

**Turkish-Czech Cross-Border Trade Infrastructure:
Ensuring The Door Between Central and Eastern Europe
and The Near East Remains Open**

Alexander J. Bělohlávek

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(editors)



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On 11 October 1924, the Republic of Türkiye [*la République de Turquie*] and the Czechoslovak Republic [*la République Tchécoslovaque*] signed the Friendship Treaty [*Traité d'amitié entre la Tchécoslovaquie / et la Turquie*]. Since its effect in 1925, this treaty has established and officially declared diplomatic and consular relationships between both signatories, which gave rise to the subsequent cooperation between the two countries.

This year, we commemorate the centennial anniversary of this important treaty. Naturally, those dealing with the mutual relations between those two countries could not let this important event go unnoticed. This book therefore celebrates this historic milestone by presenting articles from different professional fields as well as other documents, with a focus on the mutual ties between both countries.

Alexander J. Bělohávek

Lenka Kauerová

Jan Šamlot

as editors
on behalf of all authors

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List of Abbreviations

AK Party	The Justice and Development Party
ANA	The All Nipon Airways
BA/CA	The Building Act – 183/2006 Coll. on spatial planning and building regulations (no longer valid)
CA	The Construction Act – 283/2021 Coll.
CCTV	The Closed-Circuit Television
COTIF	The Convention concerning International Carriage by Rail
CTKs	Cargo Tonne-Kilometres
EU	The European Union
FIR	The Flight Information Region
GDP	The Gross Domestic Product
CHP	The Republican People's Party
IATA	The International Air Transport Association
ICAO	The International Civil Aviation Organization
ICC	The International Chamber of Commerce
ICJ	The International Court of Justice
IMF	The International Monetary Fund
IPI	The Industrial Production Index
IPR	The Prague Institute of Planning and Development
IT	The Information Technology
KUP	The Prague City Committee for Changes to the Prague City Land-use Plan (advisory body to the RHMP)
LNG	The Liquid Natural Gas
MRD	The Ministry for Regional Development
NATO	The North Atlantic Treaty Organization
OECD	The Organisation for Economic Co-operation and Development
RCT	Realistic Conflict Theory
RHMP	The Prague City Council
SBs	Stakeholder bodies
SIT	Social Identity Theory
UN	The United Nations
USD	The United States Dollar
UZR MHMP	The Spatial Development Department, Prague City Hall
VURM	The Zoning Development and Land-use Plan Committee, Prague City Assembly (advisory body to Prague City Assembly)
ZHMP	The Prague City Assembly

ARTICLES

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Key words:

airspace | airspace closures
| article 84 of the Chicago
Convention | Convention on
International Civil Aviation
| Convention Relating to
the Regulation of Aerial
Navigation Signed in Paris
| EU law | International
Civil Aviation Organization
(ICAO) | ICAO's Council
| international airspace |
international sanctions |
Riyadh Agreement | Russian
Federation | sovereignty |
space law | state borders |
Ukraine

Airspace, its Limitations and Significance of “Bosphorus Region” in the Time of Crisis

Abstract | *The article focuses on the definition of the airspace within the meaning of the International airspace law, its historical context and conditions of sanctions imposed on states in a sense of closing airspace before them. This paper brings a closer look on the evolution of the international legal sources of the airspace law, aspects of adopting both The Paris Treaty and The Chicago Treaty. Following lines also deals with the question of the sovereignty of a state above the airspace within its reach and a historical doctrinal view on this topic and a comparison with so-called “international airspace” and its legal regime. After the theoretical questions the article focuses on the consequences of the airspace closures imposed by the European Union and other states world-wide as a response to the Russian operations on Ukraine since February 2022 and having serious, not only economical, impact to this day. The view on the resolution of disputes between states in matters of imposed sanctions, including airspace closure, is brought by the case law of the ICJ, concerning Bahrain, Egypt, Saudi Arabia and The United Arab Emirates v. Qatar. Such selected case law opens the question of the jurisdiction of ICAO's Council in given matter based on the Article 84 of the Chicago Convention.*

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I. International Law and Definition of Airspace

- 1.01. The need for legally binding rules regulating the law of airspace at the international level arose in connection with technical developments in aviation, pursuing military goals with the use of aircraft, i.e. in the second half of the 19th century. But such technical developments in aviation experienced rapid growth as early as during World War I. The devastating impacts of World War I led directly to the adoption of the Paris Convention Relating to the Regulation of Aerial Navigation at the Paris Peace Conference in 1919 (the “Paris Convention”¹).
- 1.02. The cornerstone of this international regulation was primarily the technical progress in aviation.³ The legal regulation of airspace relies on the principle of exclusive territorial sovereignty, which is already incorporated in the Paris Convention. Consequently, it is useful to define State sovereignty in general terms from the perspective of public international law before we proceed to the definition of generally binding principles of exclusive territorial sovereignty in international aviation law. The definition of sovereignty is primarily subject to the doctrinal interpretations presented by legal academics. The very existence of a State provides a certain guideline. The Montevideo Convention of 1933 stipulates certain requirements that the State must meet in order to qualify as a State; these requirements are generally recognised today. Article 1 of the Montevideo Convention stipulates that a State, as a person of international law, should possess the following qualifications: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” A State can only be recognised in the international community if it meets the above criteria. The recognition of the State by other States (subjects of public international law) is inseparably connected to the recognition of the State as a sovereign State. If States recognise the existence of another State, they *de facto* recognise its sovereignty. Such mutual recognition is a *conditio sine qua non* for the establishment of diplomatic relations.⁴ State sovereignty can be defined, for instance, as the “*Independence of State power on any other power. The State is externally and internally limited only by the sovereignty of other States, by general international law and by freely assumed international commitments.*”⁵ “Any other power” shall be interpreted extensively and shall encompass *any other* internal power, originating from inside the State, and external power, meaning that the State sovereignty of a State ends where the sovereignty of another State begins. This idea has been summarised, with a certain degree of exaggeration, by John Locke in his

