SCHOOL OF ADVANCED STUDY
UNIVERSITY OF LONDON

THE LEGALITY OF THE BLOCKADING STATES' AIRSPACE RESTRICTIONS AGAINST QATAR IN INTERNATIONAL LAW AND THEIR IMPACT ON THE PRINCIPLE OF STATE SOVEREIGNTY AND FIRS' DISTRIBUTION.

PhD

Bader Abdulhadi F A AL-Dosari

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Dedication

This work is dedicated to my supportive wife, and my children, Noora, Abdulhadi and Sara, who I hope will see this achievement as a source of inspiration and encouragement for their own future learning and academic pursuits. Your unwavering support has been the foundation of my journey.

I also wish to dedicate this thesis to the memory of my father, who, since my childhood, dreamed of the day I would graduate with my PhD and affectionately called me 'Dr. Bader' long before I ever reached this milestone. His belief in me was steadfast, and his guidance was a constant source of strength. Although he passed away during my final year, I had always hoped he would live to see this achievement. His legacy and love have carried me through this journey and will remain with me always.

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Abstract

In 2017, the Gulf Cooperation Council (GCC) witnessed an unprecedented escalation as Saudi Arabia, the United Arab Emirates, Egypt, and Bahrain severed diplomatic ties with Qatar, initiating comprehensive measures that included the closure of airspace and flight information regions (FIRs). This research delves into the legal ramifications of these restrictive measures, focusing solely on the aviation aspect. Methodologically, the study employs a mixed research approach, intertwining doctrinal and social legal methodologies. The key questions addressed include the legality of airspace restrictions, the validity of countermeasures, the responsibilities of states with FIRs, the relationship between the concept of FIR and the concept of state sovereignty, the impact on FIR distribution in the Arabian Gulf and the jurisdiction of the International Civil Aviation Organization (ICAO) Council. The thesis concludes that the blockading states' reliance on countermeasures lacks justification. Failure to prove Qatar's alleged wrongful acts, coupled with a lack of proportionality in their response, undermines the legality of their actions. Additionally, the restrictions imposed, including the denial of Air Traffic Services over the high seas, violate the Chicago Convention, highlighting a failure in fulfilling international legal obligations. The research challenges Bahrain's unilateral establishment of a buffer zone, arguing that it lacks legal basis due to its location over international waters and discriminatory targeting of Qatari aircraft. Consequences of these restrictions are explored, revealing a reshaping of FIRs in the Arabian Gulf, prompting a critical inquiry into the conflict between state sovereignty and FIR concepts. The study contends that FIRs, while granting effective control to the managing state, pose challenges to sovereignty, impacting national security and the ability to respond to threats. The emergence of the Doha FIR prompts a deeper examination of the tension between state exclusivity and FIR control. Addressing the jurisdictional dispute, the research asserts that the ICAO Council had jurisdiction under the Chicago Convention, despite the broader context of the dispute. The Council's adjudication is deemed in line with judicial propriety.

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Introduction

On Monday, 5 June 2017, Saudi Arabia, the United Arab Emirates, Egypt and Bahrain – henceforth referred to as the blockading states – announced they were cutting diplomatic ties completely with Qatar and started a fierce campaign of unilateral coercive measures on all fronts, marking a rapid and unprecedented escalation of tension and hostilities such as had never previously been experienced by Gulf Cooperation Council (GCC) member states. Among these restrictive measures was the closing of their airspace and their flight information regions (FIRs) over both their territories and the high seas. This prohibition, which extended to all Qatar-registered aircraft, denied the use of airspace over their territories and over international waters that fell under Bahrain's FIR; it also banned them from flying to or from the blockading states' airports or over their territorial airspace. Moreover, the blockading states also revoked the licences and operating permits of the national carrier of Qatar, Qatar Airways, which caused to it severe inconvenience. This closure was in the form of notices to airmen (NOTAMs) from the blockading states' respective civil aviation authorities. These measures were significant because the Bahrain FIR fully covered Qatar's territory and a considerable portion of the high seas surrounding it; this resulted in the closure of the rest of the airspace over the Arabian Gulf high seas. Also, even worse for Qatar, Bahrain unilaterally introduced what it called a buffer zone adjacent to its territorial waters and verbally threatened that Qatar-registered aircraft entering that zone would be met with miliary interception. This resulted in the shifting of all of Qatar's aircraft operations to Iranian FIRs. This zone was over international waters, which are open to access by all states, yet Qatar was prevented from such access. It was unclear whether this zone that Bahrain established was an air defence identification zone (ADIZ) or a no-fly zone. Each type of zone has a different purpose and legal standing, although they share highly debatable legality, especially if they are established over international waters.

Consequently, Qatar, in response to the air restrictions imposed on it, filed two applications and memorials with the International Civil Aviation Organisation (ICAO) Council on 30 October 2017 against the blockading states. On these applications, Qatar gave detailed background to the actions of each of the blockading states and provided a comprehensive statement of law, citing relevant international treaties such as the United Nations Charter, the Vienna Convention, the UN Convention on the Law of the Sea (UNCLOS), the Chicago Convention and

its annexes and International Air Services Transit Agreement (IASTA). The intention behind these applications was mainly to urge the ICAO Council to determine that the blockading states were in violation of their obligations under mainly the Chicago Convention and its annexes, but the other abovementioned treaties as well, and to deplore their violations of the fundamental principles contained in the Chicago Convention and its annexes and to urge them to withdraw all of their imposed restrictions on Qatar-registered aircraft and to comply with their obligations under the Chicago Convention.

On 19 March 2018, the blockading states, in accordance with ICAO rules, raised two preliminary objections before the ICAO Council. They argued that the ICAO Council did not have jurisdiction under the Chicago Convention and IASTA, claiming that the real issue between the disputing states was related to matters extending beyond the scope of the Chicago Convention. They also stated that Qatar failed to meet negotiation requirements before submitting its applications.

On 29 June 2018, after extensive oral hearings and briefs, the ICAO Council reached a decision rejecting the preliminary objections of the blockading states. This resulted in the blockading states exercising their right to appeal the decision of the ICAO Council, safeguarded by Article 84 of the Chicago Convention, and they submitted a joint application to the International Court of Justice (ICJ) on 4 July 2018. Their appeal was built on many things, including the argument that the dispute among the parties required the Council to address a question that falls outside its jurisdiction, namely, the lawfulness of the countermeasures. The blockading states characterised all their measures taken against Qatar as lawful countermeasures in response to Qatar's alleged violation of its international obligations, specifically its obligations under the Riyadh Agreements. Under international law, every wrongful act of a state entails the international responsibility of that state. However, there are situations that preclude the wrongfulness of conduct that may otherwise not be in conformity with the international obligations of the state concerned. Among these circumstances is countermeasures, which are actions states are entitled to take in response to the prior unlawful conduct of another state. Countermeasures are used to induce the target state to comply with its international obligations and implement state responsibilities. On this basis – and since Qatar allegedly breached its obligations under the Riyadh Agreements – the blockading states sought to use

countermeasures to induce Qatar to comply with its international obligations and to implement its responsibility.

However, this matter is not as simple as it may seem, as there are conditions and restrictions to this concept that the injured state has to comply with. These conditions include, but are not limited to, the existence of wrongful acts and the proportionality of the countermeasures, and only the injured state is entitled to use countermeasures.[1] Thus, states that use countermeasures take the responsibility of satisfying these conditions. Furthermore, in the issue at hand, Qatar strongly rejected these allegations as baseless, disingenuous, immaterial and easily falsifiable, suggesting that these accusations were used only to justify illegal restrictive measures.

These measures and countermeasures raised many questions, including the following:

- What is the position of international law regarding the legality of the blockading states' airspace restriction measures?
- Do these measures qualify as lawful countermeasures that meet all required conditions for countermeasures?
- Does the Chicago Convention allow the use of countermeasures?
- What are the responsibilities of a state entrusted with an FIR over its territory as well as over the high seas?
- What is the position of international law regarding the legality of the buffer zone established by Bahrain?
- What was the impact of the GCC crisis on the distribution of FIRs in the Arabian Gulf?
- Does the concept of FIRs contradict or degrade the concept of state sovereignty?
- Does the ICAO Council have jurisdiction to decide disputes among its contracting parties in matters relating to the Chicago Convention if these disputes occur in a wider matter outside the scope of the ICAO Council jurisdiction?

[1] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10).

The conceptual background of this thesis is anchored in three major areas of international law: countermeasures, FIRs, and the principle of state sovereignty, reflecting the order of analysis in this study. At the core of this research lies the doctrine of countermeasures, a central concept in international law that permits states to take otherwise unlawful actions to address previous wrongful acts by another state. This study begins by examining whether the restrictive measures imposed by the blockading states in 2017 meet the legal prerequisites for countermeasures, such as the existence of internationally wrongful acts, proportionality, and the contentious notion of collective countermeasures. The analysis follows the criteria outlined in the Articles on Responsibility of States for Internationally Wrongful Acts, exploring the evidence—or lack thereof—supporting the existence of wrongful acts by Qatar, as well as the proportionality of the blockading states' responses in terms of severity and scope.

Building upon this foundation, the thesis then explores the concept of FIRs within international aviation law, specifically the regulatory framework under the Chicago Convention and its annexes. FIRs, defined as airspaces within which states provide air traffic services, are governed by ICAO's recommendations, primarily found in Annex 11. While designed as technical zones for safety and navigation, FIRs can also serve as tools of geopolitical control, affecting sovereignty, particularly when they extend over international waters or another state's territory. This research assesses how FIRs were utilized during the 2017 GCC crisis, particularly focusing on Bahrain’s unilateral creation of a buffer zone over the high seas, which restricted Qatar-registered aircraft. The final aspect of this conceptual background addresses the principle of state sovereignty, a fundamental tenet of international law, traditionally denoting supreme authority within a territory, including over its airspace. However, international agreements like the Chicago Convention limit this sovereignty, creating potential conflicts when FIRs extend beyond national boundaries. The thesis critically examines how the events of 2017 challenged traditional notions of sovereignty, as the blockading states' measures not only violated the airspace rights of Qatar but also raised questions about sovereignty over FIR-designated airspace.

Building on this conceptual foundation, the thesis aims to examine the legality of the airspace restrictions imposed by the blockading states against Qatar during the 2017 GCC crisis, analysing these measures through the frameworks of international law, countermeasures, FIRs, and state sovereignty. The research seeks to determine whether these restrictions meet

the criteria for lawful countermeasures, comply with obligations related to FIRs, and respect the principles of state sovereignty. The central argument of this study is that the airspace restrictions were unlawful and disproportionate, failing to fulfil the necessary conditions for legitimate countermeasures. The measures imposed not only lacked proportionality but were based on unproven allegations of wrongful acts and involved collective countermeasures that remain controversial in international legal discourse. Consequently, these measures functioned more as coercive tactics than as lawful countermeasures, thereby violating Qatar's rights under the Chicago Convention. Furthermore, the thesis argues that the use of FIRs during the crisis, especially Bahrain's unilateral creation of a buffer zone over international airspace, infringed on Qatar's sovereign rights, deviating from the technical purpose of FIRs as defined by ICAO Annex 11. The research also addresses the ICAO Council's jurisdiction, concluding that its decision to hear the dispute under Article 84 of the Chicago Convention was valid, thereby supporting Qatar's legal stance. Ultimately, this thesis contends that the blockading states' actions not only breached international aviation law but also represented a misuse of legal mechanisms to exert geopolitical pressure.

Original Contribution

The novelty of this thesis lies in several key contributions to the field of international aviation law. First, it addresses the uniqueness of the 2017 GCC crisis, which represents a significant departure from typical aviation disputes. This crisis unfolded unexpectedly during a time of peace, without preceding war or overt political conflict. The measures taken, including severe airspace restrictions, were unprecedented in the history of ICAO, making this case a pivotal moment that expands the scope of international aviation law. Analysing this crisis from a fresh perspective, the thesis offers a comprehensive study that broadens the understanding of how international law functions in unexpected geopolitical conflicts. Second, this thesis challenges the conventional view that FIRs are purely technical and do not conflict with state sovereignty. By arguing that FIRs inherently create tensions with sovereignty due to the regulatory control they grant over another state's airspace, it re-evaluates the nature of sovereignty in the context of FIRs. The analysis of Bahrain's actions toward Qatar during the crisis illustrates this conflict, contributing to a deeper understanding of sovereignty's interaction with FIR management. Additionally, the thesis examines the evolving jurisdiction of the ICAO Council,

particularly how the International Court of Justice (ICJ) has recognized the Council's ability to address issues beyond traditional civil aviation law when necessary for dispute resolution. This expansion raises critical questions about state consent under the Chicago Convention and whether the ICAO Council's jurisdiction is extending beyond its original mandate. By addressing this emerging issue, the thesis makes a significant contribution to ongoing debates about the Council's role in international law. Finally, my thesis also sheds light on the possibility of strengthening the argument that ICAO could be seen as a self-contained regime. While I acknowledge that this assumption is not yet strong enough to definitively establish the ICAO as self-contained, my research shows that the expansion of the ICAO's jurisdiction could address some objections to applying the concept of a self-contained regime to the ICAO. This is an important area for future exploration, and my thesis lays the groundwork for that discussion.

Research methodology

In approaching the complexities of the 2017 GCC crisis and the subsequent imposition of air restriction measures on Qatar, this research adopts a mixed methods approach that blends both doctrinal and socio-legal methodologies. The doctrinal aspect involves a meticulous examination of legal principles and international agreements relevant to airspace restrictions. This foundational analysis encompasses key legal frameworks such as the United Nations Charter, the UNCLOS, the Chicago Convention, its annexes and IASTA, providing a solid theoretical basis for understanding the legality of these measures. This foundational analysis unravels the legal implications of the air restriction measures, shedding light on the rights and responsibilities of the involved states. By delving into the principles enshrined in these international agreements, the study aims to decipher the complex legal nuances governing the crisis and assess the constraints imposed by international law on the actions of the states in question. In a broader context, doctrinal methodology is a well-established research approach that involves the analysis of legal principles, statutes, and case law to understand

and interpret legal issues.[2] It serves as the backbone of this research, providing a robust foundation for assessing the legality of the air restriction measures imposed in 2017.

