartime are to be regulated by other treaties.[102] In the sense of the Chicago Convention, Article 9 means to regulate prohibited airspace in peacetime, which is evidenced by the mere existence of Article 89 targeting the situations of war and national emergency.[103]

In this connection, the case of Flight SA1812 (Siberia Airlines) deserves attention. In 2001, the Russian airliner was destroyed by two long-range antiaircraft missiles fired during a Ukrainian air defense exercise off the Black Sea's Crimean coast.[104] The accident took place because of a planned military exercise, not relating to war or national emergency.[105] The authorities in charge of the military exercise could have invoked military necessity to establish prohibited airspace in accordance with Article 9 of the Chicago Convention, so as to prevent the civilian loss.

2.4.2 Public safety

Public safety in Article 9 of the Chicago Convention is a general term that can accommodate many situations. As clarified in Chapter I, Section 2.6, 'safety' means the risk associated with aviation activities is reduced to an acceptable level. Public safety in aviation, accordingly, does not mean that regulators must

101 See ICAO Doc 9554-AN/932, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations, 1st ed., 1990. Examples of military activities which may pose a threat to civil aircraft and which should be coordinated with ATS authorities include: a) practice firing or testing of any weapons air-to-air, air-to-surface, surface-to-air or surface-to-surface in an area or in a manner that could affect civil air traffic; b) certain military aircraft operations such as air displays, training exercises, and the intentional dropping of objects or of paratroopers; c) launch and recovery of space vehicles; and d) operations in areas of conflict, or the potential for armed conflict, when such operations include a potential threat to civil air traffic. Further on military activities over conflict zone and war, see Chapter IV of this study.

102 See Chapter V, Sections 2.2&2.3.

103 *ibid.*

104 https://www.nytimes.com/2020/01/09/world/middleeast/civilian-planes-shot-down.html, last accessed 5 January 2020.

105 No State has declared national emergency due to this military exercise.

guarantee zero risk at any time for the general public,[106] but rather the maintenance of an acceptable level of risk through risk management.

Article 9 emphasizes public safety as a justification to close airspace, twice, in both subparagraphs (a) and (b). The rationale is that every State can resort to extraordinary measures within its territory by virtue of its sovereignty.[107] It is every State's prime objective and duty to maintain internal peace, safety and social order, covering humans and objects in its territory.[108] The term public safety in Article 9 supports Contracting States to take all necessary steps to protect domestic safety; and if necessary, a State may prevent the passage of aircraft in its territory,[109] even though bilateral/regional agreements have granted foreign aircraft the right of overflight.[110] It has therefore become general practices to establish such areas only to protect "critical industrial complexes" whose damage due to an aircraft accident could "assume catastrophic proportions" (*e.g.* nuclear power plants) or especially "sensitive installations which are essential for the national security".[111]

What is necessary to preserve peace and safety for its citizens, the State concerned is the one to judge in peace time, and its decision for domestic situations is final.[112] For example, after the 17 February Revolution in 2011,[113] the Libyan authorities closed its airspace but did not issue a Notice to Airmen (NOTAM).[114] The airspace closure had been coordinated verbally with Malta Area Control Centre (ACC) – foreign flights were turned back by the Libyan Arab Jamahiriya due to lack or cancellation of landing permits.[115] In response to the complains from Member States, ICAO concluded that Libyan's measure to require new landing permits did not violate the Chicago Convention, although the permit is was difficult or impossible to obtain for foreign aircraft.[116] Recalling the sovereignty principle in Article 1 of the

106 Speaking of the health risk associated with international flights where one or more passengers are suspected of having a communication disease,
107 Bin Cheng, *Principles*, p. 51.
108 *Spanish Zone of Morocco Claims* (1923), Rapport III (1924), 2 UNRIAA, p. 642. See also *Palmas* Case (1924), p. 93.
109 Bin Cheng, *Principles*, pp.51-52.
110 Bin Cheng, *Principles*, p. 52.
111 See ICAO Doc 9426, Air Traffic Services Planning Manual (1992), Chapter 3, para. 3.3.2.6.
112 Bin Cheng, *Principles*, pp. 67-68
113 https://www.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html, last accessed 27 December 2018.
114 ICAO, Council – 192nd Session, "Summary Minutes of the Third Meeting", ICAO Doc. C-DEC 192/3, 4 March 2011, para. 79.
115 ICAO, Council – 192nd Session, "Summary Minutes of the Third Meeting", 4 March 2011, ICAO Doc. C-DEC 192/3, para. 79. Malta ACC reported that the Libyan Arab Jamahiriya were turning some flights back due to the lack or cancellation of landing permit
116 ICAO, Council – 192nd Session, "Summary Minutes of the Third Meeting", ICAO Doc. C-DEC 192/3, 4 March 2011, para. 76.

Chicago Convention, ICAO recognized that the Libyan authorities were exercising their rights granted under Article 9(b) of the Chicago convention.[117]

The key information was that the Libyan government was still in control and maintained normal communications concerning the airspace. The air navigation service providers in adjacent FIRs reported *normal* communications with the Tripoli ACC;[118] activities being carried out are consistent with Annex 11 – *Air Traffic Services* provisions on contingency planning.[119] The ICAO Air Navigation Bureau from the beginning had been involved in the coordination and monitoring of air navigation services in the Tripoli FIR.[120]

Therefore, despite domestic disturbances, there was no declared national emergency or war in the sense of Article 89 – it was still peacetime; Article 9(b) had been used as a justification for Libyan airspace closure due to public safety. The government, despite internal turbulences, was still in control of its airspace. In the peace time, Libyan government was the one to make final decisions as to its prohibited airspace.

2.4.3 Exceptional circumstances

Pursuant to Article 9(b) of the Chicago Convention, Contracting States have the right to prohibit flight over its territory in exceptional circumstances temporarily. The literal meaning of exceptional circumstances is unnatural or unexpected situations.[121] From practical experiences, exceptional circumstances have included terrorism threats, such as 9/11 attacks, or natural disasters, such as the Eyjafjallajökull volcanic eruption in 2010.[122]

On the day of 11 September 2001, American Airlines Flight 11 and United Airlines Flight 175 were hijacked. Subsequently, both aircraft intentionally crashed into the twin towers in New York, and 2,753 people were killed as a result.[123] All commercial and general aviation traffic, except national defense or emergency services, was grounded entirely for 96 hours.[124] US authorities

117 *ibid*, paras. 74-76.
118 *ibid*, para. 77.
119 On contingency planning, see further in Chapter III of this study on the operational aspects of establishing a prohibited airspace.
120 ICAO, Council – 192nd Session, "Summary Minutes of the Third Meeting", ICAO Doc. C-DEC 192/3, 4 March 2011, para. 69. "the Bureau was receiving daily updates from Regional Offices, several air navigation service providers adjacent to the Tripoli FIR, as well as the European Organisation for the Safety of Air Navigation (EUROCONTROL) Central Flow Management Unit (CFMU)."
121 https://en.oxforddictionaries.com/definition/exceptional, last accessed June 22, 2020.
122 David Alexander, "Volcanic Ash in the Atmosphere and Risks for Civil Aviation", Int. J. Disaster Risk Science, 2013, 4(1), p. 11-13.
123 https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html, last accessed June 22, 2020.
124 The 9/11 Commission Report, https://govinfo.library.unt.edu/911/report/911Report.pdf, pp.23-25, 327.

did not explicitly invoke Article 9 of the Chicago Convention ordering airspace closure, but the National Commission on Terrorist Attacks Upon the United States, also known as the "9/11 Commission", repeatedly mentioned air sovereignty,[125] and there has been no objection that US actions were justified under the terms of Article 9.[126]

In response to the abhorrent terrorist acts, the UN Security Council adopted Resolution 1368 which included a paragraph highlighting "the inherent right of individual or collective self-defense in accordance with the [UN] Charter".[127] Since 2001, States in numerous cases have referred to the principle of self-preservation and more specifically, the right of anticipatory self-defence to justify anti-terrorism actions that would otherwise have been inconsistent with treaties, such as the UN Charter's provision on the use of force.[128] ICAO, on the other hand, reviewed the adequacy of aviation security conventions and updated Annex 17;[129] it also established the Universal Security Oversight Audit Programme[130] relating to airport security arrangements and civil aviation security programs. At the national level, since the 9/11 attacks, the US has routinely used temporary flight restrictions (TFR) to restrict airspace within the distance of 30 nautical miles from the President's location, with a 10-nautical-mile radius no-fly zone for non-scheduled flights.[131]

Besides terrorist attacks, natural disasters such as the eruption of volcanos may also constitute exceptional circumstances under Article 9 of the Chicago

125 *ibid*.

126 See generally Peter P.C. Haanappel, *Law and Policy of Air Space and Outer Space: A Comparative Approach*, Kluwer 2003, p. 45. Brian F Havel & Babriel Sanchez, *The Principles of Practices of International Aviation Law,* CUP 2014, p. 43.

127 UN Security Council, Resolution 1358 (2001), Adopted by the Security Council at its 4370th meeting, on 12 September 2001. Self-defense is the most important measure of self-preservation. See James A Green, '*Self-Preservation*', Max Planck Encyclopedias of International Law [MPIL], March 2009.

128 Christopher Greenwood, 'The Caroline', Max Planck Encyclopedias of International Law [MPIL], April 2009.

129 This amendment includes the introduction of various definitions and new provisions in relation to the applicability of this Annex to domestic operations, international cooperation relating to threat information, appropriate authority, National Aviation Security Committee, national quality control, access control, passengers and their cabin and hold baggage, in-flight security personnel and protection of the cockpit, code-sharing/collaborative arrangements, Human Factors and management of response to acts of unlawful interference. The status of a number of specifications was changed to Standards. See ICAO Annex 17, Security, Safeguarding International Civil Aviation Against Acts of Unlawful Interference, 11th ed., March 2020.

130 See Chapter I, Section 3.2.2 on the legal force of Standards.

131 See US Code of Federal Regulations: CFR Sections 91.137, 91.138, 91.139, 91.141, 91.143, 91.145, 99.7. For example, President Biden was expected to visit his vacation home in Rehoboth Beach in 2021: the travel plans also include a temporary flight restriction (TFR) on airspace within 30 miles of the president's location. See https://mdcoastdispatch.com/2021/04/15/airport-operators-seek-answers-on-bidens-travel-impact/, last accessed 11 November 2021.

Convention. Speaking of volcanic ash and prohibited airspace, in the week of 14–21 April 2010, 313 airports in Europe were closed due to the Eyjafjallajökull eruption.[132] The closure of airspace was an exercise of the sovereignty under Article 9 of the Chicago Convention.[133] Icelandic authorities estimated that the ash cloud could damage the aircrafts' engines and thus endanger the lives of passengers and crew members as well as the aircraft.[134] The eruption in 2010 forced authorities to specify limits on how much ash they considered exceptional and unsafe for flight operation.[135] The UK took the lead and specifies ash-concentration values: any airspace where ash density exceeded 4 mg per cubic meter were considered *exceptional*, and thus was deemed prohibited airspace.[136]

2.4.4 Emergency

As for the term "emergency" in Article 9(b), there is no legal definition in multilateral air law treaties.[137] In international law, the definition of the term emergency is usually referred to as "grave and imminent perils that threaten vital interests."[138] Emergencies are often followed by 1) extraordinary deployment of governmental powers and resource;[139] and 2) justifications for a State's breach of international obligation as being the only means to safeguard

132 David Alexander, 'Volcanic Ash in the Atmosphere and Risks for Civil Aviation', Int. J. Disaster Risk Science, 2013, 4(1), pp. 11-13.

133 See Ruwantissa I.R. Abeyratne, *Responsibility and Liability Aspects of the Icelandic Volcanic Eruption*, 35 Air & Space L. (2010), pp. 281, 283. On competence, see Section 2.3.4 of Chapter I.

134 http://www.telegraph.co.uk/news/worldnews/europe/iceland/8528915/Iceland-shuts-airspace-after-volcanic-eruption.html , last visited (19-12-2011).

135 ICAO, Council – 193rd Session, "Summary Minutes of the Eighth Meeting", ICAO Doc. C-Dec 193/8, 29 June 2011, para. 47.

136 http://news.bbc.co.uk/2/hi/uk_news/8685913.stm, last accessed June 22, 2020. ICAO, Sixth Meeting of the International Airways Volcano Watch Operations Group, 19 to 23 September 2011, IAVWOPSG/6-REPORT.

137 The multilateral air law treaties which I have examined one by one are those listed in ICAO Secretariat's database: https://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx, last accessed May 13, 2019. As to "emergency", there is no semantic uniformity across diverse institutional treaty regimes. See Desierto, D. *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*. BRILL 2012, p. 135.

138 Garcia-Amador, Special Rapporteur, *Third Report on International Responsibility*, A/CN.4/111, Yearbook of the International Law Commission, vil. II, 1958, p. 53, para. 14.

139 For a sample of constitutional discourses on emergencies in various jurisdictions, see Bruce Ackerman, *The Emergency Constitution*,113 Yale L.J. 1029 (2004); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency*, CUP 2006; Gabriel L. Negretto and Jose Antonio Aguilar Rivera, *Exception and Emergency Powers: Liberalism and Emergency Powers in Latin America* 21 Cardozo L. Rev. 1797 (2000).

such essential interests.[140] Indicators of emergencies include the existence of a serious threat or damage to a nation's essential interests.[141] As elaborated in the previous section on public safety,[142] by virtue of territorial sovereignty, the State concerned makes final decisions as to the existence of perils in its territory.[143]

Two articles in the Chicago Convention mention the term "emergency" – Article 9 and Article 89. According to Article 9(b), in case of *emergency*, a Contracting State can "with immediate effect", temporarily restrict or prohibit flying over the whole or any part of this State's territory, on condition that such restriction or prohibition shall be applied without distinction of nationality to aircraft of all other States. According to Article 89, in case of a *national* emergency, a Contracting State resumes freedom to take actions not bound by the Chicago Convention, but this is not with immediate effect; the State has to complete formalities – there must be a declaration of national emergency and the ICAO Council must be notified.[144]

Notably, Article 89 added the adjective "national" before the word emergency. Arguably, Article 89 refers to a more severe situation where the country's vital interest is in peril,[145] whereas Article 9's use of emergency can cover relatively less severe situations such as regional emergencies. In case of war, there is a natural presumption of national emergency.[146] The analysis of national emergency and war is further presented in Chapter V.