¹ The following instances in which the author quotes the Paris Convention are based on the wording of the Paris Convention No. 35/1924 Coll., Relating to the Regulation of Aerial Navigation, of 13 October 1919, as adopted by the Czechoslovak Republic.

² VAUGHAN LOWE, *INTERNATIONAL LAW*, New York: Clarendon Law Series, Oxford University Press (2007), ISBN 978-0-19-926884-9, at 151.

³ Available at: https://applications.icao.int/postalhistory/1919_the_paris_convention.htm (accessed on 16 April 2024).

⁴ Available at: <https://www.iir.cz/o-statnosti-a-uznani-statuv-mezinarodnim-pravu> (accessed on 16 April 2024).

⁵ Available at: <https://www.mvcr.cz/clanek/statni-svrchovanost.aspx> (accessed on 16 April 2024).

Second Treatise of Government, albeit in a different context and in relation to the philosophical aspects of the freedom of individuals: *“Your liberty to swing your fists ends where my nose begins”*.

- 1.03. Exclusive state sovereignty over airspace had been considered an international custom until the adoption of the Paris Convention.⁶ The Paris Convention Relating to the Regulation of Aerial Navigation is the historically first binding multilateral treaty that contains material rules of air law, including airspace.⁷ Article 1 of the Paris Convention stipulates (cit.):

“The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.”

- 1.04. The innocent passage of civil aircraft over the territory of signatory States of the Paris Convention was allowed in times of peace. In this regard, Article 2 of the Paris Convention stipulates (cit.):

“Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed. Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.”

- 1.05. With due regard for the existence of exclusive territorial sovereignty of airspace over the territory of the contracting States to the Paris Convention, these States were allowed to prohibit the aircraft of the other signatory States to the Paris Convention from *“... flying over certain areas of its territory...”* for reasons enumerated exhaustively in Article 3. Such areas are referred to as *zones interdites*. In this regard, the said provision, i.e. Article 3 of the Paris Convention, stipulates (cit.):

“Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States from flying over certain areas of its territory. In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting States.”

- 1.06. The provisions of the Paris Convention only apply to aircraft that possess the nationality of the State in the register of which they are entered. No aircraft shall be entered in the register of one of the contracting States to the Paris Convention unless it belongs wholly to nationals of such State. An aircraft cannot be validly registered in more than one State. The Paris Convention did not allow an aircraft that is not entered in the register of a contracting

⁶ REBECCA M. M. WALLACE, INTERNATIONAL LAW, 3rd ed., London: International Law, Sweet & Maxwell (1997), ISBN 0-421-53570-9, at 104.

⁷ ČESTMÍR ČEPELKA, PAVEL ŠTURMA, MEZINÁRODNÍ PRÁVO VEŘEJNÉ [Title in translation: INTERNATIONAL PUBLIC LAW], 2nd ed., Praha: C. H. Beck, (2018), ISBN 978-80-7400-721-7, at 188, paragraph 88.

State to fly above the territory of a contracting State, except in special and temporary cases. Article 5 of the Paris Convention stipulates (cit.): *“No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State.”*

- 1.07. An aircraft of a contracting State to the Paris Convention was allowed to fly above the territory (to cross the airspace) of other contracting States without landing. The State in whose airspace the aircraft from another contracting State was flying could fix the route of the flight or order the aircraft to land, as applicable. Aircraft of a contracting State had the right to land at a foreign airport if *in distress*.⁸ The rules regulating the use of airspace by civil aircraft between the contracting States did not apply to commercial airways. Such flights required a special bilateral agreement between the States on the establishment of such a commercial airline connection. Article 15 of the Paris Convention stipulates (cit.):

“Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security, it will be obliged to land if ordered to do so by means of the signals provided in Annex D. Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States. The establishment of international airways shall be subject to the consent of the States flown over.”

- 1.08. The carriage by aircraft of explosives and of arms and munitions of war was forbidden among the contracting States to the Paris Convention.⁹ Articles 16, 27 and 28 of the Paris Convention even provided for the possibility of imposing restrictions on selected flights of the contracting States. Such restrictions could only be imposed on flights between the contracting States and exclusively subject to the conditions stipulated in the Paris Convention. The imposition of the restrictions had to be reported to the International Commission for Air Navigation as an authority set up by the Paris Convention.

- 1.09. Article 16 of the Paris Convention (cit.):

“Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory. Such reservations and restrictions shall be immediately published, and shall be communicated to the International Commission for Air Navigation, which shall notify them to the other contracting States.”

- 1.10. Article 27 of the Paris Convention (cit.):

⁸ Article 22 of Convention No. 35/1924 Coll., Relating to the Regulation of Aerial Navigation.