Complementing this legal scrutiny is the socio-legal dimension, which delves into the practical implications of these measures. This involves an exploration of factual information, including correspondence between governments and international organisations, geographical dynamics illustrated by maps and the examination of technical aspects related to FIRs. Socio-legal methodology expands the investigation beyond legal doctrines to encompass the real-world impact of legal issues on society.[3] It examines the interplay between law and society, considering social, political, and economic factors that influence or are influenced by legal processes.[4]

By intertwining these practical insights with legal principles, the research aims to offer a nuanced and comprehensive understanding of the intricate dynamics surrounding the crisis. This mixed methodology is not only designed to assess the legality of the imposed air restrictions within the confines of international law but also to capture the real-world impact on state sovereignty and the distribution of Flight Information Regions in the GCC region. By bridging the theoretical and practical aspects, this approach seeks to provide a holistic perspective, addressing the multifaceted dimensions of a crisis that transcends legal doctrines and extends into the intricate realities of international relations and aviation regulations.[5]

Thesis structure

This, then, is the background to my research, which will conduct a comprehensive analysis of these measures and countermeasures to answer all of the above-mentioned questions. In doing so, it will only focus on the air restrictive measures that were taken against Qatar and

[2] Conry EJ and Beck-Dudley CL, 'Meta-Jurisprudence: The Epistemology of Law' (1996) 33 American Business Law Journal 373-450. Also, Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 84. Hutchinson T, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 8 Erasmus Law Review 131

[3] Singh S, 'Relevance of Right to Information Act, 2005 in Socio-Legal Empirical Research' (2019) 1 CMR University Journal for Contemporary Legal Affairs 138.

[4] Mohamed K, 'Combining Methods in Legal Research' (2016) 11 The Social Sciences 5194.

[5] Creswell JW and Creswell JD, Research Design: Qualitative, Quantitative, and Mixed Methods Approaches (SAGE Publications 2022) 337.

will not include in its scope any other measures in other fields. It will be divided into four chapters, each of which will target these air restrictive measures from different angles.

Chapter 1 will start by providing background on the GCC as a regional organisation and then explore how this issue arose. The legality of the air restrictive measures will be assessed from different perspectives, starting with the compatibility of air restriction with international law in general and conventions governing airspace in particular. The rest of the chapter will be dedicated to the legality of the GCC crisis from the perspective of countermeasures, including its legal framework, conditions, and applications, with considerable focus on the proportionality of the countermeasures, the lawfulness of collective countermeasures and the notion of the Chicago Convention being a self-contained regime.

Chapter 2 will address the issue from the FIR perspective by first giving a presentation of the international rules and regulations applicable to FIRs, their definitions, how they are delineated, their legal implications and the extent to which they create obligations for states. I will then address what Bahrain called the buffer zone by discussing the two types of zones in international law: ADIZs and no-fly zones. An analysis of these two zones' objectives, states' practices and legality in international law (specifically the Chicago Convention, UNCLOS and customary international law) will be given to determine the legality of Bahrain's conduct. The final section will discuss the impact of the GCC crisis on the distribution of FIRs in the Arabian Gulf, the establishment of the Doha FIR, which was taken from the Bahrain FIR by a decision of the ICAO Council.

Chapter 3 will tackle the issue from the perspective of state sovereignty and its relationship with FIRs. As will be discussed, FIRs are not delineated based on national boundaries, which has triggered a debate over whether there is a conflict between these two concepts. To cover this debate, the chapter will be divided into two parts. The first part will deal with the concept of sovereignty itself – its status, content, legality and scope. The focus will be upon its territorial dimension and in particular its application and limitation on the airspace of states, outer space and the high seas. The second part will address the practical application of FIRs and disputes between states over them, which will finally be addressed as determining factor that determines whether a contradiction between these two concepts exists.

Chapter 4 will address the question of the ICAO Council's jurisdiction in general to decide the dispute at hand and any other future disputes among its contracting parties. It will be divided into two parts. The first will be dedicated to the ICAO as a UN agency, its history, purposes, responsibilities and features. The role of the ICAO Council will be important, as will the role of the ICAO Assembly and the historical role of the ICAO Council in dispute settlement among members of the ICAO. The topic of its jurisdiction will be discussed in depth, especially in relation to Articles 84 and 54 and the ICAO Rules for the Settlement of Differences. The second part will address the grounds for the appeal of the blockading states through discussions of three issues. The first issue to be discussed is the second ground of appeal by the blockading states, which is related to the ICAO Council's lack of jurisdiction to consider the case and the admissibility of Qatar's claims. The second issue will be the third ground of appeal relating to the failure of Qatar to meet the negotiation conditions contained in Article 84 of the Chicago Convention, as well as the procedural requirement in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences. The final issue will be about the first ground of appeal relating to the procedure adopted by the ICAO Council is flawed and in violation of the principle of due process.

1 Chapter 1: The legality of the blockading states' airspace restrictions against Qatar in international law from a countermeasures perspective

1.1 Introduction

The GCC crisis started when the blockading states began a comprehensive sanction campaign against Qatar, including a total airspace restriction that prevented Qatar from freely using its airspace over internal waters and from using the blockading states' national airspace and international waters that fell under their FIRs. This was characterised by the blockading states as a lawful countermeasure in response to Qatar's alleged violation of its international obligations, which is the main issue of this research. This chapter will start by providing background on the GCC as a regional organisation and then exploring how this issue arose. The legality of the airspace restrictions will be assessed from different perspectives, starting with the compatibility of the airspace restrictions with international law in general and conventions governing air space. The rest of the chapter will be dedicated to the legality of the GCC crisis from the perspective of countermeasures, including its legal framework, conditions and applications, with considerable focus on the condition of the proportionality of countermeasures, the lawfulness of collective countermeasures and the notion of a self-contained regime.

1.2 Background of the GCC history and current conflict

The GCC was created in May 1981 and comprises six member states: Saudi Arabia, Kuwait, Oman, Qatar, Bahrain and the United Arab Emirates. These states have close social, cultural, historical and religious ties, as well as a strong kinship among their citizens. All of these led to the creation of the GCC, the ultimate goal at the creation of which, as stated in Article 4 of its charter, is to achieve unity among member states through effective coordination, integration and interconnection.[6] This cooperation also extends to having and developing similar regulations in various fields, including, but not limited to, economics, finance, commerce, customs, communications, education, culture, health affairs, information, tourism and social,

[6] 'The Charter of the GCC' <https://www.gcc-sg.org/en-us/AboutGCC/Pages/Primarylaw.aspx> accessed 5 July 2021.

legislative and administrative affairs.[7] Another important factor underlining the existence of this regional system is security considerations subsequent to the Iran–Iraq War of 1980–1988.[8]

Throughout its history, the GCC has encountered serious political and security challenges; however, it has been able to overcome them and maintain cohesion.[9] Nevertheless, despite all the positive and lofty objectives stated in its charter, the GCC has failed to achieve one fundamental goal: unity. This failure can be clearly seen in projects the GCC endeavours to achieve, such as the confederation model, a unified currency and foreign policy, and even a defence policy.[10] Besides, the divergence of positions amongst GCC member states regarding the 'Arab Spring' was clearly a divarication, as it exemplified the first serious unprecedented dispute between Saudi Arabia, the United Arab Emirates and Bahrain on one side and Qatar on the other. In 2011, for instance, Qatar took a different position on Libya, siding with NATO allies. The states of Qatar and Oman were also drawn to political solutions rather than military intervention in Yemen.[11] However, these differences among the GCC member states remain different views, which is natural with such regional organisations. In March 2014, the GCC entered a new phase of disagreement that rapidly escalated to the withdrawal of the ambassadors of Saudi Arabia, the United Arab Emirates and Bahrain from Qatar. That incident was the first of its kind in the GCC's history. Qatar's actions were allegedly inconsistent with the GCC's agreements and were alleged to be non-compliant with the first Riyadh Agreement, which was signed on 23 November 2013 during a meeting of the GCC leaders in Riyadh. This agreement, which was no more than a signed handwritten paper, stated the following points:

> 1. No interference in the internal affairs of the Council's states, whether directly or indirectly. Not to give harbor or naturalize any citizen of the Council states that has an activity which opposes his country's regimes, except with the approval of his country; no support to deviant groups that oppose their states; and no support for antagonistic media.

[7] 'Objectives' <https://www.gcc-sg.org/en-us/AboutGCC/Pages/StartingPointsAndGoals.aspx> accessed 5 July 2021.
[8] Wafaa A Alaradi and Hasan A Johar, 'Gulf Cooperation Council: Structural and Political Challenges in Establishing a Unified Regional Gulf Identity (RGI)' (2021) 14 Contemporary Arab Affairs 78.
[9] ibid 77.
[10] ibid 79.
[11] 'Qatar Supports Political Solution to Yemeni Crisis' Ministry of Foreign Affairs <https://mofa.gov.qa/en/all-mofa-news/details/2016/09/21/qatar-supports-political-solution-to-yemeni-crisis-> accessed 10 July 2021.

2. No support to the Muslim Brotherhood or any of the organizations, groups or individuals that threaten the security and stability of the Council states through direct security work or through political influence.

3. Not to present any support to any faction in Yemen that could pose a threat to countries neighboring Yemen.[12]

Saudi Arabia and its allies accused Qatar[13] of violating this agreement, an allegation that Qatar strongly refuted, describing it as a baseless accusation and an excuse for a political vendetta unrelated to any violation of international law. The crisis lasted for about eight months before three of the boycotting countries announced the return of their ambassadors to Qatar on 16 November 2014, followed by the signing of a mechanism implementing the Riyadh Agreement on 23 November 2014.[14]

However, this dispute was not entirely solved, as, once again, on Monday, 5 June 2017, Saudi Arabia, the United Arab Emirates, Egypt and Bahrain (hereafter referred to as the blockading states) announced that they were cutting diplomatic ties with Qatar and started a series of fierce and harsh unilateral campaigns of measures that were seen coercive in all their respects, resulting in an unprecedented, rapid escalation of tension and hostilities that had never before been experienced between GCC member states. The blockading states, led by Saudi Arabia, mobilised as many countries as they could, using their influence to pressure Qatar to yield to their demands. It was a modest attempt that resulted in the Maldives, Mauritania, Djibouti, Comoros, Niger, Gabon, Senegal, Chad and Jordan joining up. The trigger for this crisis was the hacking of Qatar's national news agency with fabricated news, which was used as an excuse to cause a rift with the blockading states.[15] The allegations behind this crisis were the same as those of the 2014 crisis, but with more emphasis on alleged support of terrorism, interference in the blockading states' internal affairs, violation of the principle of non-intervention, dissemination of hate speech, incitement and 'funding and embracing terrorism, extremism

[12] 'Riyadh Agreement' United Nations (2013) <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280527ea2> accessed 10 July 2021.
[13] The same accusations were also used in the 2017 GCC crisis.
[14] Gaver CD, 'What Are the Riyadh Agreements?' (EJIL: Talk!, 1 July 2020) <https://www.ejiltalk.org/what-are-the-riyadh-agreements/> accessed 10 July 2021.
[15] 'Qatar Investigation Finds State News Agency Hacked: Foreign Ministry' *Reuters* (7 June 2017) <https://www.reuters.com/article/us-gulf-qatar-cybercrime-idUSKBN18Y2X4> accessed 11 July 2021.

and sectarian organisations'.[16] The state of Qatar strongly rejected all these allegations as baseless, disingenuous, immaterial and easily falsifiable, used only to justify the illegal airspace restrictions.[17] It is believed that the real reasons behind the GCC crisis were Qatar's determination to have an independent foreign policy and the blockading states' desire to keep Qatar in line with their positions politically and on other issues.[18]

The crisis of 2017 severely affected Qatar, as it involved a series of unilateral coercive measures on different levels, such as the closure of land, air and sea borders. Furthermore, Qatari citizens were expelled from the territories of the blocking states without exception, given only two weeks to leave, with prohibitions from entering or passing through blockading states' territories, resulting in brutal human rights violations. Nationals of the blockading states were also ordered to leave Qatar or face penalties. At first, the airspace restrictions had a considerable economic impact on Qatar, and its currency was subject to banks' manipulations through 'submitting fraudulent quotes to foreign exchange platforms based in New York, to manipulate New York-based indices, and disrupt financial markets in New York, where significant Qatari assets are held and many investors in Qatar are located'.[19] Moreover, the situation was so unusual that the citizens of the UAE were threatened with criminal charges if they sympathised with Qatar.[20] The escalation entered another phase on 22 June 2017, when the blockading states presented 13 demands to which Qatar had to concede as the only available option for lifting the airspace restrictions. These demands included, among other things, that Qatar scale down its relations with Iran, immediately shut down the Turkish military base in Qatar, shut down Al Jazeera channels and all of its affiliate stations, stop financing terrorism and pay an unspecified 'compensation for loss of life and other financial

[16] Jamal Hi Arsyad, 'International Law Study Concerning Termination of Diplomatic Relationships by Arab Countries against Qatar' (2017) 65 Journal of Law, Policy and Globalization 29.

[17] 'Written Proceedings | 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) Counter-Memorial of the Government of the State of Qatar | International Court of Justice' <Microsoft Word - FHE-DC-#190327-v18-Qatar_ICAO_Counter_Memorial_FINAL (icj-cij.org)> accessed 6 October 2021.

[18] Sultan Barakat, Sansom Milton and Ghassan Elkahlout, 'The Impact of the Gulf Crisis on Qatar's Humanitarian Sector' (2020) 44 Disasters 65.

[19] 'The State of Qatar Files Lawsuit Against Currency Manipulators in New York and London' (Government Communications Office, 8 April 2019) <https://www.gco.gov.qa/en/2019/04/08/the-state-of-qatar-files-lawsuit-against-currency-manipulators-in-new-york-and-london/> accessed 13 July 2021.