The benchmarks for emergency, 'grave and imminent perils', abstract as they are, vary from case to case.[147] Speaking of airspace restrictions due to

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140 Early as in 1837 *The Caroline* case, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited 3 December 2018), emergency or necessity serves as a legal basis for a State to suspend compliance with an international legal obligation. The ILC specifically codified the doctrine of necessity in Articles on State Responsibility Article 25. See James Crawford, *The International Law Commission's Articles on State Responsibility*. CUP 2002, pp. 178-186.

141 See Desierto, D., *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation.* Brill 2012, p. 135.

142 See Section 2.4.2 of this chapter.

143 *Faber Case, Vienna Arbitration, 1903,* p. 600, in Bin Cheng, *Principles*, pp. 67-68

144 Bin Cheng, *Principles*, p. 113. On Article 89, see Chapter V of this study.

145 Notably, ICJ in *Threat or Use of Nuclear Weapons (Advisory Opinion)* links the situation of national emergency with the derogation of human rights, see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, para. 25. Case law on human rights further defines national emergency as a situation "threatening the life of the nation". According to Jean-Marie Henckaerts and Louise Doswald-Beck *in Customary International Humanitarian Law,* CUP 2009, p. 300), this phrase "threatening the life of the nation" does not require that the whole nation be involved in the emergency but that the essence of the emergency consist of the fact that the normal application of human rights law cannot be ensured in view of the nature of the emergency.

146 Bin Cheng, *Principles*, p. 53.

147 See, for instance, US President Trump declared a national emergency on the border with Mexico in February 2019 due to immigration, https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html; Trump declares national emergency over threats against US technology in May 2019, https://www.cnbc.com/2019/05/15/trump-signs-

emergency, one can relate to the unprecedented year 2020 when many countries restricted their airspace to international aviation for the reason of awareness that an aircraft may have cases of COVID-19, a deadly communicable virus.[148] In the US, on 13 March 2020, President Trump declared a *nationwide emergency*; all 50 US states, the District of Columbia, and 4 US territories have been approved for major disaster declarations to assist with additional needs identified under the nationwide emergency declaration for COVID-19.[149]

The US measure to close airspace in March 2020 was due to a health emergency.[150] However, the US measure did not establish prohibited areas in the sense of Article 9, because the measure is linked to the right to fly into US, rather than the right to *overfly* it.[151] For airspace restrictions due to COVID-19, the most pertinent provision is instead Article 6 of the Chicago Convention because it requires any scheduled air service over or *into* the territory of a Contracting State to obtain special permission or authorization.[152] With the application of Article 6 of the Chicago Convention, ICAO recommended that Contracting States should not interrupt air transport for health reasons,[153] whereas flight restrictions can be considered in exceptional circumstances, but a State should first consult with the World Health Organization and the health authorities for a risk assessment.[154]

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executive-order-declaring-national-emergency-over-threats-against-us-technology.html.

148 For instance, on 11 March 2020, the United States barred the entry of all foreign nationals who had visited China, Iran and European countries during the previous 14 days. See New York Times, 'Coronavirus Travel Restrictions, Across the Globe' https://www.nytimes.com/article/coronavirus-travel-restrictions.html, last accessed May 25, 2020.

149 https://www.fema.gov/coronavirus/disaster-declarations, last accessed June 20, 2020.

150 Article 14 of the Chicago Convention obliges Contracting States to take effective measures to prevent the spread by means of air navigation of communicable diseases as the Contracting States shall from time to time decide to designate. Further see ICAO SARPs are Annex 9, Standard 8.15 & 8.16.

151 See Section 2.2 of this chapter. Article 9 of the Chicago Convention is to prohibit "flying over certain areas of its territory".

152 In practice, such special permission or other authorization is usually reciprocally exchanged between States in the form of a bilateral air services agreement (BASA). See *Milde,* p. 45.

153 ICAO Annex 9, Chapter 2, paragraph 2.4.

154 Article 28 of International Health Regulations (2005) prescribes that:
"1. Subject to Article 43 or as provided in applicable international agreements, a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry. However, if the point of entry is not equipped for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it, unless the ship or aircraft has an operational problem which would make this diversion unsafe.
2. Subject to Article 43, or as provided in applicable international agreements, ships or aircraft shall not be refused *free pratique* by States Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties may subject the granting of *free pratique* to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, disinsection or deratting, or other measures necessary to prevent the spread of the infection

2.4.5 Summary on the justifications to establish prohibited airspace

In assessing the justifications in Article 9 of the Chicago Convention, pursuant to Articles 1 and 2 of the Chicago Convention, a Contracting State is to make final decisions as to the existence of grave and imminent perils or other exceptional circumstances in its territory. Consistent with the principle of territorial sovereignty, a Contracting State is allowed to prohibit or restrict the overflight of foreign aircraft in its territory, subject to conditions and requirements in Article 9 of the Chicago Convention. The Chicago Convention considers safety and security to be of such overriding importance that a State can close its airspace for military necessity, public safety, exceptional circumstances and emergency. These conditions in Article 9 are to be read narrowly for a peace context which cover stable situations and disturbances that do not amount to war or national emergency.

2.5 The application of the non-distinction requirement

Having explained the four justifications where a Contracting State can establish prohibited airspace over its territory, Article 9 of the Chicago Convention further sets out requirements for the exercise of this right: under subparagraph (a), a Contracting State shall not make a distinction between aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the "aircraft of the other Contracting States likewise engaged"; under subparagraph (b), a Contracting State's restriction or prohibition of transit rights shall be applicable without distinction of nationality to "aircraft of all other Contracting States". Considering that these terms are too vague, not self-explanatory and could lead to disagreements.[155] Readers may wonder if the reference to "no distinction" in Article 9 means identical treatment or merely mandates equality of opportunity. This issue to be analyzed in light of the objects and purposes of the Chicago Convention enshrined in its preamble, as per Articles 31 and 32 of VCLT.

2.5.1 The objects and purposes of the Chicago Convention

The Chicago Convention is part of the law of peace regulating air transport relationships among friendly countries. This observation is corroborated by the Chicago Convention's object and purpose. A treaty's objects and purposes

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or contamination."

155 *Milde,* p. 47.

are often demonstrated in its preamble as the *raison d'être*.[156] The Chicago Convention's preamble says:

> *Whereas* the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and
> *Whereas* it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;
> *Therefore,* the undersigned governments having agreed on certain principles and arrangements 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;
> *Have* accordingly concluded this Convention to that end.[157]

The fourth paragraph of the preamble says "to that end",[158] States concluded the Chicago Convention; and 'that end' refers back to the first three paragraphs of the preamble. The first three paragraphs set forth the object and purpose of the Chicago Convention.[159]

The terms 'object' and 'purpose' in English are defined by each other and the two words appear to be a unitary concept.[160] However, their French counterparts are different,[161] because there is a difference between '*l'objet*' and "*le but*". French public law has developed a distinction between '*l'objet*' and '*le but*' of a legal instrument.

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156 Jean-Pierre Cot et Alain Pellet, *La Charte des Nations Unies, Commentaire article par article*, ECONOMICA 2005, pp. 4-5: « Certains se réfèrent à la jurisprudence de la Cour Internationale de Justice dans les affaires du Droit d'Asile (Rec. 1950, p. 282) et des Ressortissants des Etats-Unis au Maroc (Rec. 1952, p. 196) pour considérer que la question ne fait pas de doute: l'utilisation du préambule pour éclairer la portée des obligations souscrites l'intègre sans conteste dans les normes du droit des traités. D'autres proposent une analyse plus nuancée en ne retenant le préambule que lorsqu'il énonce le but du traité avec une précision suffisante pour diriger l'interpréation du dispositif». See also Charles de Visscher, *Problème d'interprétation judiciare en droit international public*, Paris, Pedone 1963, p. 61; cf. Charles Rousseau, *Droit international public*, Tome 1, Paris, Sirey 1970, p. 87.

157 Preamble of the Chicago Convention.

158 The French expression is "à ces fins", see ICAO Doc 7300, https://www.icao.int/publications/Documents/7300_1ed.pdf, last accessed 3 March 2019.

159 *Huang,* p. 59.

160 David S. Jonas, & Thomas N. Saunders, "The Object and Purpose of a Treaty: Three Interpretive Methods", Vanderbilt Journal of Transnational Law, vol. 43 (3), May 2010, 565, pp. 578-579.

161 The French language is examined here because in 1944, delegations agreed to, "draw up a text in the English, French, and Spanish languages, each of which shall be of equal authenticity." See https://www.icao.int/publications/Documents/7300_orig.pdf. However, the French and Spanish texts had not been established until 1949 where the Assembly of the International Civil Aviation Organization passed Resolution A3-2 where specified that French and Spanish texts are used only for the internal purposes of the Organization. See ICAO A3-2: "Preparation of French and Spanish texts of the Convention".

> According to his French doctrine, the term 'object' indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty's purpose, and this purpose, in turn, the general result which the parties want to achieve by the treaty. While the object can be found in the provisions of the treaty, the purpose may not always be explicit and be prone to a more subjective understanding.[162]

'*L'objet*' is what it does in the sense of creating a particular set of rights and obligations, and *le but* is the reason for establishing '*l'objet*.'[163] *L'objet* is more specific than *le but* in the sense of identifying rights and obligations. The first two recitals of the Chicago Convention's preamble describe the general motivation to draft the Chicago Convention: the purposes. The purposes are to make use of international civil aviation to create and preserve peace, friendship, understanding and cooperation among nations and peoples, yet meanwhile pre-empt the abuse and threat to the general security.

The objects of the Chicago Convention, in contrast, are more concrete: they are the substantial content of the norm, the provisions, rights and obligations to achieve the purpose. As it is written in paragraph 3 of the preamble, "therefore, governments agreed on certain *principles and arrangements*". The expression "in order that" in the third paragraph brings about the objects of the Chicago Convention – aviation safety and security, and equality of opportunity. The objects of the treaty are that international civil aviation may be developed in a safe and orderly manner and on the basis of equality of opportunity. These objects underpin requirements in the Chicago Convention, including to those prescribed in Article 9.

These objects and purposes in the Chicago Convention's preamble help ascertain the meaning of its specific Article 9 on prohibited airspace. With respect to prohibited airspace, on the one hand, the Chicago Convention emphasizes the overwhelming priority of ensuring safety and security among friendly countries.[164] Based on the considerations of safety and security, Article 9 lists four justifications for airspace closure or restrictions.[165] On the other hand, Article 9 highlights the requirement of "no distinction" trying to

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162 Buffard, I. and Zemanek, K., 'The Object and Purpose of a Treaty: An Enigma?', Austrian Rev of Int'l and European L, 1998, p. 326.

163 Gardiner, R. *Treaty interpretation*. OUP 2008, p. 192.

164 *Huang*, pp. 15-16.

165 See Section 2.4 of this chapter on justifications for establishing a prohibited airspace.

level the playing field,[166] so that aircraft of different countries are treated in the same manner with respect to a prohibited/restricted airspace.[167]

2.5.2 *National treatment and most-favoured-nation treatment*

Having clarified that the Chicago Convention aims to achieve equality of opportunity, this section explains such equality with respect to prohibited areas. Article 9(a) of the Chicago Convention does not allow a distinction between national aircraft and foreign aircraft engaging in international scheduled airline service. Article 9(a) requires that foreign and domestic scheduled international air services have equal *opportunity* to operate air services. Article 9(a) speaks of equality between domestic and foreign aircraft. It is often related to the concept of 'national treatment' (NT).[168]

The standard of national treatment in Article 9(a) applies to scheduled international air services but not to non-scheduled flights.[169] The reason is that the non-distinction requirement in Article 9(a) is to prevent Contracting States from using prohibited areas as a means of frustrating the operation of international scheduled international air service.[170] For non-scheduled services, Article 9(a) does not prohibit a distinction between domestic scheduled air service and foreign non-scheduled services. A Contracting State, if establishing a prohibited area for reasons of military necessity or public safety, is allowed to make a distinction between domestic scheduled air service[171] and foreign non-scheduled flights.[172] Prohibited airspace under

166 On the discussion on free-market competition and protectionism, see Pablo Mendes de, & Buissing, Niall. (2019). *Behind and beyond the Chicago Convention: The evolution of aerial sovereignty*, Wolters Kluwer 2019, Chapter 20. Peter Haanappel, *Bilateral Air Transport Agreements – 1913, 1980,* 5 Int'l Trade L. J. 241 (1980). Malgorzata Polkowska, *The Development of Air Law: From the Paris Conference 1910 to the Chicago Convention of 1944,* 33 Annals Air & Space L. 59 (2008).

167 Article 11 of the Chicago Convention emphasizes that, *subject to the provisions of this [Chicago] Convention*, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation shall be applied to aircraft of all contracting States without distinction as to nationality. This Section examines the specific provision on prohibited airspace, Article 9, to discuss the requirement of equal treatment therein.

168 National treatment is often discussed in international economic law. For example, Kamperman Sanders, A. *The principle of national treatment in international economic law trade, investment and intellectual property*, Cheltenham: Edward Elgar Publishing 2014, pp. 5-6.

169 Bin Cheng, *The Law of International Air Transport*, Stevens 1962, p. 124.

170 *ibid,* pp. 120-124.