⁹ Article 26 of Convention No. 35/1924 Coll., Relating to the Regulation of Aerial Navigation.

“Each State may, in aerial navigation, prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.”

- 1.11. Article 28 of the Paris Convention (cit.):
“As a measure of public safety, the carriage of objects other than those mentioned in Articles 26 and 27 may be subjected to restrictions by any contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.”
- 1.12. It needs to be mentioned that all restrictions imposed on the basis of Article 28 shall be applied equally to national and foreign aircraft.¹⁰
- 1.13. The airspace regime was different for private aircraft, on the one hand, and State aircraft, on the other. State aircraft were defined as military aircraft and aircraft *exclusively employed in State service*. Hence, the subject matter of the Paris Convention is limited to civil aviation or, as applicable, civil flights other than commercial airline connections, while the last-mentioned could be the subject of bilateral agreements, if any.
- 1.14. Present regulation of aviation is based on the principles of the Paris Convention and incorporated in the Chicago Convention on International Civil Aviation of 1944 (the “Chicago Convention”¹¹), which again fails to unify the regime for commercial airways. This is the reason why two additional agreements were adopted at the International Civil Aviation Conference: the International Air Transport Agreement and the International Air Services Transit Agreement. Despite the adoption of the above-mentioned agreements, (cit.): “... *issues concerning the commercial aspects themselves of regular air lines...*” remained to be regulated by bilateral agreements.¹² In this connection, it is appropriate to mention that, for example, a bilateral agreement (*Bermuda Agreement*) was adopted in 1946 between the United States and the United Kingdom, which inspired subsequent bilateral agreements concluded by the United States, establishing commercial airlines.
- 1.15. The Chicago Convention relied on the same principles as the Paris Convention. Hence, the Chicago Convention, similarly to the Paris Convention, awards exclusive sovereignty to States over their airspace – “... *over its territory and sea*”. State sovereignty awarded by the Chicago Convention consists in the recognition of the exclusive state sovereignty of all States over the airspace above their territory and sea vertically up to the boundary of outer space. Simply speaking, the Chicago Convention grants the principle of exclusive sovereignty over their airspace to all States, regardless of whether they are contracting States of the Chicago Convention or not.¹³ A State that

¹⁰ Article 28 and Article 29 of Convention No. 35/1924 Coll., Relating to the Regulation of Aerial Navigation.

¹¹ Similarly to the quotations relating to the Paris Convention, all of the author's quotes refer to the Chicago Convention No. 147/1947 Coll., on International Civil Aviation, of 7 December 1944.

¹² ČESTMÍR ČEPELKA, PAVEL ŠTURMA, MEZINÁRODNÍ PRÁVO VEŘEJNÉ [Title in translation: INTERNATIONAL PUBLIC LAW], 2nd ed., Praha: C. H. Beck, (2018), ISBN 978-80-7400-721-7, at 190, 191.

¹³ REBECCA M. M. WALLACE, INTERNATIONAL LAW, THIRD EDITION, Sweet & Maxwell, London (1997), ISBN 0-421-53570-9, at 104.

possesses the exclusive sovereignty over its airspace has no jurisdiction over an aircraft in its airspace that is entered in the register of another State. Jurisdiction over such aircraft belongs to the State in which the aircraft is registered. In this regard, Article 17 of the Chicago Convention stipulates (cit.): “*Aircraft have the nationality of the State in which they are registered.*”

- 1.16. However, the regime of airspace cannot be confused with the regime of outer space. The international community has not yet adopted any multilateral convention that would define the boundary between airspace and outer space. The generally accepted line where airspace ends and outer space begins is the “... *lowest point of a satellite orbit, around 50 or 60 miles from the earth.*” This is approximately 100-120 km from the surface of the Earth.¹⁴ Airspace, together with land areas, territorial waters and underground areas, comprises the territory of each State. The State exercises “... *independently and exclusively any and all state power...*” over the territory of the State, i.e. territorial sovereignty, including the possibility to “... *dispose of State territory in external relations, e.g. assign part of the State’s territory to another State by contract (cession).*” Dispositions with the State’s territory can be interpreted extensively as covering closures of the airspace over which the State exercises sovereignty. State territory does not include aircraft or vessels relating to the registration principle (flag state principle).¹⁵

II. Airspace and International Airspace

- 1.17. Issues of state sovereignty have historically been addressed by two legal schools of thought. The *Fauchill* and *Nys* doctrine is inclined towards the theory of airspace being open to all States in general, not part of the territory appropriated by any particular State. A contrary opinion has been voiced by *Westlake*, *Balwin* and *Collard*, who have advocated the theory that the existence of property rights and sovereignty over a particular territory is contingent on the existence of property rights and sovereignty over such territory in the unlimited upward vertical direction. The first attempts at formulating any doctrinal premises date back to ancient Rome, then relating primarily to the exercise of ownership. The ancient maxim of *Cuius est solum, eius est usque ad coelum*, attributing rights to the owner of the territory (i.e. the sovereign State) vertically in both directions, i.e. upward and downward from the surface, was generally accepted until the modern codification of rights to airspace in the Paris Convention. The Paris Convention has abandoned this idea. The modern era and technological progress gave rise to the idea of limited airspace that ends where outer space begins.¹⁶
- 1.18. Although the title of the UN Convention on the Law of the Sea of 1982 does not offer any indications to that effect, the Convention contributed to the

¹⁴ VAUGHAN LOWE, *INTERNATIONAL LAW*, New York: Clarendon Law Series, Oxford University Press (2007), ISBN 978-0-19-926884-9, at 151, 152, 175.