[20] 'Bahrain Detains Citizen for Sympathising with Qatar: State Media' (Middle East Eye édition française) <http://www.middleeasteye.net/fr/news/bahrain-detains-citizen-sympathising-qatar-agency-reports-458828410> accessed 13 July 2021.

losses caused by Qatar's policies'.[21] However, Qatar rejected these demands completely, stating through its Minister of Foreign Affairs that 'these demands are meant to infringe on the sovereignty of the state of Qatar, shut down the freedom of speech and impose auditing and probation mechanisms for Qatar.'[22] Afterwards, the 13 demands were modified to six general principles, all of which placed great emphasis on countering the financing of terrorism and combating extremism.[23] The deepest conflict in the history of the GCC organisation ended on 5 January 2021, when leaders of the GCC countries met in Saudi Arabia at the Al Ula summit, marking the end of the crisis. The airspace restrictions were lifted, and diplomatic relations were restored as a result of signing the Al-Ula Declaration.[24]

1.3 The conformity of blockading states' airspace restrictions with international law

Among the massive restrictive measures taken by the blockading states was the closing of their airspace as well as their FIRs on both territories and the high seas. This prohibition, which extended to all Qatari-registered aircraft, banned them from flying to or from their airports or over their territorial air space, which caused severe inconvenience for Qatar Airways, the national carrier of Qatar.[25] Moreover, all licences and operating permits for the national carrier of Qatar in the blockading states were revoked.[26] The operational costs of Qatar Airways were

[21] Wintour P, 'Qatar Given 10 Days to Meet 13 Sweeping Demands by Saudi Arabia' *The Guardian* (23 June 2017) <https://www.theguardian.com/world/2017/jun/23/close-al-jazeera-saudi-arabia-issues-qatar-with-13-demands-to-end-blockade> accessed 15 July 2021.

[22] Twitter DP, 'Al Jazeera Granted 48-Hour Stay of Execution as Qatar Given Extension to Saudi-Led Ultimatum' *Press Gazette* (3 July 2017) <https://pressgazette.co.uk/al-jazeera-granted-48-hour-stay-of-execution-as-qatar-given-extension-to-saudi-led-ultimatum/> accessed 15 July 2021. See also 'GCC Crisis' (*Government Communications Office*) <https://www.gco.gov.qa/en/focus/gcc-crisis/> accessed 15 July 2021.

[23] Barakat (n 18) at 68.

[24] The Al-Ula Declaration, not only brought an end to the diplomatic rift, but it also had broader implications. One of the significant points of the Declaration was the suspension of all international disputes in all international legal forums, including the dispute before the ICAO Council. This meant that any ongoing legal disputes between the involved parties, including those related to aviation and airspace, were put on hold, allowing for a fresh start and a renewed focus on resolving differences through dialogue and peaceful means. See 'UNTC' <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805b2870> accessed 24 July 2021.

[25] Request for Consultations by Qatar — Saudi Arabia – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WTO Doc. WT/DS528/1, G/L/1182 S/L/417, IP/D/37 (August 4, 2017). Request for Consultations by Qatar — United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WTO Doc. WT/DS526/1, G/L/1180 S/L/415, IP/D/35 (August 4, 2017). Request for Consultations by Qatar — Bahrain – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WTO Doc. WT/DS526/1, G/L/1180 S/L/415, IP/D/35 (August 4, 2017).

[26] 'Qatar Airways Launches Multibillion Dollar Investment Arbitrations against the UAE, Bahrain, Saudi Arabia and Egypt' (*Qatar Airways* 22 July 2020) <https://www.qatarairways.com/en/press-releases/2020/July/qatarairwaysarbitrations.html> accessed 24 July 2021.

severely affected by the airspace restrictions, with huge disturbances to its global operations and incurring considerable costs due to the rerouting of its flights.[27] For instance, the flight time between Doha and Muscat in Oman increased by one hour due to the need to use Iran's air space,[28] and the flight between Doha and São Paulo was lengthened by 1,088 miles, which added two and a half hours of flight time.[29] The same can be said about most Qatar Airways flights. Qatar Airways claimed that it incurred damages worth at least $5 billion[30] due to delays, rebooking and additional fuel for the rerouting. Also, the fee for using Iranian air space, which Qatar Airways had to use considerably due to the airspace restrictions and the conflict in Iraq and Syria, was $2000 per flight (as of 2015).[31]

The blockading states characterised these measures as lawful countermeasures permissible in international law for injured states, while Qatar asserted that these measures were not compatible with international law, mainly the Chicago Convention and the UN Convention on the Law of the Sea (UNCLOS). The issue of countermeasures will be discussed thoroughly in the next section; therefore, this section will address the position of international law with regard to the measures taken by blockading states.

As a preliminary statement, the UN Charter obligates states to fulfil their obligations to treaties to which they are parties in good faith.[32] This is reflected in both Article 2(2) and the Preamble, which is an important element to be used for the interpretation of the letter and spirit of any international treaty.[33] Moreover, the UN Convention on the Law of Treaties states that 'every treaty in force is binding upon the parties and must be performed by them in good faith'.[34] To that extent, Article 27 prevents states from using their internal laws as an excuse to escape

[27] Abeyratne R, 'Politics of Air Transport: The Qatar Issue' (2017) 17 Issues in Aviation Law and Policy 179.
[28] ibid.
[29] 'Three Maps Show How the Qatar Crisis Means Trouble for Qatar Airways' *Washington Post* (June 7, 2017) <https://www.washingtonpost.com/news/worldviews/wp/2017/06/07/three-maps-explain-how-geopolitics-has-qatar-airways-in-big-trouble/> accessed 24 July 2021.
[30] Qatar Airways (n 26).
[31] Washington Post (n 29).
[32] The principle of good faith is widely recognized in customary international law, which has been articulated in many treaties, see Jung Y and Lee SH, 'Legacy of He Byrd Amendment Controversies: Rethinking the Principle of Good Faith, The' (2003) 37 Journal of World Trade 928. See also, Mitchell AD, 'Good Faith in WTO Dispute Settlement' (2006) 7 Melbourne Journal of International Law 342-344.
[33] United Nations, Charter of the United Nations, 1945, 1 UNTS XVI <https://www.refworld.org/docid/3ae6b3930.html> accessed 11 September 2021.
[34] 'United Nations Convention on the Law of Treaties, Signed at Vienna 23 May 1969, Entry into Force: 27 January 1980' (27 January 1980) <https://www.jus.uio.no/lm/un.law.of.treaties.convention.1969/26.html> accessed 12 January 2022.

from their international responsibilities, signifying the sanctity of international obligations arising from treaties.[35] Moving into a more specific area of international law is the UNCLOS. Qatar alleged that the blockading states violated UNCLOS when they prevented all Qatari-registered aircraft from flying over their FIRs above the high seas. The basis of Qatar's claim is Article 87, which gives all states the freedom to a bundle of rights over the high seas, among which are the freedom of navigation[36] and the freedom of overflight.[37] The freedom of overflight is not just restricted to the high seas; it also includes flying over the Exclusive Economic Zone.[38] Moreover, these freedoms are given to all states equally, whether coastal or landlocked.[39] Also, as will be discussed in chapter 3, the high seas are considered *res communis*, the property of no one, owned by humankind as a whole and not subject to any state's sovereignty, as clearly stated in Article 137 of the UNCLOS. That having been said, it is very important to mention that the freedom of the high seas is not absolute, as they must be exercised with reasonable or due regards principle,[40] as well as they are used for peaceful purposes.[41] Moreover, the freedom of overflight over the high seas is regulated, and all ICAO rules and procedures must be complied with by states, as stated in Article 12 of the Convention, as well as rules of the air stipulated in Annex 2.[42] Therefore, international law

[35] Dörr O and Schmalenbach K, 'Article 27. Internal Law and Observance of Treaties', in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 453 <https://doi.org/10.1007/978-3-642-19291-3_30> accessed 12 January 2022.

[36] '31363 United Nations Convention on the Law of the Sea. Concluded at Montego Bay on 10 December 1982' (1994) 1833 United Nations Treaty Series 3 art 87 (a).

[37] ibid art 87 (b).

[38] Ibid article 58 (1).

[39] Cogliati-Bantz V, 'Freedom (?) of the High Seas: Some Preliminary Remarks on a Venerable Old Concept Special Volume: Selected Papers Presented at the ILA 78th Biennial Conference Sydney, 19-24 August 2018' (2018) 25 Australian International Law Journal 67.

[40] UNCLOS (n 36) art 87 (2).

[41] Bernard Oxman, 'The High Seas and the International Seabed Area' (1989) 10 Michigan Journal of International Law 537. See also Davenport T, 'The High Seas Freedom to Lay Submarine Cables and the Protection of the Marine Environment: Challenges in High Seas Governance Symposium on Governing High Seas Biodiversity: Essay' (2018) 112 AJIL Unbound 139; Akyoo FL, 'The Concept of 'High Seas' and the Legal Principles Governing Jurisdiction over Ships Exercising the Freedom of the High Seas' (2012) 1 Tuma Law Review 209; Wang Y, 'Reasonable Restrictions on Freedom of High Seas by "Marine Protected Areas on the High Seas": An Empirical Research Issue Focus: Legal Control of Human Activities beyond National Jurisdiction' (2019) 12 Journal of East Asia and International Law 245; Pedrozo P, 'Maintaining Freedom of Navigation and Overflight in the Exclusive Economic Zone and on the High Seas: 25th UNCLOS Anniversary' (2019) 17 Indonesian Journal of International Law 477-494; Cogliati-Bantz VP, 'Freedom of the High Seas and Extent of Coastal State Jurisdiction: Reflections on the Norstar Case' (2020) 5 Cambridge Law Review 1.

[42] 'Convention on International Civil Aviation, Chicago, 7 December 1944 Chapter VI: International Agreements on Civil Aviation: 27' (1946) 45 International Law Studies Series, US Naval War College 349.

does not allow states to claim sovereignty over the high seas, nor does it allow states to prevent other states from the freedom mentioned above.

Coming to the treaty most related to the topic, Qatar claimed in its counter-memorial before the ICJ that 'Joint Appellants imposed the aviation prohibitions in violation of their obligations under the Chicago Convention and its Annexes.'[43] This claim was based on multiple articles of the Chicago Convention and its Annexes. The Convention begins with the Preamble, which is used fundamentally for the interpretation of the spirit of the conventions and states that 'it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends.'[44] The philosophy mentioned in the Preamble conveys the message that the development of international civil aviation can play a crucial role in preserving friendship and understanding among the nations of the world, while the abuse of international civil aviation can become a 'threat to the general security'[45].[46] The Preamble consists of four pillars: peace and friendship through aviation; safety; economical and orderly air transport.[47] It is worth mentioning that the Preamble was invoked on numerous occasions on each of these pillars by the ICAO Assembly. For instance, in the 15th Session of the Assembly (Montreal, 16 June–22 July 1965), the Assembly adopted Resolution A15-7 (Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa), urging South Africa to comply with the objectives of the Convention.[48] The Assembly stated

[43] Counter-Memorial of the Government of the State of Qatar (n 17) at 45.
[44] Chicago Convention (n 42) Preamble.
[45] ibid.
[46] Abeyratne R, 'Article 1 Sovereignty' in Ruwantissa Abeyratne (ed), *Convention on International Civil Aviation: A Commentary* (Springer International Publishing 2014) 43, <https://doi.org/10.1007/978-3-319-00068-8_2> accessed 28 November 2021.
[47] Abeyratne R, *Convention on International Civil Aviation: A Commentary* (Springer International Publishing 2014), 5 <http://link.springer.com/10.1007/978-3-319-00068-8> accessed 28 November 2021.
[48] 15th Session of the Assembly, International Civil Aviation Organization https://www.icao.int/Meetings/AMC/ArchivedAssembly/en/a15/wpno.htm accessed 21 June 2022. See also Assembly Resolution at the 17th Session of the ICAO Assembly (Montreal, 16–13 June 1970), wherein the Assembly adopted Resolution A 17-1 (Declaration by the Assembly) All Archived Assembly Meetings (1st to 34th) (icao.int). In the same session (Vienna, 15 June–7 July 1971), the Assembly adopted Resolution A 18-4 (Measures to Be Taken in Pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in Relation to South Africa). At its 19th (Extraordinary) Session (New York, 27 February–2 March 1973), the ICAO Assembly adopted Resolution A19-1, which condemned Israel. At its 20th (Extraordinary) Session (Rome, 28 August–21 September 1973), the ICAO Assembly adopted Resolution A20-2 (Acts of Unlawful Interference with Civil Aviation). On the safety element, the ICAO Council on 4 June 1973 adopted a resolution that recalled the adoption by the United Nations Security Council of Resolution 262 in 1969, which condemned Israel for its premeditated action against Beirut Civil Airport, which resulted in the destruction of 13 commercial and civil aircraft. On the economic element, ICAO Assembly Resolution A21-28 (International Air Services Transit

that the objective of the Convention was in reference to Article 44, which emphasised the fundamental aims of the ICAO:

> develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to (a) Insure the safe and orderly growth of international civil aviation throughout the world; (b) Encourage the arts of aircraft design and operation for peaceful purposes; (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation; (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; (e) Prevent economic waste caused by unreasonable competition; (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines; (g) Avoid discrimination between contracting States; (h) Promote safety of flight in international air navigation; (i) Promote generally the development of all aspects of international civil aeronautics.[49]

This illustrates the importance of the compliance of states with the aims and objectives of both the Preamble and Article 44 of the Convention. While the Preamble to a treaty provides interpretative guidance and establishes the overarching principles of the agreement, it is generally not considered legally binding in the same way as the substantive articles of the treaty. Therefore, it is not typically regarded as a provision that can be 'violated.' However, a breach of the underlying principles of the Preamble could potentially be used as evidence to demonstrate non-compliance with the broader purpose of the treaty.[50] Similarly, Article 44 of the Chicago Convention, which sets out the aims of the ICAO, establishes guiding principles rather than strict obligations. While it is difficult to consider a direct 'violation' of Article 44, actions that undermine the ICAO's aims, such as discriminatory practices or failure to ensure safe and orderly international air navigation, could be argued as inconsistent with the obligations to uphold the Convention's spirit and objectives.[51]

Agreement), adopted by the 21st Session of the Assembly (Montreal, 24 September–15 October 1974), quoted the Preamble in part and recognized that one of the objectives of the Chicago Convention was that international air transport services may be operated soundly and economically.