171 ICAO Council adopted the following definition of a scheduled international air service: "A scheduled international air service is a series of flight that possesses all the following characteristics: (a) it passes through the airspace over the territory of more than one State; (2) it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public; (c) it is operated, so as to serve traffic between the same two or more points, either (i) according to a published time-table, or (ii) with flights so regular or frequent that they constitute a recognizably

Article 9(a) may allow domestic aircraft to pass over but forbid a foreign country's charter flights to do so.[173]

Article 9(b) of the Chicago Convention, in comparison, says that airspace restriction or prohibition shall be applicable without distinction of nationality to aircraft of all *other* States. Article 9(b) does not make a distinction between scheduled air services or non-scheduled flights. In other words, the distinction is prohibited among other foreign countries, no matter whether their aircraft engage in international scheduled or non-scheduled air service; meanwhile, national aircraft can be exempt from such restriction or prohibition.[174] That is to say, a prohibited area under Article 9(b), with immediate effect, is closed to all foreign flights. One can relate to the most-favoured-nation treatment (MFN).[175]

NT and MFN treatments are treaty tools used to implement the non-discrimination principle.[176] The non-distinction requirement was designed to require governments to contractually qualify their sovereignty and to engage in obligations of equal treatment.[177] This qualification to sovereignty, as aforementioned in Section 2.4.1.3 of this chapter, does not apply to war or national emergency, according to Article 89 of the Chicago Convention.

Notably, equal treatment under Article 9 is about the equality of opportunity, as outlined in the preamble of the Chicago Convention.[178] That is to say, State A cannot close the airspace over a particular area to States B and C while allowing State D's airlines to continue flights over the excluded zone.[179] Aircraft of different countries should have the same opportunity with regard to the access to a prohibited/restricted airspace.

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systematic series. " See ICAO, First Assembly, Commission No. 3, Discussions, Vol. III "Distinction between scheduled and Non-Scheduled Operations in International Civil Air Transport," ICAO Doc. 4522, A1-EC/74 (1947).

172 Article 5 of the Chicago Convention grants three rights to all non-scheduled flights, subject to the qualifications specified in the Article: (1) right to enter and make final stop for non-traffic purposes; (2) right to enter and fly over non-stop; and (3) Right to enter, fly over and stop for non-traffic purposes on a transit flight. These rights may be exercised by aircraft bearing the nationality of a party to the Chicago Convention without the necessity of obtaining prior permission. However, advance notice of intended arrival for traffic control, public health and similar purposes could be required. See ICAO Doc. 7278-C/841 (May 10, 1952), p. 9. Bin Cheng, *The Law of International Air Transport* (1962), pp. 193-195.

173 See Section 3.2 of this chapter on India-Pakistan disputes.

174 Bin Cheng, *The Law of International Air Transport,* Stevens 1962, pp. 124, 176-177.

175 United Nations Conference on Trade Development. (2010). *Most-favoured-nation treatment*. UNCTAD/DIAE/IA/2010/1, New York: United Nations.

176 United Nations Conference on Trade Development. *Most-favoured-nation treatment*. UNCTAD/DIAE/IA/2010/1, New York: United Nations (2010), pp. 13-15.

177 Kurtz, J. *National treatment*, in The WTO and International Investment Law, CUP 2016, pp. 80-82.

178 See Section 2.5.1 of this chapter.

179 Brian F. Havel & Gabriel S. Sanchez, *The Principles and Practice of International Aiviation Law,* CUP 2014, pp. 43-44.

The equal opportunity does not necessarily mean the equality of results. Results in this context are associated with the exercise of transit rights or 'privileges'[180] – the technical right to fly over without landing and landing for technical reasons only.[181] The granting of privileges remains a sovereign prerogative of each Contracting State and is dealt with in air services agreements. These agreements are concluded between States or, in exceptional cases, between States and/or Regional Economic Integration Organizations (REIOs),[182] acting in addition to States.

States usually do not exchange complete freedom of overflight between themselves.[183] The routes for overflight are often rigid in the sense that all the traffic points on a special route are individually indicated.[184] Recalling the UK delegate's speech at Committee III (I) of the Chicago Conference: "in a bilateral agreement the route and the rights in respect thereto… would be clearly laid down in agreement and would govern that route and nothing else. It would be dangerous to have anything by implication which compelled a country to give the same rights in respect to another route."[185] In this context, a blanket MFN or NT requirement does not fit into the general scheme of these air services agreements, especially in matter of routes and capacity.[186]

That is to say, in juxtaposition with this sovereign prerogative, bilateral air services agreements are different from each other in terms of privileges granted under each agreement.[187] The specification of routes in which the designated airlines of the Contracting Parties may operate has become the first and foremost instrument in regulating the transit privileges granted.[188] In essence, the non-distinction requirement in Article 9 is to achieve the object of equality of *opportunity* as per the Preamble of the Chicago Convention. States all have the opportunity to negotiate and exchange transit rights among themselves. Although a provision on MFN or NT may help enforce the prohibition of transit traffic on an equal footing, it does not mean to accord identical privileges to all aircraft of different nationalities.

180 Peter P.C. Haanappel, *Pricing and Capacity Determination in International Air Transport,* Kluwer 1984, p. 11.

181 *ibid.*

182 Pablo Mendes de, & Buissing, Niall. (2019). *Behind and beyond the Chicago Convention: The evolution of aerial sovereignty,* Wolters Kluwer 2019, pp. 97-107.

183 Bin Cheng, *The Law of International Air Transport*, Stevens 1962, pp. 387-388.

184 *ibid.*

185 *Proceedings of the International Civil Aviation Conference,* (United States Government Printing Office, Washington, 1948), p. 1279.

186 Bin Cheng, *The Law of International Air Transport*, Stevens 1962, p. 357.

187 Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization', 53 *Yale Law Journal* 207, 208-209 (1944).

188 Bin Cheng, *The Law of International Air Transport*, Stevens 1962, p. 387.

2.5.3 Nationality of aircraft

Having explained that the requirement of non-distinction as to *nationality* restricts the competence for airspace closure, this section further explores the meaning of the phrase "aircraft of other Contracting States". Article 9 uses such expression to refer not to State aircraft in the strict sense of term,[189] but to all civil aircraft registered in and, therefore, on account of Article 17 of the Chicago Convention, bearing the nationality of the other Contracting State, whether such aircraft are owned by private individuals or the State.[190]

Article 17 of the Chicago Convention, however, does not mention the nationality of the owner, [191] or the nationality of the operator.[192] If a prohibited area is set up against a particular airline, does it make a distinction as to the nationality of aircraft? A question thus arises as to whether a distinction based on an *airline's* nationality is consistent with Article 9 of the Chicago Convention, or whether a prohibited area against one particular airline is consistent with Article 9. Answers to this question depends on the interpretation of "nationality of aircraft" in the Chicago Convention.

The nationality of an aircraft depends on its State of registration. The registration of aircraft in any Contracting State, according to Article 19 of the Chicago Convention, shall be made in accordance with its own laws and regulations, subject to Article 18 of the Chicago Convention which prohibits the registration of an aircraft in more than one State at a time. Domestic laws vary from one to another in the conditions they require for registration: some require national ownership for registration,[193] and some do not. Nonetheless,

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189 Bin Cheng, *The Law of International Air Transport,* Stevens 1962, pp. 192-193.

190 See ICAO Doc. 7278-C/841 (May 10, 1952), p. 7. Bin Cheng, *The Law of International Air Transport,* Stevens 1962, 193-194.

191 R.Y. Jennings, *General Course on Principles of International Law,* 121 Recueil des Cours de l'Académie de droit international de La Haye (1967), p. 143.

192 Drafting Committee for the Chicago Convention provided an article on airlines' nationality and revised several times, but nonetheless, it was not included in the final text of the Chicago Convention. See *Proceedings of the International Civil Aviation Conference,* Vol.1 (United States Government Printing Office, Washington, 1948), pp. 427, 415 & 429:

- Article XIV, Nationality of Airlines: "No state shall be bound to grant any of the privileges of this Convention an airline of any state unless it shall be satisfied that substantial ownership and effective control are vested in the nationals of that state."
- Article XIV, Nationality of Airlines: "Each member state reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where it is satisfied that substantial ownership and effective control is vested in nationals of a state not a party to this agreement"
- Article XX: "Nationality of aircraft" or "nationality of airline" means the nationality of the state in which the aircraft of the aircraft of airline are registered.

193 For instance, Aircraft can only be registered in the German aircraft register if it is exclusively owned by German nationals or by companies which have their principal place of business in Germany, and which are substantially owned and effectively controlled by German nationals. Moreover, the majority of the persons who are entitled to represent the company or who are personally liable for the company must be German. See, Articles 20 and 3 of

most of the time, the owner and the operator are of the same nationality in most scheduled air services.[194] For instance, Air China often operates aircraft registered in China, and therefore of Chinese nationality. Nonetheless, an airline can use aircraft of a different nationality in the case of lease, charter or interchange of an aircraft or in similar situations.[195] In case of the joint operation of aircraft by several States, as in the Scandinavian Airline System (SAS),[196] the ICAO Assembly urges Contracting States to create a joint register,[197] and aircraft are always registered in a section allocated to a particular State.[198] For this situation, Article 83*bis* of the Chicago Convention makes arrangements for the transfer of certain functions and duties normally incumbent on the State of Registry to the State of Operator.[199] Therefore, an airline's operator, most of the time, though not necessarily, is the owner of aircraft of the same nationality.

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the German Aviation Act ('Luftverkehssgesetz'). An aircraft may be registered in India in either of the following categories, namely: (a) Category A – Where the aircraft is wholly owned either – (i) by citizens of India; or (ii) by a company or corporation registered and having its principal place of business within India; or (iii) by the Central Government or any State Government or any company or any corporation owned or controlled by either of the said Governments; or (iv) by a company or corporation registered elsewhere than in India, provided that such company or corporation has given the said aircraft on lease to any person mentioned in sub-clause (i), sub-clause (ii) or sub-clause (iii); and (b) Category B – Where the aircraft is wholly owned either – (i) by persons resident in or carrying on business in India, who are not citizens of India; or (ii) by a company or corporation registered elsewhere than in India and carrying on business in India. http://dgca.nic.in/aircraft/air-ind.htm

194 F. Videla Escalada, *Nationality of Aircraft: A Vision of the Future, in T.L. Masson and P.M.J. Mendes de Leon*, Air and Space Law: De Lege Ferend*a,* Essays in Honour of Henri A. Wassenbergh (Martinus Nijhoff Publishers 1992), p. 76.

195 ICAO Secretariat, "Safety Aspects of Economic Liberalization and Article 83*bis*", LC/36-WP/2-3, 27/10/15.

196 See ICAO Circular 99-AT/20 (1970): Scandinavian Airline System – Consortium Agreement and Related Agreements.

197 See ICAO Resolution A 24-12: Practical measures to provide an enhanced opportunity for developing States with community of interest to operate international air transport services, adopted by the ICAO Assembly during its 24th Session (ICAO Doc. 9414, A-24 Res.) see also Bin Cheng, *Nationality and Registration of Aircraft - Art.77 of the Chicago Convention*, 32 Journal of Air Law and Commerce 551 (1966), p. 557; M. Milde, *Nationality and Registration of Aircraft Operated by Joint Air Transport Operating Organizations or Internationa Operating Agencies*, X Annals of Air and Space Law (1985), pp. 133 - 135; K. El-Hussainy, *Registration and Nationality of Aircraft operated by International Agencies in Law and Practice*, X Air Law (1985), pp. 15-27; I.H.Ph. Diederiks-Verschoor, *International Co-operation and its Implications for Aircraft Registration and Nationality*, XIX Annals of Air and Space Law Part I (1992), pp. 145-159, and G. FitzGerald, *Nationality and Registration of Aircraft Operated by International Operating Agencies and Art.77 of the Convention on International Civil Aviation of 1944*, Canadian Yearbook of International Law, 1967, p. 193.

198 See ICAO Doc. 8787-LC/156-1 and ICAO Doc.8787-LC/156-2.

199 Article 83 *bis* of the Convention on International Civil Aviation (the Convention) entered into force on 20 June 1997. The corresponding Protocol to the Convention (Doc 9318) is in force for the 166 States parties to it as of 1 October 2015.

Considering the link between an aircraft's nationality and an airline's nationality, it is not difficult to see that a distinction based on airline's nationality may probably also make a distinction as to aircraft' nationality. In practice, airlines of different nationalities are often conferred different treatments. Every country can close its airspace to commerce with other nations and foreign airlines if it so wishes.[200] As explained in Section 2.3 of this chapter, a Contracting State exclusively exercises the right to restrict or prohibit overflight within its territory on the basis of territorial sovereignty. Transit rights for scheduled international air services are generally exchanged between the Contracting States in respect of air transport enterprises or airlines of each other.[201] More specifically, in bilateral or regional air transport agreements, the practice is to exchange transit and traffic rights in respect of airlines designated by the Contracting States.[202] Airlines wishing to exercise transit privileges must be designated by a government as 'substantially owned' and 'effectively controlled' by the designating State or their nationals.[203] The

200 P.C. Haanappel, *Pricing and Capacity Determination in International Air Transport,* Kluwer 1984, p. 11.

201 Bin Cheng, *The Law of International Air Transport,* Stevens 1962, p. 128. For instance, The International Air Services Transit Agreement and the International Air Transport Agreement address the nationality of an operator or airline. Art. I, Section 5 and 6 respectively: "Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State ..."

202 Bin Cheng, *ibid*, pp. 128 & 359. David T. Arlington, *Liberalisation of Restrictions on Foreign Ownership in U.S. Carriers: the United States Must Take the First Step in Aviation Globalization*, 59 Journal of Air Law and Commerce, pp. 133-192 (1993). B. Wood, "Foreign ownership of international airlines: a European view", in: Prof. Chia Jui Cheng and P.M.J. Mendes de Leon ed., The Highways of Air and Outer Space over Asia 311-327 (1992). J. Balfour, *Factortame: the Beginning of the End for Nationalism in Air Transport?* XVI (6) Air Law 251-266 (1991).