¹⁵ JAN ONDŘEJ, *MEZINÁRODNÍ PRÁVO VEŘEJNÉ, SOUKROMÉ, OBCHODNÍ* [Title in translation: PUBLIC, PRIVATE, COMMERCIAL INTERNATIONAL LAW], 2nd ed., Plzeň: Aleš Čeněk (2007), ISBN 978-80-7380-032-1, at 174, 175.

¹⁶ Albert I. Moon, Jr., *A Look at Airspace Sovereignty*, 29(4) JOURNAL OF AIR LAW AND COMMERCE, Pittsburg 328-345 (1963), at 328-334.

determination of the boundaries of State territory. In connection with the UN Convention on the Law of the Sea, a State that has territorial sea (Article 3) has exclusive sovereignty over the area of the territorial sea as well as the airspace over the territorial sea; it is an area of the sea up to a limit not exceeding 12 nautical miles, or 22.5 km, measured from baselines. The area where the territorial sea of the State ends also marks the end of the airspace over which the State has sovereignty. Despite the fact that neither the Chicago Convention nor the UN Convention on the Law of the Sea provide for a term that would designate the part of the airspace that is beyond the boundary of the territorial sea of any State and over which no State has sovereignty, this area is commonly referred to as *international airspace*. It is, in fact, an analogy to the regime of the high seas. States may use their national law to establish requirements and regulate aircraft entered in their public registers if they fly in international airspace, but cannot regulate the activities of aircraft registered in other States. No State has exclusive jurisdiction over international airspace (or over the high seas); hence, no State may close international airspace. States may “... *assume responsibility for providing air traffic control services...*” in parts of international airspace through international agreement. This area is called a Flight Information Region (FIR) and, for a coastal state, the FIR consists of the airspace above its land and sea territory plus any international airspace in respect of which the International Civil Aviation Organization (ICAO) has assigned responsibility to that state.¹⁷

III. Closure of Airspace

- 1.19. Jurisdiction means “*the right to prescribe and enforce rules against others*”.¹⁸ The fundamental idea is that a territorial sovereign entity (State) may exercise its jurisdiction against individuals and entities in its territory. The States expand this general principle by their laws. For instance, the criminal laws of certain States expand their jurisdiction to cover the States’ citizens who have committed criminal acts in another State, or aircraft and vessels registered in the State’s public registers, but located in a different State.
- 1.20. Legislation is a manifestation of the exercise of state sovereignty.¹⁹ In view of the fact that each State has the right of exclusive sovereignty over its territory, including its waters and airspace above, granted by international law, the State may use its national legislation to “make dispositions” with its territory, including its airspace. *A maiori ad minus*, the State may also dispose of its airspace in a manner similar to the other components of the State’s territory (as well as its waters or the conical part of the globe formed by the surface of its area and the radii drawn from it to the centre of the Earth). For example, the Czech Republic regulates the conditions for

¹⁷ Available at: <https://www.ifatca.org/article/airspace-closures/> (accessed on 16 April 2024).

¹⁸ VAUGHAN LOWE, *INTERNATIONAL LAW*, New York: Clarendon Law Series, Oxford University Press (2007), ISBN 978-0-19-926884-9, at 171.

¹⁹ VAUGHAN LOWE, *INTERNATIONAL LAW*, New York: Clarendon Law Series, Oxford University Press (2007), ISBN 978-0-19-926884-9, at 6.

using airspace, the possibility of dividing airspace and the conditions for restricting or prohibiting the use of airspace above certain areas in Section 44 et seq. of Act No. 49/1997 Coll., on Civil Aviation, in effect since 1 January 2024. The rules are analogous to the rules adopted by most other countries.

- 1.21. Restriction or prohibition of the use of airspace by a national aviation authority is an act of a general nature and, with certain differences concerning the individual national doctrines, it is one of the effects of national law. Conversely, at the international level, one generally refers to the “closure” of airspace for civil flights from other States or the “suspension” of flights applied to airlines of another (specific) State, etc.
- 1.22. Following the current events east of the EU (Ukraine), the European Union adopted the Third Package of Sanctions against Russia on 28 February 2022. These sanctions include the closure of the airspace over the *territory of the Union*.²⁰ The Czech Republic and Poland had closed their airspace three days before these sanctions were imposed, effective at midnight, 25–26 February 2022.²¹ The Russian Federation adopted reciprocal measures and closed its airspace to European and selected other airlines.²² Decisions on the closure of Russian airspace are made by *Rosavatsiya*, the Federal Agency for Air Transport. It is an executive body that provides government support in managing state-owned property in the air transport industry (civil aviation).²³
- 1.23. See, in particular, Article 3d(1) of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, which stipulates that (cit.):
“It shall be prohibited for any aircraft operated by Russian air carriers, including as a marketing carrier in code-sharing or blocked-space arrangements, or for any Russian registered aircraft, or for any non-Russian-registered aircraft which is owned or chartered, or otherwise controlled by any Russian natural or legal person, entity or body, to land in, take off from or overfly the territory of the Union.”
- 1.24. The European Union suspends the application of Article 3d(1) of the Regulation in the case of “*an emergency landing or an emergency overflight*”.²⁴
- 1.25. Selected flights are exempt from the sanctions imposed under Article 3d of the Regulation if the competent authorities determine that they are required for humanitarian purposes or for any other purpose consistent with the

²⁰ As at 28 March 2024, the effective version is Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine. See <https://www.airways.cz/zprava/evropska-unie-uzavrela-svuj-vzdušny-prostor-pro-ruska-letadla/>.