[49] Chicago Convention (n 42) art 44.
[50] Vienna Convention on the Law of Treaties (n 34) Art. 31.
[51] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 515-523.

The second allegation that Qatar held against the blockading states is the alleged violation of Article 2 of the convention by prohibiting all Qatari-registered aircrafts from flying over their FIRs above the high seas. Article 2 of the Convention recognises that states' sovereignty extends only over their territory, whether land or sea. However, states can be entrusted by the ICAO Council to provide air traffic services (ATS) over assigned portions of FIRs over the high seas, though this allocation is not to be understood as an extension of their territories.[52] Therefore, states must fulfil the FIR responsibilities entrusted to them by the ICAO to all aircraft without any discrimination.[53] Qatar's third allegation was that the measures of the blockading states were a misuse of civil aviation for purposes inconsistent with the objective of this Convention.[54] As mentioned above, the Preamble of the Convention aims to promote the development of international civil aviation through peace and friendship among the people of the world and prevent misuse for any contrary purpose. However, it must be noted that the main intent of Article 4 was preventing states from using civil aviation as a tool to threaten the general security of other nations.[55]

Moreover, Qatar alleged that the blockading states' denial of the right to non-scheduled flight[56] over their territories to all Qatari registered aircraft was not in compliance with the Convention, specifically Article 5.[57] According to this Article, contracting states grant to all aircraft of other contracting states, including non-scheduled services, the right to 'make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission'.[58] By virtue of Article 5, Qatari aircraft have been granted the right to operate non-scheduled passenger and cargo flights into the blockading states' territory or transiting over their air space.[59] Furthermore, Qatar's claim was limited not only to non-scheduled flights but also to scheduled flights. The Convention clearly

[52] Ibid, Annex 11 – Air Traffic Services, para 2.1.2. Additionally, the issue of state sovereignty and FIRs will be extensively discussed in Chapter 3.
[53] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 131- 136.
[54] Chicago Convention (n 42) art 4.
[55] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 91.
[56] Non-scheduled flights are commercial air flights that do not possess the characteristics of scheduled flights, such as charter flights.
[57] Chicago Convention (n 42) art 5.
[58] Chicago Convention (n 42) art 5. See also R Abeyratne , 'Article 5 Right of Non-Scheduled Flight' in Ruwantissa Abeyratne (ed), *Convention on International Civil Aviation: A Commentary* (Springer International Publishing 2014) 95-100, <https://doi.org/10.1007/978-3-319-00068-8_6> accessed 28 November 2021.
[59] Talmon S, 'The Recognition of the Chinese Government and the Convention on International Civil Aviation' (2009) 8 Chinese Journal of International Law 159. Franklin M and Porter S, 'Sovereignty over Airspace and the Chicago Convention: Northern Cyprus Case Note' (2010) 35 Air and Space Law 67.

states that scheduled flights have to have prior permission from the concerned state.[60] Generally speaking, such permission takes the form of a bilateral or multilateral air service agreement in which states grant each other the rights and entitlements they wish to exchange.[61] Qatar has concluded with every one of the blockading states bilateral air service agreements based on the Convention, in which these states granted all Qatari registered aircraft the right of scheduled flights to and from their territories. Not to mention that all of the states – except Saudi Arabia – are parties to the International Air Services Transit Agreement (IASTA).[62] According to IASTA Article I, Section 1, each of the contacting states grants the other contracting states the right to fly over its territory as well as the right to make a stop for non-traffic purposes such as fuelling or emergency landing.[63] These rights were also given in the bilateral agreements between Qatar and the blockading states, as well as other entitlements, such as 3rd and 4th traffic rights.[64] So, from Qatar's point of view, the denial of the right of scheduled and non-scheduled flight seemed out of line with the Convention, IASTA and the bilateral agreements.

Furthermore, Qatar alleges that the blockading states' measures were discriminatory and inconsistent with their obligations under the Convention. The Convention does not allow discrimination between its contracting states, which is one of its objectives mentioned above. This is reflected throughout its articles,[65] among which is Article 9, which gives states the right to restrict or prohibit flight over any part of their territory; however, certain conditions must be met for such rights. First, the prohibition must be exceptional during an emergency or in the interest of public safety. Second, it must be applied without distinguishing between the

[60] Chicago Convention (n 42) art 6.

[61] Ruiz-Dimalanta RT, 'Overview of the Bilateral and Multilateral Regulation of International Air Transport' (2002) 18 World Bulletin: Bulletin of the International Studies of the Philippines 79.

[62] International Air Services Transit Agreement (1944) 84 UNTS 389 (7 December 1944) (entry into force: 30 January 1945).

[63] ibid.

[64] Five freedoms of traffic rights were formally recognised. The first right is the right of an airline of state A to overfly state B to get to state C. The second right is the right of an airline of state A to land in B for fuel or maintenance with no passenger or cargo discharge or pick-up. The third right is that of an airline of state A to discharge passengers from A in B. The fourth right is that of an airline of state A to carry traffic back to A from B. The fifth freedom is the right of an airline of state A to collect passengers from state B and take them to state C see more, International Civil Aviation Organization (ICAO), 'Freedoms of the Air' <https://www.icao.int/pages/freedomsair.aspx> accessed 20 December 2020.

[65] This point will be addressed in section 4.2.4, The applicability of Article 55: lex specialis in the GCC crisis.

nationalities of the aircraft of all contracting states.[66] Neither condition was met in the GCC crisis: it was not stated or claimed by the blockading states that the their restrictive measures were taken for the interest of public safety, nor did it occur during an emergency of any kind, and it was launched solely against Qatari-registered aircraft.[67] Also, the Convention mandates that the rules over the high seas are only those determined by the Convention itself.[68] Among these rules are the Rules of the Air set out in Annexe 2, which includes the responsibilities of states to provide ATS in their FIRs, and those must be performed without any discrimination. States have undertaken under Article 37 to secure the highest degree of conformity with the ICAO Standards, and if a state is unable to comply with these Standards, it is obligated to file a difference with the ICAO Council with under Article 38. Qatar claimed that blockading states did not implement these standards, nor did they file any differences under Article 38.[69]

Finally, Qatar claimed that the Convention does not allow any deviation from its obligations except situations that fall under Article 89 as a derogation clause. This means that the blockading states can only derogate from their obligations (referring to all the articles of the Convention listed above) if Article 89 applies to the GCC crisis. This article allows states to deviate from the provisions of the Convention in the case of war or in a duly declared national emergency, for which the ICAO Council must also be notified.[70] For example, this article was invoked by Iraq when it informed the Council of ICAO that a state of emergency was declared on 14 May 1948 and all Israeli aircraft were denied the right to fly over the territorial air space of Iraq.[71] Egypt also invoked this article on the same footing as Iraq, preventing Israeli aircraft from overflying Egyptian territory.[72] Both conditions were met by this event when Article 89 was invoked, as there was a declared emergency by the state concerned and a notification was sent to the ICAO Council. However, unlike these examples of Iraq and Egypt, none of these conditions were applicable in the GCC crisis, as there was no war, nor was any national emergency declared or any notification sent to the ICAO council. Thus, it can be said that

[66] Chicago Convention (n 42) art 9.
[67] Counter-Memorial of the Government of the State of Qatar (n 17) at 76.
[68] Chicago Convention (n 42) art 12.
[69] Counter-Memorial of the Government of the State of Qatar (n 17) at 76.
[70] Chicago Convention (n 42) art 89. See also Geib R, 'Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German Luftsicherheitsgesetz' (2005) 27 Michigan Journal of International Law 251.
[71] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 677.
[72] Abeyratne R, 'Politics of Air Transport: The Qatar Issue' (2017) 17 Issues in Aviation Law and Policy 191.

states can have the freedom of derogation from the Convention if such derogation falls under the situations mentioned in Article 89; otherwise, the states are obliged to comply fully with their obligations under the Convention.

1.4 The legality of airspace restrictions by blockading states: an examination through the lens of countermeasures in international law

1.4.1 Introduction

It has been discussed in the previous section that Qatar alleged that the blockading states were in violation of their international obligations, such as those stated in UNCLOS and the Chicago Convention, with the measures they took against Qatar during the GCC crisis. This leads to a question of what the basis of these states' measures is. The blockading states gave their answers in the memorials that they submitted during their written procedures before the ICJ in 2018 with regard to the legality of their measures, including the air space restrictions. They based the legality of their actions on the lawfulness of countermeasures in international law. They have repeatedly argued that whatever they have done was lawful and whatever responsibilities or wrongfulness arose due to their actions are precluded from consequences because their actions are characterised by these states as lawful countermeasures. For example, the blockading states stated:

> The airspace restrictions beginning on 5 June 2017 – which form the subject-matter of Qatar's Application before the ICAO Council – were adopted by the Appellants as countermeasures to induce the cessation by Qatar of its prior violations of fundamental obligations under international law. Qatar is in breach of the principle of non-intervention and, with respect to terrorism and extremism, particularly its obligations under the Riyadh Agreements concluded for the specific purpose of putting an end to such unlawful conduct.[73]

Since the countermeasures play a vital role in determining the legality of the blockading stated' airspace restrictions, this section will address the lawfulness of countermeasures in international law, its legal framework, its conditions and its application. Special emphasis will

[73] '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): Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates' International Court of Justice (2019) 14-15, <https://www.icj-cij.org/public/files/case-related/173/173-20181227-WRI-01-00-EN.pdf> accessed 6 February 2021.

be given to the application of the principle of proportionality, collective countermeasures and the maxim of *lex specialis*, all of which will be used as a determining factor to prove whether or not the countermeasures were applied in a lawful and acceptable manner according to international law.

1.4.2 The concept of countermeasures in international law and its limitations and conditions

Pursuant to Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[74] 'Every internationally wrongful act of a State entails the international responsibility of that State.'[75] This basic principle deals with the legal consequences of internationally wrongful acts of states. The responsibility of a state arises from conduct that may include actions or omissions or a combination of both attributable to a state that breaches an international obligation.[76] This basic principle has been applied by the ICJ to numerous cases and advisory opinions, such as in the Corfu Channel case,[77] in the Military and Paramilitary Activities in and against Nicaragua case,[78] in the Gabčíkovo-Nagymaros Project case,[79] and in the Interpretation of Peace Treaties (Second Phase).[80] All of these orbit around the idea that any violation of any obligations by a state gives rise to the responsibility of that state, thus resulting in establishing a legal relation between the injured state and the wrongdoing state. However, there are situations that preclude the wrongfulness of conduct that may otherwise not be in conformity with the international obligations of the state

[74] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10). This article is an effort to codify the existing basic international law on the responsibility of States for their internationally wrongful acts.

[75] ibid art 1. Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, 10, 28. See also S.S. 'Wimbledon', 1923, PCIJ, Series A, No 1, 15, 30; Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, PCIJ, Series A, No 9, 21; ibid., Merits, Judgment No 13, 1928, PCIJ, Series A, No 17, 29. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, 174, 184. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, 221.

[76] ARSIWA (n 74) art 2. See also Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford, Clarendon Press, 1983) 132–166; Ruys T, 'Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework' (Social Science Research Network 2016) SSRN Scholarly Paper ID 2760853 , ,12 <https://papers.ssrn.com/abstract=2760853> accessed 6 October 2021; Ardalan A and Safa ST, 'The Concept and Status of Countermeasures and Limitations of Resorting to International Law' (2014) 22 Journal of Law, Policy and Globalization 85.

[77] Corfu Channel Case (United Kingdom v. Albania), Judgment (Merits) [1949] ICJ Rep 23.

[78] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment (Merits) [1986] ICJ Rep 14, para 283, 292.

[79] 'Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) - Order Case' (1997) 1994 International Court of Justice Report of Judgments, Advisory Opinions and Orders, para 47, 38.

[80] Refugees UNHC for, 'Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; Second Phase' (Refworld) <https://www.refworld.org/cases,ICJ,4023a1fa2.html> accessed 29 May 2022

concerned.[81] Among these circumstances[82] is countermeasures, which are actions states are entitled to take in response to the prior unlawful conduct of another state.[83] Countermeasures have been defined as follows:

> a concept within the general area of state responsibility for internationally wrongful acts, referring to proportional and unilateral non-forcible measures which an injured state may take in response to another state's wrongful act so as to induce that state to cease its conduct, to make reparation and – where appropriate – to offer assurances and guarantees of non-repetition.[84]

The ARSIWA[85] states that the objective of the countermeasures is for it to be a mechanism of inducing the target state to comply with its international obligations and to implement state responsibility.[86] The wording 'induce' conveys that these measures have the capability of coercing the target state to pressure it to stop its wrongful behaviour.[87] This aspect was present in the work of the second Special Rapporteur, Mr Ago, as before the introduction of the term 'countermeasure', he used the term 'sanctions' as a mechanism of inflicting pain to achieve compliance of the target state with its international obligations.[88] The lawfulness and the permissibility of countermeasures is rooted in customary law,[89] however, there are conditions and restrictions to this concept that the injured state has to comply with, as

[81] ARSIWA (n 74) 71.
[82] There are six circumstances: consent (art 20), self-defence (art 21), countermeasures (art 22), force majeure (art 23), distress (art 24) and necessity (art 25).
[83] ARSIWA (n 74) art 22. See also Rosenstock R, 'The ILC and State Responsibility' (2002) 96 The American Journal of International Law 792.
[84] Boleslaw Adam Boczek, *International Law: A Dictionary* (Scarecrow Press 2005) 45. See also Gabčíkovo-Nagymaros Project case (n 79) 55, para. 83; Portuguese Colonies case (Naulilaa incident), UNRIAA, vol. II (Sales No. 1949.V.1), 1011, 1025–1026 (1928); Air Services Agreement of 27 March 1946 (*United States v France*), Reports of International Arbitral Awards, vol. XVIII, 416 (1979), 443, para 81.
[85] This is an effort to codify the existing international law on the consequences of states breaching their international obligations.
[86] ARSIWA (n 74) art 49(1). See also Elagab OY, 'The Legality of Non-Forcible Counter-Measures in International Law' (University of Oxford 1986) 79, <https://ora.ox.ac.uk/objects/uuid:bbb45168-8338-447a-bf4a-fe4e47834e3e> accessed 3 November 2021.
[87] Hofer A, 'The Proportionality of Unilateral 'Targeted' Sanctions: Whose Interests Should Count?' (2020) 89 Nordic Journal of International Law 411.
[88] 'Addendum - Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part 1) 15. See also Damrosch LF, 'The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts' (2019) 46 Ecology Law Quarterly 95.
[89] Proukaki EK, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (Routledge 2009) 71.

stipulated in the ARSIWA. Thus, the following sections will focus on some of the main conditions and limitations of countermeasures.