203 See A, Cosmas, P. Belobaba, W. Swelbar, *Framing the Discussion on Regulatory Liberalisation: A Stakeholder Analysis of Open Skies, Ownership and Control*, in: Int. J. Aviation Management, Vol.1, No. 1/2, 2011, 21. Notably, in European context, the November 2002 decision of the European Court of Justice (ECJ) created a legal imperative to include Community designation of airlines in air services agreements, based on the "Right of Establishment." *Case C-466/98 Commission v UK and Northern Ireland* [2002] ECR I-9427 §47, 48. See further Pablo Mendes de Leon, *The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements; Current Proposals and Legal Objections,* in S. Hobe *et al.* (eds.), *Consequences of Air Transport Globalization* (2003), pp. 19-36; P.M.J. Mendes de Leon, *A New Phase in Alliance Building: the Air France/KLM Venture as a Case Study,* 53 Zeitschrift für Luft- und Weltraumrecht (2004) pp. 359-385. A.I. Mendelsohn, *Myths of International Aviation*, 68(3) Journal of Air Law and Commerce (2003), pp. 519-535; H.P. van Fenema, *Substantial Ownership and Effective Control as Airpolitical Criteria,* in: T.L. Masson-Zwaan and P.M.J. Mendes de Leon (eds. in chief), *Air and Space Law: De Lege Ferenda*, Essays in Honour of Henri A. Wassenbergh (Martinus Nijhoff Publishers 1992), pp. 27-42; P.P.C. Haanappel, *Airline Ownership and Control, and Some Related Matters*, XXVI Air and Space Law (2001), pp. 90-104; B. Cheng, *The Law of International Air Transport* (1962), pp. 375-379; M. Staniland, *The Vanishing National Airline?,* European Business Journal (1998), pp. 71-77; D.T. Arlington, *Liberalization of restrictions on foreign ownership in U.S. carriers: the United States must take the first step in*

privilege to fly over another State's airspace is always associated with an airline' nationality, not an aircraft's nationality.

In this context, Article 9 of the Chicago Convention prescribes that no distinction shall be made on the grounds of an aircraft's nationality. Considering that mostly an airline and its aircraft have the same nationality, if a Contracting State specifically denies the transit of one particular airline, then probably aircraft of that particular nationality is predominantly affected, creating a distinction as to aircraft's nationality. However, it might not always be so, depending on the statistical presentation of each case.

2.5.4 Summary on the 'non-distinction' requirement

Article 9 of the Chicago Convention requires that a Contracting State shall not make a distinction on the basis of aircraft's nationality when establishing prohibited airspace. The term "aircraft of a Contracting States" refers to aircraft bearing the nationality of that State, irrespective of airline's nationality. An action of a Contracting State to prohibit the transit rights of one particular airline might not necessarily create a distinction as to aircraft's nationality, but such action very likely leads to different treatments among aircraft of different nationalities.

This non-distinction requirement means to prevent Contracting States from using prohibited airspace as an instrument to discourage international air transport; it is a qualification to a Contracting State's sovereignty so that the State should accord an equal opportunity to aircraft of different nationalities. Nonetheless, most States prescribe fixed airways for overflight bilaterally so different States' airlines use different routes to fly over the same territory. The privileges for one route do not automatically apply to another route through a blanket NT or MFT provision.

2.6 The requirement of reasonable extent and location

2.6.1 The geographic scope of prohibited airspace

This section discusses another requirement in Article 9 of the Chicago Convention – "reasonable extent and location". Article 9(a) requires that airspace prohibition or restriction shall be over certain chosen areas of the State in question, not over the entire airspace.[204] Prohibited areas shall be of reason-

aviation globalization, 59 Journal of Air Law and Commerce (1993), pp. 133-181; H.A. Wassenbergh, *Principles and Practices in Air Transport Regulation* (Martinus Nijhoff Publishers 1992), p. 158.

204 Sreejith, S. *Legality of the Gulf Ban on Qatari Flights: State Sovereignty at Crossroads*, Journal of Air and Space Law, *43*(2), 194 (2018).

able extent and location so as not to interfere unnecessarily with air navigation. Article 9(b) requires a Contracting State to *temporarily* impose restrictions over the whole or any part of its territory.

As aforementioned in Section 2.2 of this chapter, Article 9(b) uses the phrase "reserve the right"; this phrase affirms the competence or right more robust than the word "may" in Article 9(a). Furthermore, Article 9(b) has fewer conditions to qualify a Contracting State's discretion than Article 9(a). As to the meaning of "reasonable extent and location", the Chicago Convention does not give more details. Contracting States may have different interpretations and have disputes with each other. The example of establishing a prohibited area in the Bay of Gibraltar (1967) gives rise to such a dispute.

2.6.2 Prohibited area in the Bay of Gibraltar (1967)

In 1967, the UK claimed that Spain established a prohibited area directly opposite the British airport of Gibraltar and that the prohibited area's extent and location would effectively prevent safe flight operations.[205] As aforementioned in Section 2.3, UNCLOS prescribes rules for international straits; nonetheless, the Strait of Gibraltar is not covered by the UNCLOS prescription concerning transit rights for international straits because the passage for Gibraltar is regulated by special long-standing international conventions.[206] Therefore, the prohibited airspace over Gibraltar is to be examined under the respective provisions of the Chicago Convention.

The UK alleged that Spain had violated Article 9(a) of the Chicago Convention because the extent and location of the prohibited area was not "reasonable" and that it interfered unnecessarily with air navigation.[207] At that time, there were no criteria for the "reasonable extent and location" of a prohibited area. Consequently, ICAO did not comment on the legality of Spanish measures, nor the application of Article 9 of the Chicago Convention. In November 1969, the ICAO Council, however, noted the following statement by its president:

> [T]he disagreement between the UK and Spain relating to the interpretation and application of Article 9 of the Convention would be deferred *sine die*; the question would not be included in the work program for any future session unless there was a request to that effect by a Council member and the Council agreed to it.[208]

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205 Y Tanaka, *The International Law of the Sea*, 2nd ed., CUP 2015, pp. 102. The free passage of the Strait of Gibraltar was declared in the 1904 Anglo-French Declaration (Article 7), and was confirmed by Article 6 of the 1912 Treaty between France and Spain regarding Morocco. Declaration between the United Kingdom and France Respecting Egypt and Morocco, 8 April 1904, (1907) 1 AJIL Supplement pp. 6–9. (1913) 7 AJIL Supplement pp. 81-93.

206 *Milde*, pp. 205-206.

207 *ibid*.

208 Doc 8903-C/994, p. 27 (emphasis added).

This dispute, nonetheless, could have instigated ICAO initiatives to specify indicators for the reasonable extent and location of prohibited areas. ICAO specified the criteria for reasonable extent and location in Annex 11 to the Chicago Convention.

2.6.3 The criteria for reasonable extent and location

Annex 11 of the Chicago Convention specifies that a prohibited/restricted area can be established as a contingency plan.[209] Its Recommendation 2.33.5 defines the reasonable extent and location:

> [W]hen a prohibited, restricted or danger area is established, the area should be *as small as practicable* and be contained *within simple geometrical limits*, so as to permit ease of reference by all concerned.[210]

Recommendation 2.33.5 in Annex 11 sets forth two indicators for reasonable extent and location: prohibited areas should be "as small as practicable" and be "contained within simple geometrical limits."

Regarding enforceability, arguably, Recommendation 2.33.5 in Annex 11 is a significant recommendation because the boundaries of prohibited areas determine the scope where aircraft can fly safely. The extent and location of a prohibited area determines safe routes and flight plans which are pre-requisites for a safe flight. As explained in Chapter I of this study, a *significant* Recommendation is subject to ICAO's audit and Member States should file a difference if cannot observe it, according to Standard 5.2.2 of Annex 15.[211] Considering that Recommendation 2.33.5 in Annex 11 is significant to aviation safety and security, Member States should file a difference if cannot observe it.

Furthermore, in 1984, the outcome of the Third Middle East Regional Air Navigation Meeting put forward additional indicators of "reasonable extent and location" for the establishment of prohibited, restricted, and danger areas.[212] As mentioned in Chapter I, Section 3, technical recommendations

209 See more in Chapter III, Section 4.3 on the contingency measures.

210 Annex 11, 15th ed., July 2018, Recommendation 2.33.5.

211 See Chapter I of this study on the legal force of Recommended Practices..

212 …e) should the establishment of prohibited, restricted or danger areas become unavoidable, the following principles should apply:
1. give due regard to the need not to prejudice the safe and economic operation of civil aircraft;
2. provide adequate buffer, in terms of time and size, within the designated area, appropriate to the activities to be conducted;
3. use standard ICAO terminology in designation of the areas;
4. promulgate information regarding the establishment and day-to-day use of the areas will in advance of the effective date(s);

at ICAO regional meetings provide detailed advice to States concerning the implementation of SARPs.[213] These technical indicators for a reasonable extent and location later were incorporated in ICAO technical manual Doc 9434, MID/3.[214]

2.6.4 Summary on reasonable extent and location

Complementing the Chicago Convention, ICAO regulations have directed Member States to consider that a prohibited or restricted area should be "as small as practicable" and be "contained within simple geometrical limits." These indicators for "reasonable extent and location" have normative value and Member States can be audited for their implementation.

2.7 The requirement to notify the international community

According to Article 9(a) of the Chicago Convention, descriptions of prohibited areas and subsequent alterations shall be communicated to the other Contracting States and ICAO as soon as possible. This is a procedural condition which a Contracting State should follow when prohibiting or restricting the operation of foreign aircraft uniformly. Standard 6.2.1 of Annex 15 to the Chicago Convention further specifies that "the limits (horizontal and vertical)", "type and periods of activity in prohibited or restricted area (when known)", regulations and procedures applicable to permanent danger shall be distributed under the regulated system of aeronautical information regulation and control (AIRAC).[215]

Pursuant to Article 9(b) of the Chicago Convention, prohibited areas are established with *immediate* effect in exceptional circumstances or emergencies,

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5. arrange for the closest possible co-ordination between *civil ATS units and relevant units* responsible for activities within the restricted or danger areas so as to enable the ATS units to authorize civil aircraft to traverse the areas in emergencies, to avoid adverse weather, and whenever the restrictions do not apply or the areas are not active; review the continuing need for the prohibited, restricted or danger areas at regular intervals; (emphasis added) See ICAO, Third Middle East Regional Air Navigation Meeting, "Report of ATS Working Group A to the ATS Committee on Agenda Item 2 f), MID/3-WP/96, 3/4/84, para. 2.6.5. The recommendations were put forward in a regional meeting, but the meeting was held in ICAO headquarter, which was extraordinary, and the ICAO Council noted these recommendations. See ICAO, Council – 112th Session, Minutes with Subject Index, C-Min.112/7, pp.56-59, in Doc 9444-C/1083.

213 ICAO Council Working Paper C-WP/11526 "Updating the Annexes to the Convention of International Civil Aviation", 6 March 2001.

214 ICAO Doc 9434, Regional Air Navigation Meeting, March/April 1984.

215 Aeronautical information regulation and control (AIRAC) defines a series of common dates and an associated standard aeronautical information publication procedure for States. See Standard 6.2.1 of Annex 15.

or for public safety. There is no need to circulate this information of prohibited areas to the international community. However, according to Article 89 of the Chicago Convention, a Contracting State that declares a *national* emergency shall notify the ICAO Council of that fact; and thereby, the requirements in Article 9 will not affect the State's freedom of action.[216] The notification requirement is significant as it enables the sharing of information so that flights can change flight plans and file for alternative routes timely.[217] The information service is essential for the safe and orderly development of civil aviation.

2.8 Interim conclusions

A Contracting State enjoys sovereignty over its territory and can exercise the sovereignty to establish prohibited/restricted airspace over its territory, subject to conditions and requirements in Article 9 of the Chicago Convention. Under Article 9 of the Chicago Convention, establishing prohibited airspace is an exercise of right rather than obligation. The conditions, or justifications for closing airspace, include military necessity, public safety, exceptional circumstances, and emergency; these conditions are to be interpreted narrowly so that they do *not* cover the airspace restrictions in times of war or in national emergency.

The requirements in Article 9 of the Chicago Convention include two aspects: the national treatment in Article 9(a) and the most-favored-nation treatment in Article 9(b). The benchmark for measuring distinction is based on the nationality of the aircraft. Therefore, a Contracting State's prohibition of one particular *airline's* transit rights might not necessarily create distinction as to the nationality of the aircraft, taking note of flexible arrangements under Article 83*bis* of the Chicago Convention. Furthermore, a prohibited/restricted area should be "as small as practicable" and "contained within simple geometrical limits."

The normative analysis is the foundation upon which this study answers the three research questions on prohibited airspace. As explained in Chapter I, this interpretation of a treaty provision is to be complemented by subsequent practices. Real-life examples of prohibited airspace help further understand the application for these conditions and requirements in Article 9.

216 See further in Chapter V.
217 On Article 89 and national emergency, see Section 2.4 of Chapter V.

3 Practices in the Application of Article 9 of the Chicago Convention

This section examines examples of prohibited airspace to confirm the meaning of terms as explained in previous sections. The following cases will be discussed:

- Pasir Gudang restricted area (2019) in Section 3.1;
- India-Pakistan dispute (1950s and 2010s) in Section 3.2;
- Qatar 'blockade' case (2017-2021) in Section 3.3.

3.1 Pasir Gudang restricted area (2019)

Malaysia announced to establish a permanent Restricted Area for military activities over Pasir Gudang, a port town of Malaysia, from 2 January 2019.[218] Singapore objected to this initiative and described the restricted area being in a "controlled and congested airspace" that will impact the existing and normal operations of aircraft transiting through.[219] Pasir Gudang is located within 3km from Singapore's Seletar airport. The airspace over Pasir Gudang is controlled by Malaysia.

Figure 4: The Pasir Gudang Port[220]

218 https://www.flightglobal.com/singapore-protests-new-malaysian-airspace-restriction/130820.article

219 https://www.channelnewsasia.com/news/singapore/singapore-malaysia-southern-johor-airspace-seletar-airport-10997022, last accessed 9 April 2020.