According to the Regulation, “*territory of the Union*” means (cit.): “*the territories of the Member States to which the Treaty is applicable, under the conditions laid down in the Treaty, including their airspace*”.

²¹ Available at: <https://www.airways.cz/zprava/cesko-a-dalsi-evropske-zeme-vydavaji-zakazy-ruskym-dopravcum/> (accessed on 16 April 2024).

²² Available at: <https://www.dw.com/en/russia-retaliates-with-airspace-closure-for-36-countries/a-60947431> (accessed on 16 April 2024).

²³ Available at: <http://government.ru/en/departments/74/events/> (accessed on 16 April 2024).

²⁴ Article 3d(2) of Council Regulation (EU) No 833/2014 of 31 July 2014.

objectives of the Regulation. Article 3d(3) of Council Regulation (EU) No 833/2014 of 31 July 2014 thus stipulates as follows (cit.):

“By way of derogation from paragraph 1, the competent authorities may authorise an aircraft to land in, take off from, or overfly, the territory of the Union if the competent authorities have determined that such landing, take-off or overflight is required for humanitarian purposes or for any other purpose consistent with the objectives of this Regulation.”

- 1.26. The Member States concerned shall inform the other Member States and the European Commission of any such authorisation within two weeks of the authorisation.²⁵ The Package of Sanctions also regulates obligations of aircraft operators of non-scheduled flights between Russia and the European Union in Article 3d(5) of Council Regulation (EU) No 833/2014 as follows (cit.):

“Aircraft operators of non-scheduled flights between Russia and the Union, operated directly or via a third country, shall notify prior to their operation, and at least 48 hours in advance, all relevant information concerning the flight to the competent authorities of the Members State of departure or destination.”

- 1.27. The relevant rules continue with Article 3d(6) of Council Regulation (EU) No 833/2014 (cit.):

“Upon refusal of a flight notified in accordance with paragraph 5, the Member State concerned shall immediately inform the other Member States, the Network Manager and the Commission.”

- 1.28. The Network Manager for air traffic management network functions is provided for in Article 3e(1) of Council Regulation (EU) No 833/2014 (cit.):

“The Network Manager for air traffic management network functions of the single European sky shall support the Commission and the Member States in ensuring the implementation of, and compliance with, Article 3d. The Network Manager shall, in particular, reject all flight plans filed by aircraft operators indicating an intent to carry out activities over the territory of the Union that constitute a violation of this Regulation, such that the pilot is not permitted to fly.”

- 1.29. The Network Manager’s obligations include the submission of regular reports to the Commission and the Member States, as provided for in Article 3e(2) of Council Regulation (EU) No 833/2014 (cit.): *“The Network Manager shall regularly supply to the Commission and the Member States, based on the analysis of flight plans, reports on the implementation of Article 3d.”*

- 1.30. Some other States around the world have cancelled their flights over or to Russia in consequence of the situation east of the European Union. But a number of States, conversely, still allow overflight and landing at Russian airports. Hence, airlines from the Middle East and China continue to fly to the Russian Federation. The States whose airlines fly to Russia and use Russian airspace also include selected African States, for instance Morocco, Egypt, Algeria or Ethiopia.²⁶ Despite the fact that Turkey closed its airspace

²⁵ Article 3d(4) of Council Regulation (EU) No 833/2014 of 31 July 2014.

²⁶ Available at <https://russtd.com/a-list-of-foreign-airlines-flying-to-russia.html> (accessed on 16 April 2024).

to military and commercial flights from Russia to Syria in April 2023,²⁷ it keeps its own airspace open. Airlines of European countries that fly to destinations in the territory of the Russian Federation include the following Turkish companies (the fact that the territory of Turkey lies in Europe as well as in Asia is intentionally disregarded for the purposes of this paper): Turkish Airlines, Pegasus Airlines, as well as the Serbian Air Serbia – they fly, for instance, to Moscow, St. Petersburg, Kazan and Sochi.²⁸

IV. Legal Basis for EU Closure of Airspace before Russian Airspace (to Russian Aircraft)

- 1.31. Article 4(2) of the Treaty on the Functioning of the European Union stipulates that shared competence between the European Union and the Member States applies, *inter alia*, in the area of transport. While preserving the principle of solidarity expressed in Article 5(3) of the Treaty on European Union, the European Union, as regards aviation matters (cit.):
“in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”
- 1.32. Similarly, in Article 2(2) of the Treaty on the Functioning of the European Union (cit.):
“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”
- 1.33. Transport at the EU level is regulated in Title VI (Articles 90 – 100) of the Treaty on the Functioning of the European Union. These provisions only apply to transport (cit.): *“by rail, road and inland waterway”*.²⁹ Article 100(2) of the Treaty on the Functioning of the European Union is the only provision regulating the procedure followed by EU bodies in adopting measures relating to air transport (cit.): *“The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.”* However, Council Regulation (EU) No 833/2014 of 31 July 2014 was adopted by the EU bodies pursuant to Article 215 of the Treaty on the Functioning of the European Union (cit.):

²⁷ Available at: <https://www.reuters.com/world/middle-east/turkish-air-space-closed-planes-carrying-troops-russia-syria-trt-cites-minister-2022-04-23/> (accessed on 16 April 2024).