A. The existence of internationally wrongful acts

To start with, the use of countermeasures presupposes the existence of wrongful acts, which is deemed to be a basic requirement for countermeasures to be lawful. This was emphasised by the Special Rapporteur, Mr Arangio-Ruiz, in his Third and Fourth Reports on State responsibility. The existence of wrongful acts should be the first prerequisite for a lawful resort to countermeasures.[90] However, he clarified that the establishment of internationally wrongful acts does not necessarily require an objective decision from an arbitral or judicial procedure. Furthermore, it does not imply the need for a prior agreement between the injured state and the wrongful state regarding the existence of such wrongful acts.[91] Nevertheless, any state that resorts to countermeasures on the presumption that the other state has committed a wrongful act 'will do so on its own risk'.[92] Such risk would be that the alleged injured state will be held responsible if this action alleged against the wrongful state is proven not to have occurred or if its rights have not been violated.[93] The report of the International Law Commission (ILC) in its 44th session in 1992 recognised the pre-existence of an internationally wrongful act as a *sine qua non* for the lawfulness of countermeasures.[94] So, the question arises as to what constitutes an international wrongful act of a state. Article 2 of the ARSIWA has supplied the answer that the acts or the omission should meet two criteria: the wrongful acts must be assigned to the state being subjected to countermeasures under international law, and such acts must constitute a breach of an international obligation in force.[95] These criteria have been referred to by the ICJ on multiple occasions, such as the United States Diplomatic and Consular Staff in the Tehran case, which stated:

> [f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or

[90] Arangio-Ruiz G, 'Third Report on State Responsibility' 19, <https://digitallibrary.un.org/record/114841?ln=en> accessed 20 March 2022. Arangio-Ruiz G 'Fourth Report on State Responsibility' 12, < http://www.gaetanoarangioruiz.it/wp-content/uploads/2017/04/4th_rep-GAR.pdf > accessed 20 March 2022.
[91] ibid Arangio-Ruiz Fourth Report 12.
[92] ibid.
[93] ibid.
[94] United Nations, *Report of the International Law Commission on the Work of Its Forty-Fourth Session, Yearbook of the International Law Commission 1992*, Vol. 2 Part 2 (United Nations 1995) 25, para 166.
[95] ARSIWA (n 74) art 2.

incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[96]

Once these two criteria are met, the actions of the state in question are regarded as wrongful acts and entail its international responsibility.[97] Therefore, the starting point should be to address the wrongful acts that were alleged against Qatar by the blockading states and whether these accusations qualified as wrongful acts in international law; then, a conclusion can be drawn as to whether or not these measures are deemed permissible countermeasures that could preclude the wrongfulness of the actions of the blockading states.

B. The blockading states' justification

The cornerstone on which the blockading states based the legality of their actions is Qatar's alleged violation of the Riyadh Agreements and their Implementing Mechanism.[98] The blockading states' accusations against Qatar are reflected into three main points: Qatar supports the Muslim Brotherhood of Egypt and other extremists, failure to extradite or prosecute 'terrorists' and spreads hate speech and incitement of violence on Al Jazeera.[99] With regards to the first point, Qatar's alleged violation is that it did not allow the extradition of 'the Muslim Brotherhood leader Al-Qaradawi'[100] when Egypt requested it in 2015 on Interpol red notice.[101] Moreover, Qatar's alleged support for extremists is demonstrated, according to the blockading states, when it expressed its reservation regarding Egypt's unilateral military action in Libya in 2015 at the meeting of the Council of the Arab League. Egypt labelled its strike as fighting against ISIS and terrorism, so Qatar's reservation was translated as support for extremists.[102]

The second accusation against Qatar is linked to its alleged failure to extradite or prosecute terrorists. The blockading states gave many examples to support this point, which they claim are proof of Qatar's violation of the Riyadh Agreements, specifically the obligation not to give

[96] 'Judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran Judicial and Similar Proceedings: International Court of Justice' (1980) 19 International Legal Materials, 41, para 90.
[97] United Nations, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Yearbook of the International Law Commission, 2001*, vol 2 (United Nations 2008) 34-36, <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 14 February 2022.
[98] Riyadh Agreement (n 12).
[99] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) at 40.
[100] ibid 41.
[101] ibid.
[102] ibid 42.

shelter to terrorist individuals or groups that pose threats to the other GCC states. For instance, the alleged proof of this incident is that in December 2016, a Qatari citizen, Al-Nu'aymi (whom they insinuated has a strong link to the government of Qatar) posted on Twitter a statement that was understood by the blockading states as promotion of hate speech and incitement to violence in the region without being prosecuted.[103] Likewise, Qatar allegedly did not prosecute 'Sa'd bin Sa'd Muhammad Shariyan Al-Ka'bi and 'Abd al-Latif Bin 'Abdallah Salih Muhammad Al-Kawari, who were subject to UN sanctions as 'major facilitators of Al-Qaida and the Al Nusra Front'[104] Finally, the blockading states accuse Qatar of spreading hate speech and inciting violence on the Al Jazeera network channel through using it as a destabilising media platform against the blockading states. Such 'destabilisation' happens when Al Jazeera gives the Muslim Brotherhood and others, who are seen by these states as terrorists, a platform to spread what these countries view as violence and extremism.[105] Qatar allowed all of this to happen without stopping Al Jazeera from this conduct. Therefore, it was accused of being in violation of the Riyadh Agreements, and based on all of these alleged violations by Qatar, the measures taken against Qatar were lawful countermeasures allowed by international law and by the Implementing Mechanism of the Riyadh Agreements, which stated that in the event of non-compliance by any GCC member state, other member states are entitled to undertake any necessary measures to safeguard their security and stability.[106] These countermeasures were taken in alignment with the intention of protecting their security and stability.

C. Qatar's response

Qatar initially denied these accusations, describing them as baseless and without any legal supporting evidence. It responded to the first accusation of supporting terrorism and extremism with reaffirmation of its position against terrorism through its efforts to counter it throughout its active membership in the Terrorist Financing Targeting Centre (TFTC), a partnership between the GCC member states and the United States, with the main goal of

[103] ibid 44.
[104] ibid. This does not seem to have any relevance to the current crisis. Also, if a country deserves to be subject to countermeasures and sanctions just because one or many of its citizens are under UN sanctions, then every country in the world will need to be subject to countermeasures.
[105] ibid 47.
[106] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) annex 20: Mechanism Implementing the Riyadh Agreement, 528.

disrupting any financial assistance to any terrorist groups. Also, Qatar stated that even after the GCC crisis, it continued to work with the blockading states within the framework of the TFTC without any complaint from the blockading states.[107] Furthermore, in July 2017, Qatar signed a memorandum of understanding (MOU) with the US on combating and financing terrorism, a step that from Qatar's point of view conveyed a message to the international community that Qatar was innocent of those charges and had nothing to fear in this regard. Qatar received a testification from the United States that refuted these allegations by stating that it encountered 'terrorism and violent extremism in all forms, including by being one of the few countries to move forward on a bilateral Memorandum of Understanding with the United States'.[108] With regards to the alleged support to the Muslim Brotherhood as a breach of the Riyadh Agreement and its example of the extradition of Al-Qaradawi to Egypt, Qatar responded that the Interpol red notice had been withdrawn, as it appeared that there was no basis for the accusation against him.[109] Also, the designation of Al-Qaradawi as a terrorist by the blockading states was after the GCC crisis, which cannot be used as a reason for the countermeasures, and Qatar raised the fact that this 'terrorist' was hailed as the 'international figure of the year' and given a prize in 2012 by the Vice President and Prime Minister of the UAE, Sheikh Mohammed bin Rashid Al Maktoum, as well as the King Faisal Prize for Islamic Studies, one of the highest accolades in the Muslim world.[110] Concerning the second example alleging that Qatar supported extremism when it expressed its reservation, Qatar as well as all of the GCC states, including Saudi Arabia, the UAE and Bahrain, rejected this accusation through the Secretary General of the GCC Council at that time, Abdul Latif al-Zayani,[111] who said that accusation was 'unfounded, contradict[ed] reality, and ignore[d] the sincere efforts by Qatar, as well as the Gulf Cooperation Council and Arab states, in combating terrorism and extremism at all levels'.[112] By contrast, Qatar claimed that accusations of supporting terrorism and extremism are more appropriately lodged against the blockading states themselves. For instance, Qatar claimed in its counter-memorial before the ICJ that Saudi Arabia and Egypt

[107] Counter-Memorial of the Government of the State of Qatar (n 17) at 28.
[108] 'Joint Statement of the Inaugural United States-Qatar Strategic Dialogue' (United States Department of State) <https://2017-2021.state.gov/joint-statement-of-the-inaugural-united-states-qatar-strategic-dialogue/> accessed 16 November 2021.
[109] Counter-Memorial of the Government of the State of Qatar (n 17) at 35.
[110] ibid.
[111] He is currently Bahrain's foreign minister.
[112] 'Qatar Recalls Envoy to Egypt in Row over Libya Strikes' *BBC News* (19 February 2015) <https://www.bbc.com/news/world-middle-east-31532665> accessed 16 November 2021.

were the main sources of foreign terrorist fighters for ISIS. Furthermore, as per a CNN investigation, Saudi Arabia and the UAE transferred weapons to al-Qaeda in Yemen and the UAE supplied advanced weapons to militias accused of war crimes.[113]

The second allegation was that Qatar had breached the Riyadh Agreement by failing to extradite or prosecute terrorists. Qatar's defence was that there was no time the UN had accused it of not complying with its international obligations concerning the implementation and enforcement of the UN sanctions against those names on the UN sanction list, including arrest, imprisonment, asset freezes and travel bans.[114] Finally, on the allegation that Qatar supported the Muslim Brotherhood by giving them the opportunity to appear on the Al Jazeera[115] network, which violates the Riyadh Agreement, Qatar refuted such accusation on two points. First, it claimed that it had no role in deciding who appeared on Al Jazeera; it is an independent channel that has editorial independence, and being a state-owned channel does not affect that status. Likewise, the BBC has such independence, even though it was established by a UK Royal Charter and is funded by a tax administered by the UK government.[116] This independence is consistent with international law, which cherishes the freedom of the press as well as the freedom of expression. Second, Qatar accused the blockading states of having a double standard with regard to the Muslim Brotherhood. There are many political parties associated with the Muslin Brotherhood in many countries in the Middle East and North Africa,[117] including GCC countries like Kuwait and Bahrain. It is not a mere geographical presence; the Muslim Brotherhood is also an active participant in electoral politics and serves in these states' governments. Bahrain has even had members of the Muslim Brotherhood in its parliament.[118] More importantly, the Muslim Brotherhood is not on the UN list of terrorist organisations, nor has it been designated as such in the list of the GCC's committee for the follow-up of the implementation of the Riyadh Agreement.[119]

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[113] Counter-Memorial of the Government of the State of Qatar (n 17) at 37.
[114] ibid 30.
[115] One of the thirteen demands of the blockading states is to shut down this channel, as it poses a threat.
[116] 'BBC Royal Charter Archive' <https://www.bbc.com/historyofthebbc/research/bbc.com/historyofthebbc/research/royal-charter/> accessed 20 November 2021.
[117] For instance, Morocco, Tunisia, Jordan, Kuwait, Yemen, Libya, Iraq, Algeria and Bahrain.
[118] 'A Band of (Muslim) Brothers? Exploring Bahrain's Role in the Qatar Crisis' Middle East Institute <https://www.mei.edu/publications/band-muslim-brothers-exploring-bahrains-role-qatar-crisis> accessed 20 November 2021.
[119] Counter-Memorial of the Government of the State of Qatar (n 17) at 43.

D. Wrongful acts are prerequisite for countermeasures [120]

During their proceedings before the ICJ in 2018, both parties to the Gulf crisis submitted evidence to support their positions with regard to the crisis at hand. It was clear to any reader of the written documents of both parties that the types of evidence that were provided before the Court was mostly in the form of press reports and articles, other reports on such media as Twitter and extracts from books.[121] It is very arguable that this type of evidence can be capable of proving facts or can be treated in itself as evidence, as stated by the ICJ in the Military and Paramilitary Activities in and against Nicaragua case:

> the Court has been careful to treat them with great caution; even if they seem to meet high standards of objectivity, the Court regards them not as evidence capable of proving facts, but as material which can nevertheless contribute, in some circumstances, to corroborating the existence of a fact, i.e., as illustrative material additional to other sources of evidence.[122]

Furthermore, the ICJ developed a set of standards in the Application of the Genocide Convention decision against which the value of this type of evidence is evaluated.[123] The first among these standards is the partiality of the source of the evidence. Second is the mechanism by which the evidence has been gathered; generally, the Court pays more attention to a report that is a court-like production such as the judgments from the International Criminal Tribunal for the former Yugoslavia (ICTY) than to anonymous reports.[124] Finally, the examination of the quality or the character of these press reports means that greater credence is generally given to evidence that contains unchallenged facts or statements against interest. This point was stated clearly by the Court in the United States Diplomatic and

[120] It is not the researcher's intention to vindicate any of the parties involved in the argument or to state who is right and who is not in this political rivalry. Rather, the intention here is to determine whether the internationally wrongful act attributed to Qatar indeed occurred. Upon this determination rests the legality of the countermeasures of the blockading states.