220 Source: https://ops.group/blog/malaysia-shuts-down-plans-for-ils-approach-at-singapores-seletar-airport/, last accessed 8 August 2020.

The Malaysian announcement to establish the airspace over Pasir Gudang as a restricted area, according to public news information, is a response to Singapore's plan to implement procedures for an instrument landing system (ILS) at Seletar airport;[221] Malaysia considered that Singapore's plan would "stunt development" around the Pasir Gudang industrial area, including imposing height restrictions on buildings and affecting port activities.[222]

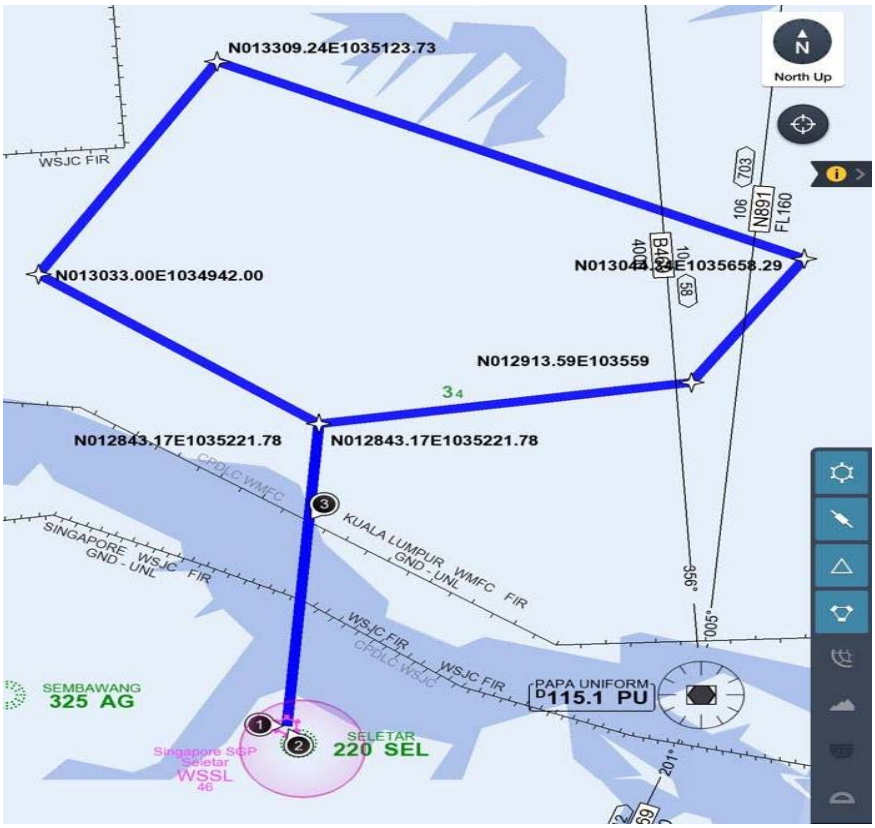

Figure 5: Proposed restricted airspace over Pasir Gudang[223]

221 The ILS procedure refers to an assisted navigational aviation facility at the airport which provides vertical and horizontal guidance to pilots while the flight is descending and approaching the runway. ILS procedures provide a point of entry which guarantees the accuracy and efficiency of flights and increases the probability of landing a plane in an airport, Malaysian Transport Minister Mr. Loke explained in parliament. See https://www.channelnewsasia.com/news/singapore/singapore-malaysia-southern-johor-airspace-seletar-airport-10997022, last accessed 9 April 2020.

222 https://www.flightglobal.com/singapore-protests-new-malaysian-airspace-restriction/130820.article, last accessed 9 April 2020.

223 Source: https://ops.group/blog/malaysia-shuts-down-plans-for-ils-approach-at-singapores-seletar-airport/, last accessed 8 August 2020.

It is difficult to argue that the deployment of ILS satisfied the conditions in Article 9: military necessity, public safety, exceptional circumstances or emergency. The reason to establish Pasir Gudang restricted airspace was that the ILS of Singapore's Seletar airport would impose additional requirements or limitations preventing Malaysia from developing tall buildings in Pasir Gudang or operating tall ships in Pasir Gudang Port.[224] First, this reason is not relevant to military necessity or public safety;[225] it is rather about concerns over possible hindrance to Pasir Gudang's economic development due to the ILS. Second, it is also difficult to compare potential limitations to building height to exceptional circumstances, such as the 9/11 terrorism attacks or volcanic eruption.[226] Thus, the creation of ILS is difficult to be justified by military necessity, exceptional circumstances or public safety under Article 9.

Nonetheless, in this author's view, it is possible to justify the ILS with 'emergency'. If the ILS was proved to have created grave and imminent perils that threaten vital interests for Malaysia, this situation could constitute emergency for a country. Meanwhile, to be justified as an emergency under Article 9, as aforementioned in Section 2.4 of this chapter, it would be more persuasive if Malaysia could use the extraordinary deployment of governmental powers and resource in relation to the port, at a level comparable to crises such as the COVID-19 pandemic.

Finally, Singapore concedes to Malaysia's sovereignty right to establish prohibited areas in its territory. In the spirit of bilateral cooperation and good faith, on 9 April 2019, Singapore and Malaysia made a joint statement.[227] Singapore has withdrawn the ILS procedures for Seletar Airport and Malaysia has indefinitely suspended its permanent restricted area over Pasir Gudang.[228]

Pasir Gudang is within Malaysian territory, so Malaysia is able to exercise the sovereignty to establish prohibited airspace over Pasir Gudang. The deployment of ILS at Singapore's Seletar airport is hardly commensurable with natural disasters, pandemics or terrorist attacks, but Malaysia is the one to determine whether the situations could create grave and imminent perils that threaten vital interests of Malaysia. This case highlights that a State makes decisions about its domestic situations in peacetime. Other countries may contest that no sufficient evidence shows that a situation falls into the justifications in Article 9. Nonetheless, a Contracting State of the Chicago Convention can claim

224 https://www.channelnewsasia.com/news/singapore/singapore-malaysia-southern-johor-airspace-seletar-airport-10997022, last accessed 9 April 2020.

225 See Section 2.4.1 of this chapter.

226 See Section 2.4.3 of this chapter.

227 Joint Statement by Prime Minister Tun Dr Mahathir Mohamad and Prime Minister Lee Hsien Loong at the 9th Malaysia - Singapore Leaders' Retreat in Putrajaya on 9 April 2019, https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2019/04/0904_SG-MY-Joint-Statement, last accessed April 9, 2020.

228 *ibid.*

to establish prohibited areas by virtue of airspace sovereignty, and often other Contracting States defer to this exercise of sovereignty.

3.2 India-Pakistan dispute (1950s and 2010s)

India and Pakistan have established prohibited airspace against each other during the past decades. This section examines the legality of these State practices and reflects their contribution to the interpretation of Article 9 of the Chicago Convention.

3.2.1 Dispute in the 1950s

In early 1952, Pakistan established a prohibited area along its western border with Afghanistan,[229] therefore Indian carriers were forced to fly via Karachi before continuing to Iran, and then north to Kabul, comprising a flight path of 1,900 miles.[230] India claimed that Pakistan violated Article 9 of the Chicago Convention, because the action was discriminatory: the prohibited area was subjectively imposed only against India; in contrast, other countries, such as Iran, still enjoyed the privilege of overflight.[231] Second, the Pakistani prohibited airspace is not of reasonable extent and location, because of its excessive impact upon commercial aviation.[232]

Pakistan countered that it had simply inherited the prohibited areas established in British India in 1935,[233] and due to the hostility of the local population toward India, the government could not guarantee the safety of Indian crew and passengers along Pakistan's western border.[234]

Speaking of the legality of the 1950s prohibited area, it seems difficult to justify Pakistan's action as far as Article 9 of the Chicago Convention is concerned. Being a Contracting States of the Chicago Convention since 1947,[235] Pakistan has agreed to observe the conditions in Article 9 in establishing prohibited airspace; the historical west-border restrictions have to be viewed in light of *lex posterior*, the Chicago Convention. Article 9 of the Chicago Convention requires Contracting States not to discriminate aircraft on the basis of nationality. Pakistan's action in 1950s, driven by the population's opposition

229 *Milde,* pp. 204-205.
230 Steven D. Jaffe, *Airspace Closure and Civil Aviation,* Routledge 2016, pp. 172-174.
231 *Milde,* pp. 204-205.
232 Steven D. Jaffe, *Airspace Closure and Civil Aviation,* Routledge 2016, p. 173.
233 *ibid.*
234 ICAO Press Release 1952, in Steven D. Jaffe, *Airspace Closure and Civil Aviation*, Routledge 2016, p. 173.
235 Pakistan adheres to the Chicago Convention on 6 November 1947. India adheres to the Chicago Convention on 1 March 1947. See https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf, last accessed 6 September 2020.

against India, did target Indian carrier and Indian aircraft.[236] It was only Indian aircraft that cannot transit over the said prohibited area in Pakistan. Thus, a distinction is made due to aircraft's nationality; this distinction violates Article 9 of the Chicago Convention.

Finally, the dispute was settled through Pakistan's establishment of special corridors leading across the prohibited zone, enabling Indian aircraft to reach Kabul with minimum rerouting.[237] On 19 January 1953, the ICAO Council noted that the disagreement had been settled.[238]

3.2.2 Dispute in the 2010s

3.2.2.1 Summary of the facts

In the early morning hours of 26 February 2019, Indian warplanes crossed the *de facto* border in the disputed region of Kashmir,[239] and dropped bombs against the town of Balakot in Pakistan.[240] This attack in Balakot was alleged to be in retaliation for a suicide bombing in Indian-administered Kashmir that killed more than 40 Indian soldiers and was claimed by the Pakistan-based Islamist militant group Jaish-e-Mohammed.[241] Pakistan condemned the Jaish-e-Mohammed bombing, and denied any connection to it.[242] On February 28, Pakistan said its air force shot down two Indian fighter jets over the disputed border region of Kashmir.[243]

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236 As clarified in Section 2.5 of this chapter, Indian aircraft is not necessarily operated by Indian carrier, and Indian carrier's aircraft do not necessarily equal to aircraft of Indian nationality. Nonetheless, the hostility of the two countries in 1950 made it clear that Pakistan's action pivot to both Indian carrier and Indian aircraft.

237 *Milde,* pp. 204-205.

238 Doc 7388-C/860, pp. 30-31.

239 Joanna Slater; Niha Masih (15 February 2019), "Modi vows action after dozens die in deadliest attack in Indian-held Kashmir in 3 decades", Washington Post Quote: "Both India and Pakistan claim the Himalayan region of Kashmir, but it has been divided between them for more than 70 years."

240 Joanna Slater (26 February 2019), "India strikes Pakistan in severe escalation of tensions between nuclear rivals", *Washington Post*; Michael Safi, Mehreen Zahra-Malik, Azar Farooq (26 February 2019), "Get ready for our surprise: Pakistan warns India it will respond to airstrikes", *Guardian* Quote: "Pakistan, ... said the war planes made it up to five miles inside its territory." See https://graphics.reuters.com/INDIA-KASHMIR/010090XM162/index.html, last accessed 6 September 2020.

241 "Pulwama attack: India will 'completely isolate' Pakistan". BBC. 16 February 2019. Archived from the original on 15 February 2019. Retrieved 16 February 2019. "Jaish terrorists attack CRPF convoy in Kashmir, kill at least 38 personnel". The Times of India. 15 February 2019. Archived from the original on 15 February 2019. Retrieved 15 February 2019.

242 "On Kashmir attack, Shah Mahmood Qureshi says 'violence is not the govt's policy'". DAWN.COM. 16 February 2019. Archived from the original on 23 February 2019. Retrieved 26 February 2019.

243 https://www.cnn.com/2019/02/27/india/india-pakistan-strikes-escalation-intl/index.html#:~:text=New%20Delhi%2C%20India%20(CNN),it%20responded%20to%20the%20incident, last accessed May 31, 2019.

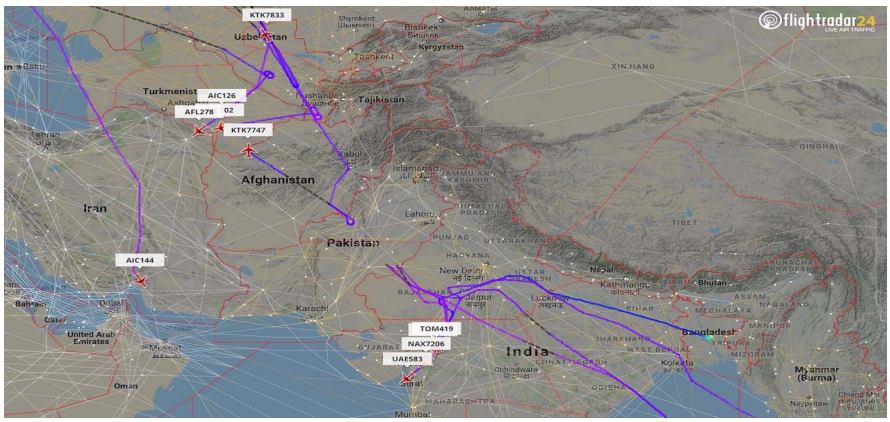

Figure 6: Airspace closure over Pakistan[244]

Tensions between India and Pakistan escalated and affected air traffic in the region. Pakistan closed its airspace entirely and India closed more than half a dozen airports for all civilian air traffic on 27 February 2019.[245] India lifted its airport closure within hours.[246] In contrast, Pakistan's top aviation official told parliament that airspace would only be reopened if India withdrew fighter jets placed at bases near the border.[247] Finally, on 15 July 2019 at 19:11 UTC, Pakistan reopened its airspace to all commercial traffic with immediate effect. Flights were once again transiting Pakistan along published routes as they had done prior to 27 February 2019.[248]

From February to July 2019, due to the closure of Pakistani airspace, international airlines that normally transit between Indian and Pakistani airspace have been forced to reroute, including flights by Singapore Airlines,

244 Source: https://www.flightradar24.com/blog/tensions-between-india-and-pakistan-affect-air-traffic/, last accessed May 31, 2019.