²⁸ Available at: <https://russtd.com/a-list-of-foreign-airlines-flying-to-russia.html> (accessed on 16 April 2024).

²⁹ Article 100(1) of the Treaty on the Functioning of the European Union.

“1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities. 3. The acts referred to in this Article shall include necessary provisions on legal safeguards.”

- 1.34. The Council of the EU adopted the above-mentioned sanctions list specifically on the basis of a decision in accordance with Title V of the Treaty on the Functioning of the European Union³⁰ and on the proposal of the High Representative of the Union for Foreign Affairs and Security Policy.
- 1.35. Article 215 of the Treaty on the Functioning of the European Union must be applied with due regard for the fact that the list of competences shared by the Member States and the EU bodies is only indicative.³¹ The category of shared competences is simultaneously a category of residual competences, i.e. competences granted to the EU bodies by primary law that are not included in the enumerative lists of exclusive competences (Article 3 of the Treaty on the Functioning of the European Union) or supporting competences (Article 6 of the Treaty on the Functioning of the European Union) and are classified as shared competences.³² This is the reason why the adoption of restrictive measures under Article 215 of the Treaty on the Functioning of the European Union is a shared competence of the European Union.

V. Consequences of Closure of Airspace in Connection with Russia’s Special Operations in Ukraine

- 1.36. Closing of the States’ airspace has inevitable global ramifications. Flights are longer and more expensive, especially due to the increasing prices of oil and natural gas on the commodities markets. The price of aviation fuel has

³⁰ Specifically, Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine.

³¹ Indicative list of shared competences in Article 4 TFEU (cit.): “1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty.”

³² KAREL KLÍMA, et al. EVROPSKÉ PRÁVO [Title in translation: EUROPEAN LAW], Plzeň: Aleš Čeněk, (2011), ISBN 978-80-7380-335-3.

significantly increased since the beginning of Russia's special operations. The price of aviation fuel was USD 150 per barrel on 21 March 2022. This represents a 39% price increase compared to February 2022 and a 121% year-on-year increase. Naturally, before Russia's airspace was closed, aircraft had used the shortest possible routes. Hence, the closure has resulted in the cancellation or major rerouting of certain flights. Commercial flights between Europe and Asia and between Asia and North America were affected the most.³³ For instance, flights from Frankfurt to Tokyo and flights to Seoul in South Korea cannot use the *great circle route*, representing the shortest connection between two world airports. The closure of Russian airspace has resulted in flights from Frankfurt to Tokyo being forced to avoid Middle Asia entirely, which prolongs the flight distance by 22.1% and increases flight time by 28.7%. Flights that have to avoid the North Pole now have a flight distance longer by 31.4% and flight time increased by 31.3%.

- 1.37. States with a high demand for flights over Russian airspace suffer more than others. A study drawn up by the IATA includes the following States among those that are most affected, in which the demand for air travel has dropped as a result of the escalating situation east of the European Union: Ukraine, where net airline bookings made during 24 February – 15 March v. 4 February – 23 February dropped by 125%; in the same time intervals: Moldova (117%), Turkmenistan (94%), Tajikistan (58%), Uzbekistan (53%), Russia (48%), Kyrgyzstan (40%), Serbia (39%), Armenia (38%) and Latvia (29%). The global economy has also been affected by the curtailing of Russian and Ukrainian air cargo traffic. Total segment-based freight tonnes carried by air to, from and within Russia and Ukraine accounted for 0.9% of the total global cargo traffic in 2021. That number captures both cargo traffic that starts in the two countries, and cargo traffic that only transits there. Russia accounted for 2.5% of total global dedicated cargo flights in 2021. Both domestic and international dedicated cargo flights have deteriorated markedly since the conflict in Ukraine escalated. Despite the fact that the number of Russian international cargo flights was down 19% year-on-year after February 2021, the number of domestic flights was up 11% year-on-year after February 2021, after the situation in Ukraine escalated. The above-mentioned flights between Europe and Asia and between North America and Asia represented 47.3% of all international CTKs (cargo tonne-kilometres) from February 2021 to March 2022 (Europe-Asia accounted for 20.6% and North America-Asia for 26.7%). However, other airlines profit from these flight bans or restrictions, for instance, airlines domiciled, or aircraft registered, in the countries of the Middle East, which may provide such flights unhindered by the restrictions applied to Russian airspace.³⁴
- 1.38. Despite the need to avoid the Russian airspace, the demand for flights from Europe to Japan has not decreased significantly. The necessary rerouting

³³ Available at: <https://www.iata.org/en/iata-repository/publications/economic-reports/the-impact-of-the-conflict-between-russia-and-ukraine-on-aviation/> (accessed on 16 April 2024).