[121] Counter-Memorial of the Government of the State of Qatar (n 17); Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73).

[122] Nicaragua case (n 78) para 62.

[123] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) [2007] (Judgment, ICJ Reports) 43.

[124] Halink S, 'All Things Considered: How the International Court of Justice Delegated Its Fact-Assessment to the United Nations in the Armed Activities Case Institute for International Law and Justice – Armed Activities on the Territory of the Congo Democratic Republic of the Congo v. Uganda' (2007) 40 New York University Journal of International Law and Politics 23.

Consular Staff in Tehran case: press reports might be used as evidence if they are 'wholly consistent and concordant as to the main facts and circumstances of the case'.[125]

The evidence provided by the blockading states did not seem to meet these standards. They were seen as subjective, not a product of a court-like process, and they finally did not meet the requirement of consistency and concordance. As such, the alleged wrongful acts attributed to Qatar had no proof or acceptable conclusive evidence, which means that the international wrongful act had not materialised, and what the blockading states have against Qatar are merely unproven allegations versus equivalent allegations from Qatar against them. These allegations of violating the Riyadh Agreement were never raised before the Committee for the Follow-up of the Implementation of the Riyadh Agreement, which is a permanent committee created after the signing of the Riyadh Agreement with the purpose of setting standards for listing names and reports of any violations by any state member with evidence and proof.[126] If these allegations of the blockading states had any merits or existence, they would have been raised before this committee.

Therefore, these measures of the blockading states against Qatar were not taken as a response to an internationally wrongful act and thus do not qualify as lawful countermeasures that can preclude the wrongfulness of the blockading states. This conclusion could be the end of this analysis, because if there was no prior violation, there cannot be countermeasures; however, for the sake of providing a comprehensive analysis, the allegation against Qatar will be presumed to be true, so the next sections will discuss the applicability of the main conditions and limitations of countermeasures.

1.4.3 The principle of proportionality in countermeasures

The principle of proportionality is considered to be the most crucial and difficult element to the legality of countermeasures, as stressed by Special Rapporteur Crawford.[127] The lawfulness of countermeasures can be contested if they are disproportionate, which would allow the wrongdoing state to invoke the responsibility of the injured state and render such

[125] Case Concerning United States Diplomatic and Consular Staff in Tehran, (n 96) 10, para 13.
[126] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 38, Letter from Abdul Latif Bin Rashid Al-Ziyani, GCC Secretary General, to Khalid Bin Mohamed Al Ativa, Minister of Foreign Affairs of the State of Qatar (19 May 2014), The Second Report of the Committee for the Follow-up Mechanism of Implementation of the Riyadh Agreement 16 Rajab 1435 AH.
[127] Proukaki (n 89) 264. See also Franck TM, 'On Proportionality of Countermeasures in International Law' (2008) 102 The American Journal of International Law 715.

measures unlawful, even though they were initially taken in response to wrongful acts. The importance of the principle of proportionality manifests in its aim to control the intensity of the measures taken by the injured state against the wrongdoing state, as well as the achievement of legal certainty and predictability through the establishment of limitations with which the severity and excessiveness of countermeasures can be measured.[128] This principle is well recognised in international jurisprudence and in states' practices. The ICJ in the Gabčíkovo-Nagymaros Project case stated that 'the effects of a countermeasure must be commensurate with the injury suffered'.[129] Furthermore, in the air service agreement arbitration between France and the United States, the tribunal cross-examined the action of France for not allowing the changing of gauges on flights from the West Coast via London and the countermeasures taken by the US to suspend Air France from operating to Los Angeles. The tribunal held that the countermeasures of the US complied with the principle of proportionality and corresponded to those actions of France.[130] This principle is found in many different fields of international law, such as UNCLOS and international trade law.[131] That said, the question arises as to what is meant by proportionate countermeasures. What are the criteria that should be followed in assessing the proportionality of particular countermeasures and therefore judging the lawfulness of this response? This section will cover the controversy regarding the criteria of the principle of proportionality in countermeasures in the work of the ILC, as well as in the academic literature, with the aim of determining the proportionality of the countermeasures in the GCC crisis.

The first criterion that has been suggested to be used in the evaluation of the proportionality of countermeasures is the assessment of equivalence between the initial wrongful act and the measures taken.[132] This position was followed by the work of the ILC. The special rapporteur, Mr Riphagen, stated in his Sixth Report that 'The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed'.[133] He suggested that for the assessment of the lawfulness of

[128] Proukaki (n 89) 264.
[129] Gabčíkovo-Nagymaros Project case (n 79) 56, para 83.
[130] Air Services case (n 84) para 83.
[131] Hofer (n 87) at 401.
[132] The Naulilla Case (n 84) 1028.
[133] Riphagen W, 'Sixth Report on (1) the Content, Forms and Degrees of State Responsibility, and (2) the 'implementation' (Mise En Oeuvre) of International Responsibility and the Settlement of Disputes' (United Nations 1985) 11.

countermeasures, the seriousness of both the initial violation and the reprisal should be taken into account.[134] This approach has been criticised, as it puts considerable burden on the wrongdoing state and adds the element of punishment to the countermeasures.[135] Mr Arangio-Ruiz suggested different wording in his Fourth report on state responsibility, stressing that the term 'manifestly disproportional' opens the door to subjectivity and uncertainty in the application of the principle of proportionality and therefore, it should be avoided.[136] Instead, he opted for simple terms like 'out of proportion' or 'disproportionate', and in his proposal of Article 13 wrote, 'Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof'.[137] He also emphasised that for the assessment of proportionality, it is not enough to take into consideration the quantitative element, which is the damage caused by the wrongful act, but also the qualitative factor, that is, the seriousness of the breach and the importance of the interest being protected by the breached rules.[138] The wording of the Final Articles with regard to the principle of proportionality has combined the previous positions as follows: 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'.[139] It emphasises that countermeasures must be proportionate to the injury suffered and take into account not only the seriousness of the internationally wrongful acts but also the rights of the injured state, the wrongdoing state and third parties that have been affected by the wrongful acts.[140] Moreover, others have taken different criteria from international lawyers and scholars. For instance, Zoller sees the proportionality not as either the breach or the response but as the objectives aimed at by countermeasures and the methods employed to achieve them.[141] Likewise, Cannizzaro has chosen the criteria of the appropriateness of both the aims and the methods used to achieve them; however, he distinguishes the 'legal objective' from the

[134] ibid.
[135] Paddeu F (ed), 'Countermeasures', Justification and Excuse in International Law: Concept and Theory of General Defences (Cambridge University Press 2018) 270, <https://www.cambridge.org/core/books/justification-and-excuse-in-international-law/countermeasures/1B801BF676723ECA7E73FEA0670C7B92> accessed 19 March 2022.
[136] Fourth report, Arangio-Ruiz (n 90) 23.
[137] ibid 35.
[138] ibid 23.
[139] ARSIWA (n 74) art 51.
[140] ARSIWA (n 74) at 135.
[141] Zoller E, 'Peacetime Unilateral Remedies: An Analysis of Countermeasures' (1984) 136.

subjective aims of the state using the countermeasures.[142] Others have rightly taken a position that all of the criteria mentioned above, including the nature of the wrongful acts and their seriousness and gravity, are factors that must be taken into consideration when judging the proportionality of countermeasures.[143] It might be said that the practical assessment of the principle of the proportionality of countermeasures is quite difficult to achieve. However, these criteria should all be considered when judging the proportionality of countermeasures.[144] Also, the principle of proportionality should be evaluated on a case-by-case basis and the appropriate criteria applied accordingly. All of these criteria will be used to test the proportionality of the measures of the blockading states. To ensure a clear framework for evaluating the proportionality of the blockading states' countermeasures, this analysis will adopt a combined approach, incorporating both qualitative and quantitative criteria, as well as the appropriateness of aims and methods. This approach is chosen because it captures the full spectrum of considerations relevant to the legality of countermeasures under international law. The qualitative criteria focus on the gravity of the alleged wrongful acts, while the quantitative criteria assess the scope of measures taken. The appropriateness criteria consider whether the aims and methods of the countermeasures are aligned with legitimate objectives and necessary outcomes. This combined assessment is necessary for evaluating complex disputes like the GCC crisis, where countermeasures involve a wide range of measures that can have far-reaching effects. By employing this approach, the analysis will provide a comprehensive evaluation of whether the countermeasures taken against Qatar meet the principle of proportionality, or whether they exceed the bounds of what is legally permissible in response to the alleged violations of the Riyadh Agreement.

The applicability of the principle of proportionality in blockading states' countermeasures

As concluded above, for the assessment of the proportionality of countermeasures, all of the mentioned criteria should be used; therefore, the same methodology will be used to examine the applicability of such principles in the blockading states' countermeasures. The allegation

[142] Cannizzaro E, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 European Journal of International Law 896.
[143] Paddeu (n 135) at 278.
[144] ibid 279.

against Qatar was that it violated the Riyadh Agreement, and the response by the blockading states, amongst massive bundles of unilateral coercive measures outside the aviation field, was the closing of their airspace as well as their FIRs over both their territories and the high seas. Such closures put civil aviation in the Bahrain FIR at considerable safety risk. It was reported to the ICAO that during the airspace restrictions, the number of incidents concerning military aircraft operating at close distance from Qatari civilian aircraft were very noticeably severe and frequent.[145] Topping it all off, Bahrain unilaterally introduced what they called a 'buffer zone' adjacent to its territorial water and verbally threatened that Qatari registered aircraft entering such zones would be met with miliary interception, which resulted in the shifting of all of Qatar's aircraft operations to Iranian FIRs.[146] So, when comparing the gravity and the seriousness of the alleged violation of Qatar, for which the blockading states were not able to show any visible proof other than unsupported statements and accusations, and the response of the blockading states, one will find that the response was not commensurate to the alleged violation on qualitative and quantitative levels. The allegations as illustrated above were about news channel activities, not extraditing Muslim Brotherhood members and spreading hate speech. Logical proportionate countermeasures could have been suspending extradition agreements with Qatar, starting a media campaign against what Qatar was doing – which the blockading states have indeed done considerably in this regard- – or any measures to that effect (although countermeasures do not need to be like for like). Furthermore, the appropriateness of both the aims and the methods of the countermeasures can be evidently used to prove the non-applicability of the principle of proportionality in this crisis. The aims of the blockading states' countermeasures are seen in their list of 13 demands,[147] which can be described as a literal demand for the surrender of state sovereignty and asking for total submission to the will of the blockading states. The illustration of this statement is clearly reflected in demand number 13, which states that Qatar agrees to 'monthly compliance audits

[145] Annex 5, Letter from Abdulla Nasser Turki Al-Subaey, President of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO Council (20 Feb. 2019), in '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): Rejoinder of the State of Qatar' International Court of Justice <https://www.icj-cij.org/public/files/case-related/173/173-20190729-WRI-01-01-EN.pdf > accessed 6 October 2021.

[146] ICAO Response to Preliminary Objections (A), Letter from Adbulla Nasser Turki AlSubaey, Chairman of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO, 2017/15984, at Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 25, Exhibit 3, 970.

[147] 13 demands (n 21).

in the first year after agreeing to the demands, followed by quarterly audits in the second year, and annual audits in the following 10 years'.[148] Some of the demands clearly fall short of the relevance factor to the alleged wrongful act of Qatar and have no connection to the Riyadh Agreement at all, namely demands 1 and 2, which concern scaling down diplomatic ties with Iran and shutting down the Turkish military base.[149] These aims endangered territorial integrity and political independence and interfered in Qatar's domestic affairs. Hence, the countermeasures used against Qatar do not seem to meet the appropriateness criteria in either the aims of such measures or in the method used to achieve them. Surprisingly, the alleged violations of Qatar, the countermeasures applied by the blockading states and the requested remedies to such wrongful acts are all at considerably distinct levels and could lead to the conclusion that these countermeasures are not commensurate to the alleged violation according to any of the criteria for assessing the proportionality requirement in countermeasures.

1.4.4 The lawfulness of collective countermeasures

The blockading states have built all of their arguments against Qatar on an alleged violation of the Riyadh Agreement, and they have specifically stated in their memorial document before the ICJ that the violation by Qatar by supporting a hostile group and terrorism was over an issue 'of a particular interest of Egypt'.[150] This statement means that the only state 'injured' or directly affected because of the alleged violation by Qatar is Egypt. This implies that the actions by the blockading states regarding this allegation, which is one of the major allegations against Qatar, were based on the lawfulness of collective countermeasures, as they themselves admitted. Surprisingly, Egypt is not a party to the Riyadh Agreement, nor is it a fundamental subject matter of the same.[151] Besides, the joining of Maldives, Mauritania, Djibouti, Comoros, Niger, Gabon, Senegal, Chad, Yemen and Jordan in the countermeasures

[148] ibid.
[149] ibid.
[150] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 14.
[151]The reference to Egypt was made in the Supplementary Riyadh Agreement as follows: All countries are committed to the Gulf Cooperation Council discourse to support the Arab Republic of Egypt and contribute to its security, stability and financial support, ceasing all media activity directed against the Arab Republic of Egypt etc. See more at Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 21.

against Qatar raises the question over the legality of collective countermeasures by non-injured states in international law.