245 "Pakistan airspace restrictions extended to May 30", https://in.reuters.com/article/pakistan-airspace/pakistan-airspace-restrictions-extended-to-may-30-aviation-official-idINKCN1SM0U0, Reuters, last accessed May 21, 2019.

246 "Pakistan airspace to remain shut for Indian flights till May 30", https://www.thehindu.com/news/international/pakistan-airspace-to-remain-shut-for-indian-flights-till-may-30/article27138888.ece, last visited May 21, 2019.

247 "Pakistan reopens airspace months after India standoff", https://www.aljazeera.com/news/2019/07/pakistan-reopens-airspace-months-india-standoff-190716062219180.html, last accessed May 21, 2019.

248 A0710/19 (Issued for OPKR OPLR) – WITH IMMEDIATE EFFECT PAKISTAN AIRSPACE IS OPEN FOR ALL TYPE OF CIVIL TRAFFIC ON PUBLISHED ATS ROUTES. 15 JUL 19:08 2019 UNTIL PERM. CREATED: 15 JUL 19:11 2019.

Finnair, British Airways, Aeroflot, Thai Airways, and of course, Air India.[249] This incident provokes the following comments.

3.2.2.2 The legality of Pakistan's restrictions

3.2.2.2.1 Pakistan's right to regulate its territorial airspace

First of all, the dispute concerns transit rights through Pakistani airspace. Article I, Section 1 of the Transit Agreement, to which both India and Pakistan are parties, affirms the right of overflight for both countries' airlines.[250] Article I, Section 2 of the Transit Agreement also made it explicit that the exercise of overflight privileges shall be in accordance with the Chicago Convention,[251] including the principle of territorial sovereignty. This means that airlines' transit rights are subject to a Contracting State's territorial sovereignty. On the basis of territorial sovereignty, Pakistan exclusively exercises the right to restrict transit rights over its territory in accordance with Article 9 of the Chicago Convention.

Airstrikes between India and Pakistan bring public safety concerns, and may also invoke military necessity under Article 9(a), or qualify exceptional circumstances under Article 9(b). As aforementioned in section 2.6 of this chapter, prohibited airspace in Article 9(a) has to be part of the territory of reasonable extent and location; prohibited airspace in Article 9(b) can cover the *entire* territory, but it has to be temporary. After incidents in February 2019, Pakistan was circulating notices to airmen (NOTAMs) that closed its *entire* airspace,[252] so that this section examines this action against Article 9(b) of the Chicago Convention. Article 9(b) requires that airspace prohibition or restriction shall be applicable without distinction of nationality to all foreign aircraft.

That is to say, based on territorial sovereignty, Pakistan enjoys the exclusive right to prohibit the use of its sovereign airspace. Still, the exercise of such right has to satisfy the non-distinction requirement, among others, in Article

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249 https://www.flightradar24.com/blog/tensions-between-india-and-pakistan-affect-air-traffic/, last accessed June 20, 2020.

250 "Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:
1. The privilege to fly across its territory without landing;
2. The privilege to land for non-traffic purposes.
The privileges of this Section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. In areas of active hostilities or of military occupation, and in times of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities."

251 Nonetheless, whether absolute sovereignty in the Chicago Convention always pre-empt conferral of air freedoms by other treaties invites further discussion. See Sreejith, S. Legality of the Gulf Ban on Qatari Flights: State Sovereignty at Crossroads. *Air and Space Law* (2018), *43*(2), pp. 191-203.

252 See Section 3.2.2.1 of this chapter.

9(b) of the Chicago Convention. Notably, all the Pakistan NOTAMs from 2019 February to April formulate that "Pakistani airspace remains closed for *all*, except the following routes..." As to the use of routes, according to ICAO's Asia/Pacific Region ATS Route Catalogue of April 2019,[253] regional consultation has been going on among Pakistan, India, Afghanistan and their neighboring countries. There was no unilateral measure from Pakistan preventing *one particular* country's aircraft from flying over its territory. None of the NOTAMs single out one particular country's aircraft or airline:[254] it is consistent with the non-distinction requirement in Article 9(b).

3.2.2.2.2 Pakistan's restriction in Airway P518

In April 2019, Pakistan eased the restriction, and some reports said that only *Indian* carrier and aircraft could not fly over Pakistani airspace.[255] This is not accurate. Since April, there has been one airway available for flights between the two countries – Airway P518, but for westbound flights only.[256]

253 https://www.icao.int/APAC/Documents/edocs/Asia-Pacific%20Region%20ATS%20Route%20Catalogue%20Version%2018.pdf, last accessed June 20, 2020.

254 A0409/19 (Issued for OPKR OPLR) – E)PAKISTAN AIRSPACE WILL REMAIN CLOSED FOR ALL OVERFLYING (TRANSIT) FLIGHTS TILL 24TH APRIL 2019,TIME 1000 UTC(EST) EXCEPT THE FOLLOWING ATS ROUTES: 01) PURPA DCT 3550N07210E DCT PS G325 KALAT G452 DERBO AND VICE VERSA 02) PURPA DCT 3550N07210E DCT PS G325 PG G665 ASVIB AND VICE VERSA 03) PURPA DCT 3550N07210E DCT PS G325 JI-METBI/EGRON AND VICE VERSA 04) PURPA DCT 3550N07210E DCT PS G325 PG T385 TAPDO 05) APELO B505 PG G325 PS DCT 3550N07210E DCT PURPA 06) ALPOR M504 TELEM 07) SAPNA DCT TAPDO AS CONTINGENCY CONNECTIVITY FOR WEST BOUND FLIGHTS ON 24 HRS BASIS 08) TRANSIT FLIGHTS ARE ALSO PERMITTED ON ROUTE SEGMENT SERKA-KALAT AND VICE VERSA 09) PIRAN A453 GADER AND VICE VERSA 10) KABIM DCT TAPDO AND VICE VERSA AS BI-DIRECTIONAL CONTINGENCY CONNECTIVITY FOR TRANSIT FLIGHTS ON 24HRS BASIS 11) ALPOR G216 LAKIV N894 TELEM. SFC – UNL, 08 APR 11:00 2019 UNTIL 24 APR 10:00 2019 ESTIMATED. CREATED: 08 APR 11:02 2019.
A0410/19 – IN ADDITION TO OUR NOTAM A0409/19 FOLLOWING ATS ROUTES ARE ALSO AVAILABLE FOR OVERFLYING (TRANSIT) FLIGHTS: 1) KABIM P518 PG KEBUD 2) KABIM P518 PG ASVIB. FL280 – FL430, 08 APR 11:10 2019 UNTIL 24 APR 10:00 2019 ESTIMATED. CREATED: 08 APR 11:11 2019
A0257/19 (Issued for OPKR OPLR) – PAKISTAN AIRSPACE WILL REMAIN CLOSED FOR ALL OVERFLYING (TRANSIT) FLIGHTS TILL 11TH MARCH 2019, TIME 1000UTC(EST) EXCEPT THE FOLLOWING ATS ROUTES: I) PURPA DCT 3550N07210E DCT PS G325 KALAT G452 DERBO AND VICE VERSA II) PURPA DCT 3550N07210E DCT PS G325 PG G665 ASVIB AND VICE VERSA III) PURPA DCT 3550N07210E DCT PS G325 JI-METBI/EGRON AND VICE VERSA IV) PURPA DCT 3550N07210E DCT PS G325 PG T385 TAPDO V) APELO B505 PG G325 PS DCT 3550N07210E DCT PURPA VI) ALPOR M504 TELEM VII) SAPNA DCT TAPDO AS CONTINGENCY CONNECTIVITY FOR WEST BOUND FLIGHTS ON 24 HRS BASIS VIII) TRANSIT FLIGHTS ARE ALSO PERMITTED ON ROUTE SEGMENT SERKA-KALAT AND VICE VERSA. SFC – UNL, 08 MAR 11:30 2019 UNTIL 11 MAR 10:00 2019 ESTIMATED. CREATED: 08 MAR 13:57 2019.

255 "Pakistan's airspace to remain shut for Indian flights till May 30", https://economictimes.indiatimes.com/industry/transportation/airlines-/-aviation/pakistans-airspace-to-remain-shut-for-indian-flights-till-may-30/articleshow/69344427.cms?from=mdr#:~:text=Pakistan%20fully%20closed%20its%20airspace,Kuala%20Lumpur%20on%20March%2027, last accessed 21 May 2020.

256 At that time, Pakistan also published a bunch of NOTAMs saying that they would allow eastbound overflights on a few airways which connect Oman and India through Pakistan's airspace over the Gulf of Oman, but initially India did not authorise the use of these. That changed on 2nd June, when India published a NOTAM saying they would allow eastbound flights to enter Indian airspace at waypoint TELEM. Evidence showed that Pakistan attempted to open one eastbound and one westbound transiting airway through Pakistani airspace between the Muscat and Mumbai FIRs (NOTAM A0258/19), but reciprocal connect-

The question is whether the action by Pakistan to restrict traffic, allowing westbound traffic on Airway P518, is consistent with the non-distinction requirement in Article 9(b). It is difficult to argue that Pakistan made a distinction as to the nationality of the aircraft in the use of Airway P518, because all aircraft are provided with equal opportunity[257] to use Airway P518 to go west. Lufthansa adjusted routes and increased the amount of additional fuel in the event of delays; Emirates, Etihad, Air France, and more continued to fly with adjustments.[258] There was no discriminatory treatment to aircraft of one particular nationality.

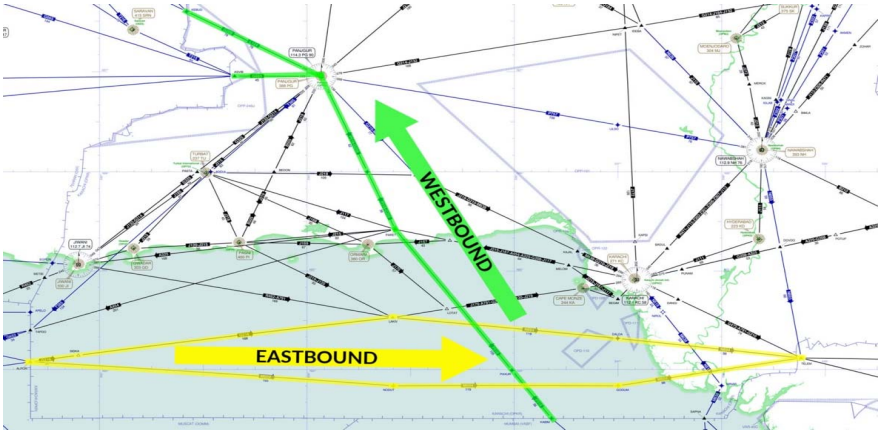

Figure 7: Air routes between India and Pakistan in April 2019[259]

Unfortunately, Indian airlines were reported to have suffered extraordinary losses[260] because its long-haul flights were diverted around the Pakistani

ivity was denied by Mumbai FIR (NOTAM A0357/19).
So piecing together the Notams issued by both countries, here are the options for overflights.
– Westbound: Airway P518, from waypoint KABIM on the Pakistan/India border in the south, to either KEBUD or ASVIB on the the Pakistan/Iran border in the north.
– Eastbound: Choice of two routes from waypoint ALPOR on the Oman/Pakistan border in the west, to waypoint TELEM on the Pakistan/India border in the east.
See https://ops.group/blog/pakistan-india/, last accessed June 29, 2020.

257 See Preamble of the Chicago Convention.

258 "Why Pakistan closing its airspace hurts it more than it hurts India", https://www.cnbctv18.com/aviation/why-pakistan-closing-its-airspace-hurts-it-more-than-it-hurts-india-4255841.htm, CNBC, last accessed June 29, 2020.

259 Source: https://ops.group/blog/pakistan-india/, last accessed 5 May 2019.

260 According to India's civil aviation minister, national carrier Air India lost Rs 491 crore until July 2, while IndiGo suffered a loss of Rs 25.1 crore till May 31. SpiceJet and GoAir lost Rs 30.73 crore and Rs 2.1 crore, respectively till June 20 due to the Pakistan airspace closure. These losses are minuscule stacked for an economy of India's size. https://www.indiatvnews.com/news/india-air-india-lost-rs-491-crtill-july-2-due-to-closure-of-pakistan-airspace-government-532364.

airspace, thus taking longer to reach destinations in Europe, the Gulf, and the US.[261] In particular, Air India's loss was significantly high, because Air India, backed by the government of India, is the only Indian airline that can have substantial overseas operations.[262]

Pakistan's regulation of Airway P518 applies to aircraft of all nationalities. Opportunities are equal, but results are not: Indian airlines and Indian aircraft are in a more disadvantaged position compared to other countries. What is the reason? Was there a distinction on the basis of the nationality of the aircraft? A conundrum arises as to how to interpret the distinction on account of aircraft's nationality with the practice of route fixing in bilateral air services agreements.

Airway P518 is a route fixed in the bilateral agreement between the Government of India and the Government of Pakistan relating to Air Services (India-Pakistan BASA).[263] India and Pakistan do not exchange complete freedom of overflight between themselves.[264] Aircraft of India and Pakistan fly over each other's territory through designated routes; both countries have control over every single point along the route, whether or not within their own territories.[265] Airway P518 is a rigid route, in the sense that all the traffic points on the route are individually indicated.[266] Under the bilateral agree-

261 "Air India loses Rs 300 crore in 2 months due to Pakistan's airspace restrictions", https://www.businesstoday.in/sectors/aviation/air-india-loses-rs-300-crore-in-2-months-due-to-pakistan-airspace-restrictions/story/341498.html, last visited May 21, 2019.

262 "Why Pakistan closing its airspace hurts it more than it hurts India", https://www.cnbctv18.com/aviation/why-pakistan-closing-its-airspace-hurts-it-more-than-it-hurts-india-4255841.htm, last accessed June 29, 2020.