³⁴ Available at: <https://www.iata.org/en/iata-repository/publications/economic-reports/the-impact-of-the-conflict-between-russia-and-ukraine-on-aviation/> (accessed on 16 April 2024).

naturally results in an increase in costs of airline services. Moreover, nobody has addressed the drastic consequences for the environment. It is rather illogical when the airlines, mindful of their responsibility for the environment, inform their passengers of each “kilogram” of CO₂, even in the passenger receipts, but nobody dares to analyse the consequences of the restrictions adopted by the individual States and by the international communities. The President of All Nipon Airways (ANA), Mr Shinichi Inoue, speaking with FlightGlobal in Tokyo, said (cit.): “*business travel demand from Japan to Europe ‘has been significant’, and Japan remains a popular travel destination for European travellers.*” In the interview with FlightGlobal, he also commented on the increase of the operational costs of flights (cit.):

“As a result of having to reroute European flights to avoid the airspace, operational costs are up between 10 and 15%, with the airline having to adjust crew resources as a result... while European flights usually require three crew in the flight deck, the airline now has to allocate one more crew member because of longer flying hours.”

- 1.39. Mr Inoue also mentioned that Istanbul would offer All Nipon Airways a “gateway to Africa” and Stockholm would offer access into Scandinavia.³⁵

VI. Case-law of the International Court of Justice

- 1.40. The International Court of Justice was also called upon to resolve a case involving the closure of airspace, albeit in a different context than the current developments east of the European Union. The case concerned a number of restrictive measures imposed by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (Applicant States, Appellants) on Qatar. Those measures included the closure of the Appellants’ airspace to Qatar-registered aircraft. Pursuant to the airspace closure, all Qatar-registered aircraft were barred by the Appellants from landing at or departing from their airports and were denied the right to overfly their respective territories, including their territorial seas. Certain restrictions also applied to non-Qatar-registered aircraft. Aircraft flying to and from Qatar were required to obtain prior approval from the civil aviation authorities of the Appellants in order to be allowed to use the airspace when overflying their territory.³⁶ The restrictive measures were taken in response to Qatar’s alleged breach of the Riyadh Agreements (of 2013 and 2014)³⁷ pursuant to which Qatar undertook to prevent (cit.): “*support, financing or harboring individuals or groups that threaten the national security, primarily terrorist groups.*” On 4 July 2018, the Appellants instituted an appeal from a Decision rendered by the Council of the International Civil Aviation Organization (ICAO) on 29 June 2018 in proceedings commenced by the State of Qatar against these States

³⁵ Available at: <https://www.flightglobal.com/airlines/europe-demand-strong-despite-russian-airspace-closure-ana-president/157132.article> (accessed on 16 April 2024).

³⁶ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 16, paragraph 21, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

³⁷ Available at: <https://casnujs.in/2022/01/30/jurisdiction-under-article-84-of-the-chicago-convention-1944-in-the-context-of-middle-east-conflict-2/> (accessed on 16 April 2024).

on 30 October 2017, pursuant to Article 84 of the Chicago Convention.³⁸ In its Application of 30 October 2017, Qatar demanded the invalidation of the restrictions concerning the airspace of the said States that had been imposed on Qatar. Qatar specifically argued that the restrictive measures imposed by the Appellants violate their obligations under the Chicago Convention.³⁹ Qatar filed two applications against the Appellants to the ICAO Council, and the Appellants raised two preliminary objections (appeal), arguing that the ICAO Council lacked jurisdiction to resolve the claims raised by Qatar in its application and that these claims were inadmissible. Both preliminary objections (appeal) were rejected by the ICAO on 29 June 2018.

- 1.41. The Appellants argued and attempted to prove that the ICAO erred in that the procedure adopted by the ICAO was (cit.): *“manifestly flawed and in violation of fundamental principles of due process and the right to be heard”*. The Appellants also argued that (cit.):

*“the ICAO Council lacked jurisdiction under the Chicago Convention since the real issue in dispute between the Parties involved matters extending beyond the scope of that instrument, including whether the aviation restrictions could be characterized as lawful countermeasures under international law.”*⁴⁰

- 1.42. The Appellants also asserted that *“the ICAO Council erred in fact and in law”*. On 14 July 2020, the International Court of Justice rejected the appeal brought by the Appellants, confirming the standpoint of Qatar, i.e. that the decision of the ICAO Council based on the application submitted to it by Qatar was admissible.⁴¹ When addressing the issue of whether the dispute between the parties is a dispute concerning the interpretation or application of the Chicago Convention pursuant to Article 84 of the Chicago Convention, the International Court of Justice held that (cit.):

“The Council’s jurisdiction ratione materiae is circumscribed by the terms of Article 84 of the Chicago Convention to this type of disagreement. As the Court explained in 1972, a disagreement relates to the interpretation or application of the Chicago Convention if, ‘in order to determine [it], the Council would inevitably be obliged to interpret and apply the [Convention], and thus to deal with matters unquestionably within its jurisdiction’ (Appeal Relating to the Jurisdiction of the ICAO

³⁸ Article 84 of the Chicago Convention (cit.): *“Settlement of disputes. If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.”*

³⁹ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 17, paragraph 23, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴⁰ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 17, paragraph 24, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴¹ Available at: <https://www.icj-cij.org/case/173>.