Before venturing into the issue of collective countermeasures, it is important to distinguish between measures authorised by the United Nations Security Council (UNSC), typically referred to as the imposition of sanctions, and collective countermeasures.[152] The Charter of the United Nations bestows upon the UNSC the primary responsibility for the maintenance of international peace and security by empowering it to impose sanctions and obligate member states to fully follow such measures as states themselves accept to carry, as stated in Article 25 of the Charter.[153] The Security Council is empowered by Chapters VI, VII, VIII and XII to take a variety of measures as necessary to perform its duties. Article 39 is the trigger of the UNSC's actions, as it gives the Council the sole power to determine any 'threat to the peace, breach of the peace, or act of aggression' and to impose any appropriate measures for the maintenance and restoration of international peace and security.[154] The actions available to the council include the following: calling upon the concerned parties to follow provisional measures that it deems necessary,[155] imposing non-military sanctions to give effect to any of its decisions,[156] and authorising the use of armed force when it considers the non-military sanctions inadequate.[157] The list of measures mentioned in the UN Charter are non-exhaustive, serving as illustrations of what coercive measures the Council can take, for instance, 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.'[158] This type of collective measures by the UNSC is not discussed here; however, what is being addressed is measures taken in response to a violation of the wrongdoer state by states that are not injured.

Collective countermeasures relate to the utilization of countermeasures by a state other than the injured state, as a response to a violation of a communitarian norm guided by the

[152] Bills A, 'The Relationship between Third-Party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations Erga Omnes in International Law' (2020) 89 Nordic Journal of International Law 117.
[153] Charter of the United Nations (n 33).
[154] Charter of the United Nations (n 33) art 39.
[155] Charter of the United Nations (n 33) art 40.
[156] Charter of the United Nations (n 33) art 41.
[157] Charter of the United Nations (n 33) art 42.
[158] Charter of the United Nations (n 33) art 41.

provisions of Article 48 of ARSIWA, with the aim of achieving cessation and reparation.[159] In legal doctrine, there exists a wide array of terms used interchangeably to describe this concept, including 'collective countermeasures',[160] 'third-party countermeasures'[161] 'third-State countermeasures',[162] 'countermeasures of general interest',[163] 'solidarity measures',[164] as well as 'multilateral sanctions'.[165] Despite the lack of a settled terminology, these terms all envision the use of collective countermeasures as a means to address breaches of communitarian norms committed by states acting individually, in defense of a collective interest.[166] The presence of various terms to describe this legal concept highlights the ongoing uncertainty and lack of a universally accepted name.[167] For the purpose of this study, the term collective countermeasures is used, as it best aligns with the rationale of Article 48 of the ARSIWA. The topic of collective countermeasures is deemed to be what the Special Rapporteur on State Responsibility, James Crawford, rightly referred to as 'extremely controversial'[168] in international law. The truth of this statement is reflected in the debate on the ILC Articles in the Sixth Committee of the General Assembly. Views were split amongst states between for and against the permissibility of collective countermeasures. The objections of states against collective countermeasures can be summarised in three main points: First, collective countermeasures have no basis in international law and have no support in the *opinio juris*, as states' practice in this field of international law was generally

[159] ARSIWA (n 74) art 48 and 54.
[160] Crawford J, 'Third Report on State Responsibility' 101-102, para 386. Also, Crawford J, State Responsibility: The General Part (Cambridge University Press 2013) 703.
[161] Dawidowicz M (ed), 'Introduction', Third-Party Countermeasures in International Law (Cambridge University Press 2017) 34. 'International Law and Third-Party Countermeasures in the Age of Global Instant Communication' (QIL QDI, 18 July 2016) <http://www.qil-qdi.org/international-law-third-party-countermeasures-age-global-instant-communication/> accessed 2 February 2024; Bills A, 'The Relationship between Third-Party Countermeasures and the Security Council's Chapter VII Powers: Enforcing Obligations Erga Omnes in International Law' (2020) 89 Nordic Journal of International Law 118.
[162] Charney J, 'Third State Remedies in International Law' (1989) 10 Michigan Journal of International Law 75. See also, Proukaki (n 89) 4; Hakimi M, 'Unfriendly Unilateralism' (2014) 55 Harv. Int'l L. J. 119.
[163] Alland D, 'Countermeasures of General Interest' (2002) 13 European Journal of International Law 1222.
[164] Koskenniemi M, 'Solidarity Measures: State Responsibility as a New International Order?' (2002) 72 British Yearbook of International Law 337.
[165] Dawidowicz (n 161) 34.
[166] Bills A, 'The Relationship between Third-Party Countermeasures and the Security Council's Chapter Vii Powers: Enforcing Obligations Erga Omnes in International Law' (2020) 89 Nordic Journal of International Law 29.

[167] Dawidowicz (n 161) 34.
[168] Crawford J, 'Fourth Report on State Responsibility' 73, para 47. See also Crawford J, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 The American Journal of International Law 874.

limited, inconsistent and predominantly done by Western countries.[169] Second, collective countermeasures contradict the UN Charter and create an 'encroachment on the authority of the Security Council under Chapter VII of the Charter'[170] mentioned above, since dealing with serious breaches of obligations owed to the international community as a whole or serious violations of international laws is a prerogative of the UNSC, and such responsibilities are better off left to it.[171] Third, collective countermeasures open the door to abuse through intervention and aggression by mainly the powerful states against smaller or weaker states to achieve political gains under the pretence of countermeasures.[172] As Bahrain said, 'According to one view countermeasures were the prerogative of the more powerful State, and many small States regarded the concept as synonymous with aggression or intervention.'[173]

The supporters on the other side claimed that collective countermeasures are important because they provide options other than the use of force to enforce fundamental obligations. If such an option is not allowed, states will have no other way but to intervene in more catastrophic ways.[174] Moreover, the use of collective countermeasures has been deemed necessary on numerous occasions in situations where the UNSC was not able to respond to or failed to take crucial actions against serious breaches, such as in Syria.[175] Also, there is a state practice that exists, however limited, in which non-injured states have taken measures against wrongdoing states, for instance, the trade embargo imposed by the European Community, Australia, Canada and New Zealand against Argentina after it invaded the Falkland Islands, or those against Iraq after its invasion of Kuwait.[176] Nevertheless, Crawford stated that

[169] Dawidowicz M, 'Third-Party Countermeasures in the ILC' in Dawidowicz M (ed), *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) 94 <https://www.cambridge.org/core/books/thirdparty-countermeasures-in-international-law/thirdparty-countermeasures-in-the-ilc/3090DD339B40C96812F44826F9AEE65B> accessed 3 May 2022.

[170] Dawidowicz M, 'Third-Party Countermeasures: Observations on a Controversial Concept' in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015) 346 <https://www.cambridge.org/core/books/sovereignty-statehood-and-state-responsibility/thirdparty-countermeasures/4C07F690285D7F832C230A68079FFC7D> accessed 1 March 2022.

[171] ibid 345.

[172] ibid 347.

[173] ibid 345.

[174] Crawford Third report (n 160)106.

[175] Dawidowicz (n 170) 349.

[176] Draft ARSIWA (n 74) at 137-139. Also, recently the EU has enacted sanctions against Russia due to its military aggression against Ukraine. These sanctions are a comprehensive series of measures in trade, finance, and transport, including total closure of EU airspace to all aircraft that is owned, registered or controlled by Russia. This is very pertinent to the issue of the GCC crisis and will be discussed in the last section.

such practices were not enough to reach the conclusion that non-injured states have the right to take countermeasures in the absence of injury.[177] However, it is said that the current state practice of collective countermeasures is more diversified and widespread, which may refute the idea of limited practice.[178] The illustration of this notion is the Arab League collective countermeasures against Syria and Libya as a response to the brutal repression of the civilian population and the their violations of international human rights and humanitarian law.[179] More recently, the US and EU have taken measures against Russia due to its invasion of Ukraine.[180]

With regard to the fear of the abuse arising from the 'auto-interpretation' of wrongful acts that was raised by the opponents of collective countermeasures, Crawford suggested that this issue can be considerably reduced with formulas like 'gross, well attested, systematic and continuing' breaches.[181] He emphasised that collective countermeasures generally had not been taken in response to 'isolated or minor violations' but had been restricted to serious breaches labelled as 'major political crises'.[182] Interestingly, the Institut de Droit International asserted in its 2005 Krakow Resolution in Article 5 that the permissibility of collective countermeasures is linked to the occurrence of 'a widely acknowledged grave breach of an *erga omnes* obligation'.[183] This approach is based on state practice which indicates that collective countermeasures are generally taken as a response to 'a widely acknowledged grave breach of an *erga omnes* obligation' generally breach of 'communitarian norms'.[184]

Having said that, it is essential to distinguish between three key aspects of when addressing collective countermeasures under article 48 of ARSIWA: First, erga omnes obligations are those owed to the international community as a whole. These obligations are universal in nature and protect fundamental norms, such as prohibitions against genocide, slavery, or

[177] Crawford Third report (n 160) 101- 106.
[178] Dawidowicz M, 'Permissibility of Third-Party Countermeasures: Evaluation' in Dawidowicz (ed) *Third-Party Countermeasures in International Law* (Cambridge University Press 2017) 283 <https://www.cambridge.org/core/books/thirdparty-countermeasures-in-international-law/permissibility-of-thirdparty-countermeasures-evaluation/4125528E4E1CFF2EE395C78C331CD20E> accessed 3 May 2022.
[179] ibid 242-243.
[180] This issue will be discussed a more detail in the next section.
[181] Crawford Third report (n 160).
[182] ibid 105.
[183] Gaja MG, 'Obligations and Rights Erga Omnes in International Law' Institut de droit international (2005) <https://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf> accessed 30 March 2022.
[184] Dawidowicz (n 178) at 270.

torture. Article 48(1)(a) of ARSIWA explicitly allows any state to invoke responsibility for breaches of these obligations, even if it has not suffered direct injury. This provision reflects the principle that such obligations aim to protect global values, making their observance a shared responsibility among all states. The broad scope of *erga omnes* obligations also justifies collective action in cases of widely acknowledged grave breaches, emphasizing the necessity of upholding fundamental international norms through cessation and reparation, even by states not directly affected by the breach as mentioned above. Second, *erga omnes inter partes* obligations are obligations that exist specifically among a defined group of states, bound by a particular treaty or agreement. The concept of *erga omnes* inter partes obligations has been recognized by the ICJ, especially in cases like The Gambia v. Myanmar and Belgium v. Senegal.[185] These obligations are treaty-based, arising from multilateral agreements such as the Genocide Convention and the Convention against Torture.[186] The ICJ emphasized that such obligations are owed by each state party to all other state parties, reflecting a shared interest in compliance.[187] For example, the obligations under the specific agreement are inter partes in nature, as they are only owed to the states that are parties to the agreement.[188] Article 48(1)(b) of ARSIWA recognizes that states party to a multilateral treaty may invoke responsibility for breaches of *erga omnes* inter partes obligations. According to Article 1 of the 2005 Resolution on obligations *erga omnes* drafted by the Institut de Droit International (IDI), *erga omnes* inter partes obligations are described as obligations under a multilateral treaty that a state party owes to all other states parties to the same treaty.[189] This is based on their shared values and commitment to compliance, enabling all states within the treaty framework to respond to breaches. Unlike *erga omnes* obligations of general international law, *erga omnes* inter partes obligations are exclusively treaty-based and represent a 'smaller

[185] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, para 41. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, para 68.
[186] Yvonne Breitwieser-Faria, 'Can Erga Omnes Partes Obligations Satisfy the "Interest Of A Legal Nature" Requirement of Article 62 ICJ Statute?' (*Opinio Juris*, 28 August 2024) <https://opiniojuris.org/2024/08/28/can-erga-omnes-partes-obligations-satisfy-the-interest-of-a-legal-nature-requirement-of-article-62-icj-statute/> accessed 20 October 2024.
[187] The Gambia v. Myanmar(n 185)
[188] Carli E, 'Community Interests Above All: The Ongoing Procedural Effects of Erga Omnes Partes Obligations Before the International Court of Justice' (*EJIL: Talk!*, 29 December 2023) <https://www.ejiltalk.org/community-interests-above-all-the-ongoing-procedural-effects-of-erga-omnes-partes-obligations-before-the-international-court-of-justice/> accessed 20 October 2024.
[189] Institut de droit international (n183) Art. 1.

circle' of obligations.[190] Third, the participation of non-injured states in collective countermeasures. Non-injured states are those that do not suffer direct legal harm from a breach but might still seek to intervene in support of collective interests. Under international law, non-injured states may lawfully act in cases of *erga omnes* obligations to enforce compliance with fundamental norms. However, their involvement is generally not recognized in breaches of *erga omnes inter partes* obligations, as these breaches are confined to the legal relationships established by specific agreements among the signatories.

That having been said, due to the lack of consensus amongst states and to the controversial nature of collective countermeasures, Special Rapporteur Crawford proposed (based on the suggestion of the United Kingdom) a saving clause[191] as a compromise, as he feared that the complete deletion of Article 54 would convey an implication that 'countermeasures can only be taken by injured States, narrowly defined'.[192] Therefore, the ILC has taken a position not to endorse the collective countermeasures but either to preclude them, confessing that 'there appears to be no clearly recognized entitlement of States referred to in Article 48 to take countermeasures in the collective interest'.[193] Under the ARSIWA, states other than the injured states have the right to invoke the responsibility of another state if the obligation beached is owed to a group of states, including the invoking state, and established for the protection of a collective interest of the group[194] or if the obligation breached is owed to the international community as a whole.[195] However, Article 48 (2) of the ARSIWA limits such invocation to requesting from the wrongdoing state cessation, non-repetition or performance of obligation. Moreover, Article 54 states that this chapter on countermeasures does not prejudice the right of a state entitled under Article 48 to invoke the responsibility of another state and to take lawful measures to ensure cessation and reparation. Article 54 of ARSIWA provides for 'lawful measures' that states entitled under Article 48 can take in response to breaches of obligations owed to a group of states or to the international community as a whole. The ILC commentary clarifies that the term 'lawful measures' was deliberately chosen

[190] Carli (n 188). See also, Pok Yin Stephenson Chow, 'On Obligations Erga Omnes Partes' [2020] SSRN Electronic Journal 500-503.
[191] Crawford J, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 The American Journal of International Law 875.
[192] Crawford Fourth Report (n 168) 18.
[193] ARSIWA (n 74) at art 54 para 6.
[194] ibid 48 1 (a).
[195] ibid (n 74) 48 1 (b).

instead of 'countermeasures' to avoid preempting any position on the legality of measures by non-injured states in cases of breaches of collective or erga omnes obligations.[196] This approach keeps the scope broad, covering actions aimed at cessation and reparation, but without explicitly equating them to countermeasures. Special Rapporteur Crawford emphasized that, although countermeasures could potentially fall under 'lawful measures' in cases of breaches of erga omnes obligations, the ILC refrained from endorsing this view due to the limited state practice and lack of consensus.[197] However, some scholars argue that the phrase 'lawful measures' may indeed imply countermeasures when read contextually, even though this interpretation remains contested due to the ambiguity in terminology.[198] Therefore, 'lawful measures' under Article 54 remain a flexible and evolving category that may include countermeasures, but the final interpretation will depend on future state practice and legal developments. In this sense, while countermeasures are not conclusively ruled out under 'lawful measures,' the ambiguity serves as a compromise to maintain a degree of openness for states, ensuring that any further interpretation aligns with developing norms of international law.