263 P518 NOBAT 2109.0N 06800.0E PARET 2527.2N 06451.5E PANJGUR https://www.icao.int/APAC/Meetings/2013_SAIOACG3_SEACG20/WP09%20ATS%20Route%20Catalogue.pdf, last accessed June 29, 2020.

264 Agreement between the Government of India and the Government of Pakistan Relating to Air Services, June 23, 1948. https://mea.gov.in/bilateral-documents.htm?dtl/5183/Agreement+relating+to+Air+Services, last accessed June 29, 2020.

265 See Section 2.5 of this chapter.

266 An airline designated by the Government of India shall be entitled to operate air services in both directions on each of the routes specified in this paragraph and to land for traffic purposes in the territory of Pakistan at each of the points therein specified.
I. Delhi and/or Jodhpur to Karachi.
II. Delhi – Lahore.
III. Bombay – Karachi.
IV. Ahmedabad and/or Bhuj – Karachi.
V. Bhuj – Karachi.
VI. Calcutta – Dacca.
VII. Calcutta – Chittagong.
VIII. Bombay or Delhi to Karachi and thence to Muscat, points in the Persian Gulf, points in Oman and Qatar Peninsulas, points in Iran, points in Iraq, points in the Middle East and points in Europe including the United Kingdom and if desired, beyond.
IX. Bombay or Delhi, Karachi, Masirah, points in Hadramaut, Aden and via intermediate points to Dar-es-Salaam and, if desired, beyond.

ment between India and Pakistan, India is entitled to operate air services in both directions on each of the routes specified in the BASA.[267] After the air strikes, Pakistan unilaterally changed the both-direction operation in Airway P518 to one-direction. This action was allowed under the Indian-Pakistan bilateral air service agreement.[268] Nonetheless, the question is whether this action is consistent with Article 9.

Pakistan's action to make aircraft go westbound in Airway P518 did not make a distinction on account of aircraft's nationality: all aircraft on this route to go west only, no matter the airline's nationality or aircraft's nationality. However, not all foreign aircraft *de facto* need Airway P518 to the same extent. In comparison, some other air routes are open, such as routes connecting China and Iran, subject to close coordination with Pakistani authorities.[269]

X. Calcutta to Ghittagong, points in Burma, Siam, Indo- China and Hongkong to China and, if desired, beyond.

267 Agreement between the Government of India and the Government of Pakistan Relating to Air Services, Article IX, para. 10.

268 For the operation on Airway P518 and M504, Pakistan only allowed one-direction traffic for Indian airlines after February 2019; this is restriction to Indian airline and aircraft's transit rights, but such unilateral restriction is consistent with bilateral agreement between the two countries.
Changes made by either Contracting Party in the specified air routes, except those which change
I. the final point of departure within its own territory and
II. the points served by the designated airlines in the territory of the other Contracting Party, shall not be considered as modifications of this Agreement. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change shall be given without delay to the aeronautical authorities of the other Contracting Party.
https://mea.gov.in/bilateral-documents.htm?dtl/5183/Agreement+relating+to+Air+Services, last accessed June 29, 2020.

269 https://ops.group/blog/pakistan-india/, last accessed June 29, 2020.

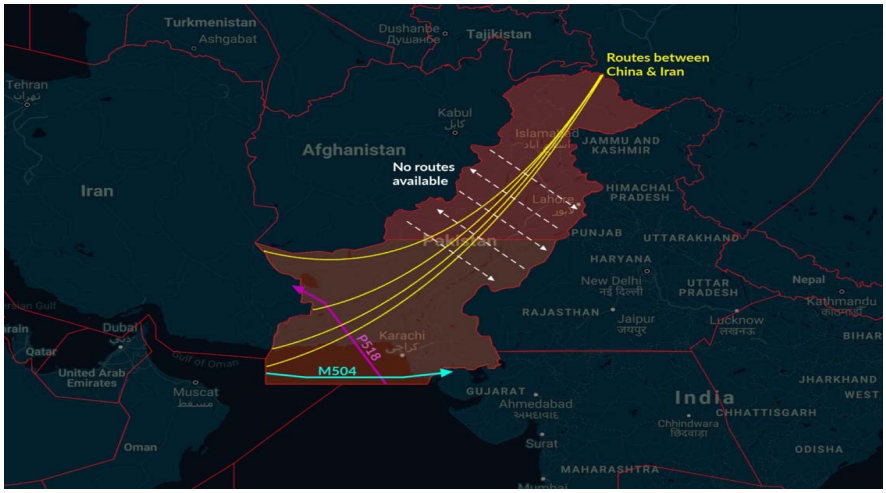

Figure 8: Air Routes over Pakistan in April 2019[270]

For India, however, the restriction in Airway P518 meant that no aircraft could use the route to go east to New Delhi in 2019.[271] Pakistan took actions in Airway P518, a route fixed in the BASA with India, so that Indian airlines and aircraft going to New Delhi have to take detours. This is a geographic fact. Such detours hit Indian airlines more than other countries – New Delhi is Indian capital.

Pakistan's restriction in Airway P518 *per se* applies to all aircraft, irrespective of nationality; however, such a restriction is applied in an air route fixed in the bilateral agreement with India. Airway P518 is more important to India than to other countries. If the action of Pakistan made any distinction, it is a distinction on account of *routes*, targeting India-related routes such as Airway P518. Due to the practices of route fixing in bilateral agreements, Pakistan's action impacts the operation of airlines designated under India-Pakistan BASA, and depending on domestic laws, if the aircraft affected are also registered in India,[272] it could be proven that discriminatory treatments were in place for Indian aircraft. This is a long causal link. Pakistani NOTAMs *per se* always show that air restrictions apply to *all* aircraft, irrespective of the nationality of the aircraft.[273]

Nonetheless, even if the discriminatory treatment is proven, Pakistan may still argue that this violation of this non-distinction requirement would be

270 Source: https://ops.group/blog/pakistan-india/, last accessed June 29, 2020.
271 *ibid.* https://ops.group/blog/pakistan-india/, last accessed June 29, 2020.
272 See Section 2.5.3 of this chapter.
273 *ibid.*

justified in cases of war and national emergency, because a Contracting State resumes its complete freedom action as a belligerent, pursuant to Article 89 of the Chicago Convention. This argument was employed by India in the hearing of Indian-Pakistan's 1970s dispute.[274] In fact, air strikes between these two countries might create a situation of war, but neither country declared war or notified ICAO of the existence of a national emergency in 2019.[275] The elements of war and its starting point is presented in Chapter IV of this study.

3.2.3 Interim conclusions

Albeit prescriptions in bilateral/regional agreements, the suspension of transit privileges over a Contracting State's territory is subject to territorial sovereignty and the Chicago Convention. Pakistan's prohibited airspace along its western border in the 1950s did target Indian aircraft only; the action was hardly consistent with Article 9 of the Chicago Convention. The regulation of transit rights by Pakistan in 2019 in law did not make a distinction regarding aircraft's nationality. However, because Airway P518 is the route designated in Indian-Pakistan BASA, Air Indian and Indian airlines are the principal airlines being hit. This measure made a distinction on the basis of air routes, but it applies to all aircraft without making a distinction as to the nationality of an aircraft.

3.3 Qatar 'blockade' case (2017-2021)

In June 2017, Saudi Arabia, the United Arab Emirates (UAE), Bahrain and Egypt alleged that Qatar had failed to suppress the activities of terrorists and extremists,[276] and thereby declared the immediate closure of their airspaces to all Qatari registered aircraft.[277] This section will focus on airspace closure against Qatar and discuss the associated regulatory issues.

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274 See Chapter V, Section 2.3.2 of the chapter.

275 In fact, Pakistan was asking Indian authorities' cooperation to open more routes, but get refused by India due to safety reasons and air strikes. See https://ops.group/blog/pakistan-india, last accessed 29 June 2020.

276 See the joint statement of Bahrain, the United Arab Emirates, Saudi Arabia and Egypt in response to the foreign Minister of Qatar in his address to the 37th session of the United Nations Human Rights Council, http://english.alarabiya.net/en/News/gulf/2018/02/28/Arab-Quartet-responds-to-Qatar-s-remarks-at-the-UN-Human-Rights-Council.html, last accessed 6 January 2020. Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, https://www.icj-cij.org/files/case-related/174/174-20181227-WRI-01-00-EN.pdf, last accessed June 29, 2020.

277 http://flightservicebureau.org/qatar-airspace-update/, last accessed July 26,2018, last accessed June 29, 2020.

3.3.1 *The proceedings*[278]

On 30 October 2017, Qatar filed two complaints to the ICAO Council.[279] On 19 March 2018, Bahrain, Egypt, Saudi Arabia, and the UAE raised preliminary objections to the effect that the ICAO Council did not have the jurisdiction, or in the alternative, that the claims made by Qatar were inadmissible, on the grounds that the lawfulness of the countermeasures and Qatar's compliance with critical obligations under international law are entirely unrelated to the Chicago Convention.[280] The ICAO Council, at the eighth meeting of its 214th Session on 26 June 2018, rejected these preliminary objections by 23 votes to 4, with 6 abstentions.[281]

On 4 July 2018, Bahrain, Egypt, Saudi Arabia, and the UAE appealed the ICAO Council's decision to the ICJ, as provided for by Article 84 of the Chicago Convention, arguing that the ICAO council is not competent to adjudicate.[282] On 14 July 2020, the ICJ rejected the appeal and held, by fifteen votes to one,

278 See Pablo Mendes de Leon, "The End of Closed Airspace in the Middle East: A Final Move on the Regional Chess Board?", (2021), 46, Air and Space Law, Issue 2, pp. 299-308.

279 On 30 October 2017, Qatar presented Application (A) and its corresponding Memorial under the terms of Article 84 of the Chicago Convention. Bahrain, Egypt, Saudi Arabia and the United Arab Emirates were named as Respondents. The said Application (A) and its corresponding Memorial relate to a disagreement on the "interpretation and application of the Chicago Convention and its Annexes" following the referenced announcement by the Governments of the Respondents on 5 June 2017 "with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and would be barred not only from their respective national air spaces, but also from their Flight Information Regions (FIRs) extending beyond their national airspace even over the high seas". On 30 October 2017, Qatar also presented Application (B) and its corresponding Memorial under the terms of Article II, Section 2 of the International Air Services Transit Agreement (Transit Agreement) and Chapter XVIII of the Chicago Convention. Bahrain, Egypt and the United Arab Emirates were named as Respondents. Application (B) relates to a disagreement on the "interpretation and application" of the Transit Agreement, following the referenced announcement by the Governments of the Respondents on 5 June 2017 "with immediate effect and without any previous negotiation or warning, that Qatar-registered aircraft are not permitted to fly to or from the airports within their territories and are barred from their respective national air spaces". ICAO Council, ICAO Annual Report: Settlement of Differences, available at https://www.icao.int/annual-report-2017/Pages/ supporting-implementation-strategies-legal-and-external-relationsservices-settlement-of-differences.aspx, last accessed: 31 Jan. 2020.

280 Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates, https://www.icj-cij.org/files/case-related/174/174-20200714-JUD-01-00-EN.pdf, last accessed 29 June 2020.

281 ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, para.124.

282 *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar),* Joint Application Instituting Proceedings, 4 July 2018, https://www.icj-cij.org/files/case-related/173/173-20180704-APP-01-00-EN.pdf, last accessed 29 June 2020.

that the ICAO Council indeed has jurisdiction to entertain Qatar's application on 30 October 2017 and that the said application is admissible.[283]

On 11 June 2018, Qatar filed a case to the International Court of Justice (ICJ), in which Qatar accused the UAE of human rights violations as a result of the blockade and of expelling Qataris and closing UAE airspace and seaports to Qatar.[284] On 23 July 2018, the ICJ approved a number of preliminary measures in favor of Qatar[285] based on the obligations of the UAE under a human rights treaty, the Convention on the Elimination of all Forms of Racial Discrimination (CERD).[286] In June 2019, the ICJ rejected the UAE's request for provisional measures, including unblocking Qatari territorial access to the website by which Qatari citizens could apply for a permit to return to the UAE.[287] On 4 January 2021, Saudi Arabia and Qatar agreed to open airspace, land, and sea borders.[288]

3.3.2 The legality of the blockade in air law

This case study considers the legality of the closure of Saudi Arabia, Egypt, Bahrain, and UAE's airspace in light of Article 9 of the Chicago Convention. By NOTAMs issued during the week of 5 June 2017, Saudi Arabia, Egypt, Bahrain, and UAE restricted the airspace over their respective territories in respect of overflight by Qatar-registered aircraft, *i.e.*, the airspace over the territory of the four countries, including their respective territorial seas within the relevant flight information region(s) (FIR(s)) – and did not apply to international airspace over the high seas.[289]

283 *ibid,* last accessed 29 June 2020.

284 ICJ, *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (The State of Qatar v. The United Arab Emirates)*, Application Instituting Proceedings, 11 June 2018, https://www.icj-cij.org/en/case/172, last accessed June 29, 2020.

285 *ibid,* Request for the Indication of Provisional measures, Order, 23 July 2018.

286 In accordance with the *Convention on the Elimination of all Forms of Racial Discrimination (CERD)*, first, families that include a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited; second, Qatari students affected by those measures are given the opportunity to complete their education in the UAE or to obtain their educational records if they wish to continue their studies elsewhere; and third, Qataris affected by those measures are allowed access to tribunals and other judicial organs of the UAE.

287 ICJ, *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (The State of Qatar v. The United Arab Emirates)*, Request for the Indication of Provisional measures, Order, 14 June 2018, https://www.icj-cij.org/en/case/172, last accessed 29 June 2020.

288 Saudi Arabia 'to open airspace, land and sea border' with Qatar, https://www.aljazeera.com/news/2021/1/4/saudi-arabia-qatar-agree-to-open-airspace-land-and-sea-border, last accessed 5 January 2021.

289 ICAO, Working Paper presented by the Secretary General, Council – Extraordinary Session, concerning the Request of Qatar – Item under Article 54(n) of the Chicago Convention, ICAO document C-WP/14639, 14 July 2017, para. 2.1.