Council (*India v. Pakistan*), Judgment, I.C.J. Reports 1972, at 66, para. 36).⁴²

- 1.43. In its application submitted to the ICAO Council on 30 October 2017, Qatar requested the ICAO Council to determine that the measures consisting, for instance, in a restriction of airspace, violate the States’ obligations under the Chicago Convention, its Annexes and other rules of international law. The State of Qatar also requested a decision stipulating that these acts (of the Appellants) represented a violation of the fundamental principles of the Chicago Convention, and demanded the withdrawal of all restrictions imposed on Qatar-registered aircraft. Qatar also demanded that the States that had imposed such measures (Appellants) comply with their international obligations and negotiate in good faith the future harmonious cooperation with Qatar to safeguard the safety, security, regularity and economy of international civil aviation. Qatar argued that (the Appellants) breached, in particular, Articles 2, 3bis, 4, 5, 6, 9, 37 and 89 of the Chicago Convention.⁴³
- 1.44. The International Court of Justice found in favour of Qatar unanimously in respect of the rejection of the Appellants’ claims from their preliminary objections, and by fifteen votes to one in respect of the issue of jurisdiction of the ICAO Council to entertain the application submitted to it by Qatar.⁴⁴

VII. Scope of Jurisdiction of the Council of International Civil Aviation Organization (ICAO)

- 1.45. The International Civil Aviation Organization (ICAO) is an intergovernmental international organisation associated with the UN. The ICAO was established by the Chicago Convention of 1944. The ICAO was created to support the joint cooperation of the Member States and the sharing of their airspaces for mutual benefit. Air carriers, especially these days, rely on the expert technical and diplomatic apparatus of the ICAO, which adjusts international flights to the new technological developments. To this end, the ICAO communicates with technicians in the field of aviation, especially in order to provide effective sustainable solutions to a number of expert issues. The International Civil Aviation Organization primarily offers its Member States diplomatic support and creates a global aviation network, *connecting families, cultures and businesses all over the world*, and promoting sustainable growth and socio-economic prosperity in aviation.⁴⁵ All 193 Member States of the Chicago Convention meet triennially at the General Assembly, which, apart from adopting resolutions, approves the ICAO budget and determines the

⁴² Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 23, paragraph 46, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴³ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 23, paragraph 47, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴⁴ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 40, paragraph 126, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴⁵ Available at: <https://www.icao.int/about-icao/Pages/default.aspx> (accessed on 16 April 2024).

future direction of the ICAO; the Assembly also selects 36 Member States to sit on the ICAO Council for the entire three-year term. Each of these States sends their diplomatic representative for the duration of the three-year mandate, and these diplomatic representatives elect the President of the ICAO Council.

- 1.46. In connection with the issue of the scope of jurisdiction exercised by the ICAO Council pursuant to Article 84 of the Chicago Convention, as outlined in the case-law of the International Court of Justice annotated above, it is appropriate to provide more details concerning the quoted Article of the Chicago Convention. Article 84 of the Chicago Convention (cit.):

“Settlement of disputes. If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.”

- 1.47. The Appellants in the above-quoted case-law of the International Court of Justice, i.e. Bahrain, Egypt, Saudi Arabia and United Arab Emirates, argued that the measures they had adopted against Qatar “*fall within the broader area of public international law and, consequently, outside the subject matter of the Chicago Convention; hence, the ICAO Council has no jurisdiction to entertain (Qatar’s application).*” However, the International Court of Justice held that the arguments submitted by Qatar in the delimitation of the requirements of Article 84 of the Chicago Convention, when the application was submitted to the ICAO Council, justify the jurisdiction of the ICAO Council. The International Court of Justice ruled as follows (cit.):

“The Court considers that the disagreement between the Parties brought before the ICAO Council concerns the interpretation and application of the Chicago Convention and its Annexes and therefore falls within the scope of Article 84 of the Convention. The mere fact that this disagreement has arisen in a broader context does not deprive the ICAO Council of its jurisdiction under Article 84 of the Convention.”

- 1.48. The International Court of Justice supported its opinion by arguments adopted from and invoking its previous case-law (cit.):

“As the Court has observed in the past, ‘legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned’ (United States of America v. Iran), Judgment, I.C.J. Reports 1980, at 20, para. 37; see also Certain Iranian Assets (Islamic Republic of Iran v. United States of

America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), at 23, para. 36).⁴⁶

1.49. The International Court of Justice also noted that (cit.):

“Nor can the Court accept the argument that, because the Appellants characterize their aviation restrictions imposed on Qatar-registered aircraft as lawful countermeasures, the Council has no jurisdiction to hear the claims of Qatar. Countermeasures are among the circumstances capable of precluding the wrongfulness of an otherwise unlawful act in international law and are sometimes invoked as defences (see Gabčíkovo Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, at 55, para. 82).”

1.50. As concerns the arguments presented by the Appellants and based on the measures themselves, the International Court of Justice concluded (cit.):

“The prospect that a respondent [Appellant] would raise a defence based on countermeasures in a proceeding on the merits before the ICAO Council does not, in and of itself, have any effect on the Council’s jurisdiction within the limits laid down in Article 84 of the Chicago Convention. As the Court stated when considering an appeal from a decision of the ICAO Council in 1972.”⁴⁷

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⁴⁶ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 23-24, paragraph 48, <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).

⁴⁷ Judgment of the International Court of Justice of 14 July 2020 in *Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar*, at 24, paragraph 49, available at: <https://www.icj-cij.org/sites/default/files/case-related/173/173-20200714-JUD-01-00-EN.pdf> (accessed on 16 April 2024).