According to Article 9 of the Chicago Convention, Contracting States have the right to restrict or prohibit the overflight within its territory. In 2017, the blockade was alleged to induce Qatar's compliance with its general international law obligations, including under the applicable international treaties and United Nations Resolutions on anti-terrorism.[290] Saudi Arabia, Egypt, Bahrain, and UAE claimed the closure of their airspace for the purpose of ensuring safety, regularity, and efficiency of air traffic.[291]

Public safety, as aforementioned,[292] is a reason to close airspace under both Article 9(a) and Article 9(b) of the Chicago Convention. Under Article 9(a), airspace prohibition or restriction can only be over *part* of the territory and the State has to accord the same treatment between domestic and foreign scheduled air traffic services; under Article 9(b), the prohibition or restriction can be over the whole of the territory, but it has to be temporal and applies to aircraft of all foreign nationalities.

Saudi Arabia, Egypt, Bahrain, and UAE closed *all* of their airspaces to Qatari airlines and Qatari-registered aircraft. Since the prohibited airspace is over the *entire* territory, it is necessary to examine conditions for airspace closure under Article 9(b) of the Chicago Convention.

Article 9 (b) requires that airspace restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States. The blockade prohibited Qatari-registered aircraft from using the airspace of the four countries. Qatari-registered aircraft are singled out due to their nationality. Other countries' aircraft can still fly over the four countries. In closing its sovereign airspace, Saudi Arabia, Egypt, Bahrain and UAE did make a distinction on with regard to the nationality of the aircraft, so the measure is inconsistent with Article 9(b).

The blockade by these four countries also made a distinction on account of nationality of the *airline*. Qatar Airways was not able to land or fly over Bahrain, Cairo, Jeddah and UAE FIRs.[293] That is to say, if a Qatari airline lease an aircraft registered in India, for example, this aircraft still was not able to fly over the airspace of Saudi Arabia, Egypt, Bahrain, and UAE. Nonetheless, as aforementioned in Section 2.5 of this chapter, the Chicago Convention did not prohibit the distinction made on the basis of the nationality of the *airline*. The distinction as to the nationality of the airline is not inconsistent with Article 9 of the Chicago Convention, unless statistics show that distinction

290 ICJ, Appeal Relating to The Jurisdiction of The ICAO Council Under Article II, Section 2, Of The 1944 International Air Services Transit Agreement (*Bahrain, Egypt and United Arab Emirates v. Qatar*), Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, and the United Arab Emirates, vol. I, chapter 2., https://www.icj-cij.org/files/case-related/174/174-20181227-WRI-01-00-EN.pdf, last accessed 29 June 2020. p. 55.

291 *ibid*, pp. 56-59.

292 See Section 2.4.2 of this chapter.

293 Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017).

between *airlines* also leads to the distinction on account of the nationality of the *aircraft*.

Mindful of the potential inconsistency with Article 9, during the proceedings, Saudi Arabia, Egypt, Bahrain, and UAE were trying to justify their action on the basis of a countermeasure.[294] However, in order to be justifiable, a countermeasure must meet certain conditions, including proportionality.[295] Proportionality requires a comparison between the 'effects of the countermeasures' and the 'injury suffered', taking into account 'the rights in question'.[296] As has been ruled by the ICJ, the ICAO Council has the jurisdiction to decide on the availability of countermeasures and whether the conditions for their exercise have been met.[297] It is out of this study's scope to present a quantitative analysis for Qatar's alleged actions in relation to terrorism to see whether these actions are proportionate with the effects of the blockade.

This study argues that the blockade may be justified as a measure for self-preservation during a *national* emergency as per Article 89 of the Chicago Convention, which allows Contracting States to resume freedom in action in *national* emergencies. This argument relates to the scope of application of Article 9 and boils down to a Contracting State's exclusive rights and powers with respect to its own territory.[298]

As was explained in Section 2.4.4 of this chapter, the term "national emergency" means to cover a special emergency situation, the benchmark of which is grave and imminent perils that endanger the country's vital interests. Article 9 lists emergency as a justification for airspace closure, whereas Article 89 specifies that *national* emergency is a caveat to Article 9. The Chicago Convention and its Article 9, including the qualifications to a Contracting State's right therein, are the law for peacetime. Article 9 does not affect the interests of the national defense of the (ex-)enemy States.[299] Therefore, depending on the case, if the Gulf situation constitutes grave and imminent

294 Appeal Relating to The Jurisdiction of The ICAO Council Under Article II, Section 2, of The 1944 International Air Services Transit Agreement (*Bahrain, Egypt and United Arab Emirates v. Qatar*), Judgment July 14, 2020, paras.46-48; Appeal Relating to The Jurisdiction Of The ICAO Council Under Article 84 of The Convention On International Civil Aviation (*Bahrain, Egypt, Saudi Arabia And United Arab Emirates V. Qatar*), Judgment July 14, 2020, para. 46-48.

295 Art. 51 of Articles of State Responsibility, Commentary, para. 2; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v Mexico*, ICSID Case No. ARB (AF)/04/5, para. 155.

296 Art. 51 Articles of State Responsibility.

297 Appeal Relating to The Jurisdiction of The ICAO Council Under Article II, Section 2, of The 1944 International Air Services Transit Agreement (*Bahrain, Egypt and United Arab Emirates v. Qatar*), Judgment July 14, 2020, para.49; Appeal Relating to The Jurisdiction of The ICAO Council Under Article 84 of The Convention On International Civil Aviation (*Bahrain, Egypt, Saudi Arabia And United Arab Emirates V. Qatar*), Judgment July 14, 2020, para. 49.

298 See Chapter V, Section 2.2.

299 Bin Cheng, *Law of International Air Transport*, Stevens 1962, p. 296.

perils that threaten vital interests of the countries on a nationwide scale,[300] the countries affected are entitled to declare a national emergency and notify the ICAO Council in accordance with Article 89. Once Article 89 is activated,[301] the States at issue resumes the freedom from the Chicago Convention, so that Article 9 does not limit the freedom to establish prohibited airspace against aircraft of one particular nationality.

3.3.3 *The closure of delegated airspace*

Having examined the closure of the four countries' airspace, this section now looks at the airspace over Qatar's territory. In addition to banning all Qatar-registered aircraft from overflying *Bahrain airspace*,[302] on 5 June 2017, Bahrain specified that all Qatar-registered aircraft should use two specific entry and exits routes in the *Bahrain FIR*.[303] Because the Bahrain FIR fully encompasses Qatar's sovereign airspace and much of the high seas surrounding it, this measure had the effect of closing off the rest of the airspace over the Arabian Gulf high seas.[304] Qatar has delegated the provision of services above its territorial airspace to Bahrain; Qatar controls traffic within their Terminal Control Area (TMA) up to Flight Level 245 (FL 245).[305]

Qatar complained that the blockade concern not only the four countries' sovereign airspaces, but also the FIRs under their jurisdiction.[306] Since 12 June 2017, contingency routes had been promulgated by Bahrain, Iran and Oman, to add to existing air traffic services (ATS) routes over the Gulf already being utilized for arrival and departures to/from Qatar.[307] As a compromise, Bahrain accommodated the Qatar-registered aircraft rerouted away from Bahrain Airspace over the high seas within Bahrain FIR by implementing

300 Qatar's actions are alleged to have raised a serious risk of compromising neighbor countries' security and interests and stability of the peoples of the region. https://www.icj-cij.org/files/case-related/173/173-20181227-WRI-01-00-EN.pdf, para. 2.46.

301 See further in Chapter V on Article 89.

302 ICAO Response to Preliminary Objections (B), Exhibit 5, NOTAMS Issued by the Respondents, pp. 971-973.

303 *ibid.*

304 ICAO Council, First ATM Contingency Coordination Meeting For Qatar, Summary of Discussions, ICAO Doc. ACCM/1 (6 July 2017), Appendix A at 4-5 (map indicating that prior Westbound routes were prohibited by NOTAM, leaving only two available routes for entry into and exit from Doha for Qatar-registered aircraft).

305 ICAO, 'Current FIR Status', https://www.icao.int/safety/FITS/Lists/Current%20FIR%20Status/DispForm.aspx?ID=211&ContentTypeId=0x010052E9663F7BEC124F98A382A2B443E7C2, last accessed July 26, 2018. Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017).

306 Counter-Memorial of the State of Qatar, https://www.icj-cij.org/files/case-related/173/173-20180704-APP-01-00-EN.pdf, last accessed 13 September 2021.

307 ICAO Council, 211th Session, Summary Minutes of the Tenth Meeting, ICAO Doc. C-MIN 211/10 (23 June 2017), p. 5.

contingency ATS routes: DOH-ALVEN direct to EGMT in Tehran FIR (from 5 June to 22 June 2017) and T800 starting 22 June 2017.[308]

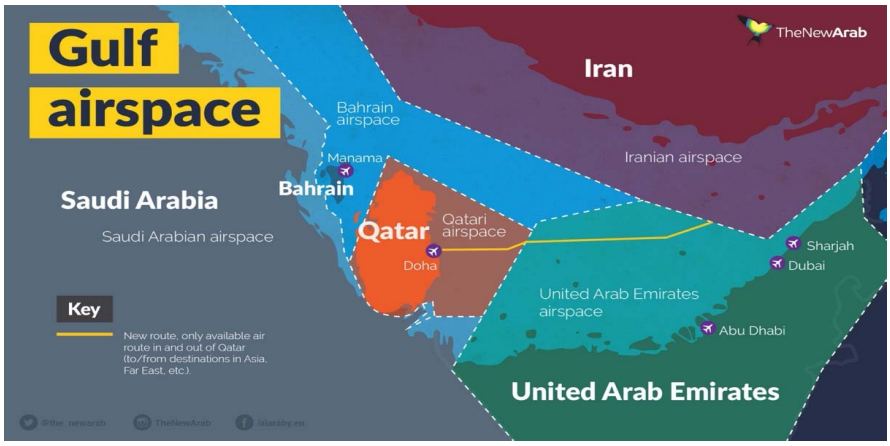

Figure 9: The new route in and out of Qatar[309]

This case shows that an FIR covering more than one country's territory can give rise to disputes. Bahrain *de facto* manages an FIR that includes Qatar's airspace. On the one hand, Qatar is the *de jure* authority to regulate its airspace by its accession to the Chicago Convention, in light of the treaty's Articles 1 and 2; and according to Article 28 of the Chicago Convention, Qatar shall provide air navigation facilities to facilitate international air navigation in "its territory".[310] On the other hand, in practice, Bahrain FIR authorities provide navigational facilities and flight information to an area that includes Qatari airspace, on the basis of Annex 11 and regional navigational plan under ICAO's auspice.[311] A question arises as to the balance between sovereignty and technical considerations. It is about the jurisdiction derived from treaties. Chapter III continues the discussion on territory, sovereignty, and FIR with a focus on prohibited area in delegated airspace.

308 ICAO Council, First ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/1 (6 July 2017), para.6.4.

309 Source: https://english.alaraby.co.uk/english/comment/2018/1/15/uaes-claims-about-airliner-interception-damage-all-gulf-aviation, last accessed 8 August 2019.

310 See Section 3.2 of Chapter III.

311 ICAO Council, First ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/1 (6 July 2017), Appendix A at 4-5.

3.3.4 *Interim conclusions*

The blockade against Qatar in 2017 was not consistent with Article 9 of the Chicago Convention, because only Qatar-registered aircraft is prevented from using the airspace of the four countries. Nonetheless, depending on local situations, the four countries could declare a national emergency and invoke Article 89 to justify their ban. Bahrain's NOTAMS attracts more attention because its FIR encompasses all of Qatar's sovereign airspace. Chapter III will discuss who and how to establish a prohibited area in delegated airspace(s).

4 CHAPTER SUMMARY AND CONCLUSIONS

In order to understand the current legal regime on prohibited airspace, this chapter starts with a normative analysis of Article 9 of the Chicago Convention. The normative analysis answers the first and second research questions concerning the legal conditions and the jurisdiction to establish prohibited airspace.

Articles 1 and 2 of the Chicago Convention recognize a Contracting State's sovereignty over its territory. On the basis of the sovereignty principle, Article 9 of the Chicago Convention confirms that a Contracting State has the right to establish prohibited/restricted airspace over its territory. This jurisdiction is limited to "its territory": the landmass and waters under its sovereignty. In particular, 'territorial waters' in the Chicago Convention, meaning waters under sovereignty, include 1) the territorial sea, 2) international straits; 3) internal waters and 4) archipelagic waters.

Meanwhile, Article 9 sets conditions and requirements to qualify the exercise of this right: under Article 9(a), a prohibited or restricted airspace can be established by reasons of military necessity, public safety, emergency, or exceptional circumstances. Furthermore, no distinction shall be made between national aircraft and foreign aircraft engaging in international scheduled airline service; the prohibited airspace should be of "reasonable extent and location" as not to interfere unnecessarily with air navigation; and Contracting States should circulate the descriptions of the prohibited areas to the international community.

Under Article 9(b) of the Chicago Convention, a Contracting State reserves the right to prohibit or restrict overflights of designated areas in exceptional circumstances, during a period of emergency or in the interest of public safety. The prohibited or restricted areas thereby established must be temporary and shall be applicable without distinction of nationality to aircraft of all *other* States. In practice, depending on bilateral air service agreements, a blanket requirement of non-distinction does not mean all aircraft get the same treatments, because the routes and capacity are fixed individually in each bilateral agreement. A Contracting State's action to restrict traffic on account of a route

does not violate Article 9(b)'s requirement, but it may in effect create discriminatory treatment among aircraft of different nationalities.

These conditions and requirements in Article 9 qualifying the exercise of sovereignty prevent Contracting States from using prohibited airspace as an instrument for frustrating air services agreements and disrupting international air services in peacetime. These qualifications and requirements, nonetheless, do not affect the exercise of sovereignty by a Contracting State in times of war or national emergency.