Therefore, since the ARSIWA does not provide a clear-cut answer as to the lawfulness of collective countermeasures, the proposal of Crawford and the Institut de Droit International could be a provisional solution that limits collective countermeasures to a serious, well-attested and 'widely acknowledged grave breach of an *erga omnes* obligation'[199] that could elevate the fear of abuse of collective countermeasures. Admittedly, it is quite difficult to reach a clear answer for the time being, as even this approach might raise many questions on how to distinguish a serious, well-attested breach from those other types of breaches; this difficulty will lead to the issue of auto-interpretation mentioned above.

The application of collective countermeasures in the GCC crisis

After discussing the position of collective countermeasures within the ILC and the final article of state responsibility, we may ask whether collective countermeasures taken against Qatar by those countries that are not party to the Riyadh Agreement are permissible under

[196] ARSIWA (n 74) at art 54 para 6.
[197] Crawford (n191) 884-885.
[198] Tsagourias N, 'The Law Applicable to Countermeasures against Low-Intensity Cyber Operations' (2015) 14 Baltic Yearbook of International Law Online 22.
[199] Gaja (n 183).

international law. As illustrated above, the collective countermeasures are still a grey area in international law, and their lawfulness is quite debatable, depending on the circumstance and the seriousness of the wrongful act attributable to the responsible state. First, as was established in the previous section, the blockading states – the supposedly injured states – that have bilateral legal relations with Qatar – the Riyadh Agreement – were not able to prove their allegations against Qatar in an acceptable legal manner, which led to the conclusion that their measures could not be interpreted as lawful countermeasures, so the measures of non-injured, non-party states that have nothing to do with the GCC crisis or the Riyadh Agreement are more likely to be deemed unlawful measures. Second, on the assumption that the wrongful acts attributable to Qatar were proven, do these wrongful acts constitute a serious breach of international law? Or is such a breach owed to the international community as a whole? Or can it be described as a gross, well-attested, systematic or widely acknowledged grave breach of an *erga omnes* obligation? Can the alleged wrongful acts attributed to Qatar be described as a breach of an *erga omnes* obligation towards all parties and non-parties to the Riyadh Agreement?[200] The measures taken by the blockading states in the GCC crisis fall primarily under the category of *erga omnes inter partes* obligations. This is because the allegations against Qatar were based on violations of the Riyadh Agreement, which is a treaty binding only among its signatories. The obligations under this agreement constitute inter partes obligations, i.e., obligations owed specifically among the treaty parties. Therefore, the breach in question is limited to the signatories of the Riyadh Agreement, making it an *erga omnes inter partes i*ssue. However, Egypt's participation in the countermeasures, despite not being a party to the Riyadh Agreement, positions it among the non-injured states. The involvement of other states like Maldives, Mauritania, Djibouti, Comoros, Niger, Gabon, Senegal, Chad, Yemen, and Jordan also reflects the actions of non-injured states, as they lack both a direct legal injury and contractual relations with Qatar under the Riyadh Agreement. In this context, their measures cannot be justified under international law, which restricts non-injured states from taking countermeasures for breaches of *erga omnes inter partes* obligations. As such, the GCC measures, involving both signatories and non-signatories of the

[200] It is noteworthy to mention that Kuwait and Oman, both members of the GCC and signatories to the Riyadh Agreement, were expected to be affected states in the alleged violation by Qatar. However, they diverged from the stance of the blockading states, expressing their opposition to the airspace restrictions on Qatar. Notably, neither Kuwait nor Oman sided with the blockading states nor initiated any actions against Qatar.

Riyadh Agreement, demonstrate the questionable lawfulness of collective countermeasures by non-injured states in this crisis. As stated earlier, the current state practice with regard to the permissibility of collective countermeasures is normally linked to serious breaches of communitarian norms; the blockading states could not produce acceptable legal evidence to prove the mere existence of the wrongful acts, let alone proof of the seriousness and gravity of such acts. Therefore, and based on the above logic and analysis, it can be said that the lawfulness of the collective countermeasures in the GCC crisis is quite questionable due to the absence of evidence concerning the wrongful acts in the first place, as well as the absence criteria of the seriousness of the breach that entails the use of collective countermeasures.

1.4.5 The applicability of Article 55: lex specialis in the GCC crisis

This section will be dedicated to addressing a claim raised by the state of Qatar before the ICJ that the Chicago Convention excludes the application of countermeasures in reliance on Article 55 of the ARSIWA. As Qatar stated:

> the Council could find that, as lex specialis, the Chicago Convention excludes countermeasures as a circumstance precluding wrongfulness…Qatar recalls that "[t]o the extent that derogation clauses or other treaty provisions (e.g., those prohibiting reservations) are properly interpreted as indicating that the treaty provisions are 'intransgressible', they may entail the exclusion of countermeasures.[201]

Qatar's claim is based on the maxim of *lex specialis* articulated in Article 55 of the ARSIWA, which states that in the conflict between treaties and or any area of international law, the precedence is given to the specific rule over the general one: the 'specific prevails over the general'.[202] The rationale behind this maxim is that special rules are generally precise and consider the features of that specific area of international law better; as a result, these rules are more appropriately applied in their context than general law.[203] These special agreements

[201] Counter-Memorial of the Government of the State of Qatar (n 17) at 93.

[202] Sir G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' 33 British Yearbook of International Law (1957) 236. See also the analytical study in the report of the Study Group of the Commission finalized by Martti Koskenniemi on the fragmentation of international law: difficulties arising from the diversification and expansion of international law (A/CN.4/L.682 and Corr.1 and Add. 1); the report is available from the Commission's website, documents of the fifty-eighth session.

[203] United Nations, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (21 July 2014) <https://www.un-ilibrary.org/content/books/9789210556583s001-c014> accessed 5 February 2022. See also Salimi Torkamani H, 'Self-Contained Regimes and Their Relations with General International Law' (2010) 27 International Law Review

are built on the consent of the parties involved to give priority to certain laws over others or even to exclude the usage of certain actions that might otherwise be rights of every state in general international law. Also, this maxim has been widely accepted in the international legal system and is used by academics and in case law in international judicial forums to solve conflicts of norms.[204] For instance, in the North Sea Continental Shelf case, the ICJ stated that the rules of general law can be deviated from by special agreement between parties as follows:

> would no doubt have been possible for the Parties to have identified in the Special Agreement certain specific developments in the law of the sea of this kind, and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*.[205]

The notion of special rules was also referred to by the ICJ in the case of the United States Diplomatic and Consular Staff in Tehran concerning the seizure of the US Embassy and its diplomatic and consular staff in Tehran as a response to the United States' intervention in the internal affairs of Iran.[206] The Court rejected that justification, asserting that 'the rules of diplomatic law, in short, constitute a self-contained regime' that lays down the responsibilities of the receiving state towards the diplomatic mission and offers counter actions for any abuse of such mission.[207] Moreover, the World Trade Organization (WTO) is a famous example of this field; it is a system that establishes its own dispute mechanisms that generally prevent the use of countermeasures.[208] Article 23 of the WTO Dispute Settlement Understanding (DSU) provides that members are bound by DSU rules and procedures that prevent states from

207; Adany TV, 'International Law at the European Court of Justice: A Self-Contained Regime or an Escher Triangle Part III: Developments in International Law' (2013) 2013 Hungarian Yearbook of International Law and European Law 165.

[204] It is worth mentioning that others have criticised this maxim and questioned the exclusivity of the special law on the basis that it leads to the fragmentation of the application of the international law while weakening the effectiveness of its enforcement (Proukaki (n 89) 246). They argue that the special law regime can never be operated alone apart from the general law as the latter plays a crucial role in filling gaps that exist in the former or in situations where such a special regime collapses (Thirlway H, The Sources of International Law (Oxford University Press 2019) 196). See also Simma B and Pulkowski D, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483; McRae D, 'The Relationship between International Economic Law and Public International Law: The Role of Self-Contained Regimes' (2019) 11 Indian Journal of International Economic Law 3.

[205] 'Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) – Judgment Case' (1982) 1982 International Court of Justice Report of Judgments, Advisory Opinions and Orders 38.

[206] Case Concerning United States Diplomatic and Consular Staff in Tehran, (n 96) 40.

[207] ibid.

[208] Proukaki (n 89) 228.

resorting to countermeasures without prior authorisation of the Dispute Settlement Body.[209] Therefore, deviation from obligations under the WTO is not allowed except if that deviation is based on Articles XX and XXI of GATT, which is the national security exception.[210] The application of the special law concept is reflected in many different fields of international law, including, but not limited to, diplomatic law, European Community law,[211] and human rights.

That having been said, there are some limitations to this principle that must be kept in mind. For instance, the Study Group on the Fragmentation of International Law concluded that the application of such special laws does not entirely exclude the relevant general law, as the latter will remain applicable in situations where the former does not provide remedies.[212] The group also indicated that there are situations where the general law will prevail over the special law, for instance, if the prevalence of the special could disturb the purpose of the general law, or in situations where third parties might be affected due to the application of such special law, or if the general law in question falls under the category of non-derogable law.[213]

On the same footing with the WTO, Qatar claimed that the maxim of *lex specialis* has a strong relevance in deterring the usage of countermeasures in the field of aviation, based on the rationale of that maxim. The justifications are based on the peculiarity of aviation, as it is a very unique and specific branch of international law, and its rules and regulations tend to be standardised among all states with the paramount objective of the maintenance of aviation

[209] 'Understanding on Rules and Procedures Governing the Settlement of Disputes', World Trade Organization <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#23> accessed 8 January 2022.
[210] 'The General Agreement on Tariffs and Trade (GATT 1947)' World Trade Organization. See also Simo RY, 'The Law of International Responsibility: The case of the WTO as a 'lex specialis' or the fallacy of a 'self-contained' regime' (2014) 22 African Journal of International and Comparative Law 184.
[211] The EU operates as a self-contained legal regime, expressly prohibiting countermeasures among its member states. This prohibition, found in key treaties like the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), the principle of sincere cooperation (Article 4(3) TEU) reinforces this prohibition. It compels member states to refrain from measures jeopardizing the Union's objectives, starkly limiting the use of countermeasures. The EU's legal system, marked by the direct effect and primacy of EU law, ensures conflicts are resolved within the supranational framework, diminishing the relevance of countermeasures rooted in inter-state reciprocity. The EU's commitment to internal dispute resolution, including referrals to the Court of Justice, underscores its status as a self-contained regime deterring countermeasures between its member states. for further reading see Consolidated Version of the Treaty on European Union [2008] OJ C115/13. Also, Consolidated version of the Treaty on the Functioning of the European Union [2007] OJ C115/01. Phelan W, 'What Is Sui Generis About the European Union? Costly International Cooperation in a Self-Contained Regime' (2012) 14 International Studies Review 367.
[212] 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) International Law Commission, vol. II, Part Two, United Nations, 178, para. 251.
[213] Ibid 179.

safety. It is also one of the fundamental objectives of the ICAO[214] that has been translated through the introduction of the Standards and Recommended Practices (SARPs), the main intention of which is having sets of rules and standards to be equally applied on a universal level without any discrimination among the parties to the Chicago Convention.[215] Discrimination could cause a huge disruption to the system; therefore, the Chicago Convention is considered to be a non-discriminatory regime. The reflection of this statement is enlarged throughout its articles, which repeatedly state that there must not be any distinction made between the nationality of aircraft for the application of the Convention. For example, Article 9 gives states the right to prohibit flight over certain areas or the whole of its territory on exceptional basis during emergencies, incidents threatening public safety, or times of military necessity provided that the restriction applies to all parties without any discrimination based on nationality of aircraft.[216] The same formula is also used in Article 11 and Article 35, all confirming that this convention is a non-discriminatory regime where all rules, measures, treatment, charges, fees and regulations are applied on a non-discriminatory basis without any distinctions by the nationality of the aircraft.[217] Finally, the Convention, like the WTO system, does not allow any state to derogate from its rules except in very limited circumstances, such as in wartime or in a duly declared national emergency.[218]

The blockading states responded that Qatar's claim that the Chicago Convention excludes the application of countermeasures should be rejected on the basis of the following: First, the Riyadh Agreements give them a 'broad and free-standing right'[219] to take unrestricted unlimited actions in cases of non-compliance by their contracting parties.[220] They claimed that such a right is broad enough to justify any measures that might be inconsistent with the Convention.[221] Second, the Convention does not expressly state an exclusion of the right of

[214] Chicago Convention (n 42) art 44.
[215] ibid.
[216] Chicago Convention (n 42) art 9.
[217] Chicago Convention (n 42) art 11, 35.
[218] Chicago Convention (n 42) art 9, 89.
[219] '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): Reply of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates' International Court of Justice (2019) 88 < https://www.icj-cij.org/public/files/case-related/173/173-20190527-WRI-01-00-EN.pdf > accessed 6 February.
[220] 'UNTC' United Nations <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280527eaf> accessed 6 March 2022; Mechanism Implementing the Riyadh Agreement, 17 April 2014.
[221] Reply of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 219) 89.

countermeasures, nor are its obligations deemed 'intransgressible' obligations, as claimed by Qatar.[222] Finally, state practice refutes the claim of the exclusion of countermeasures in the Convention. The blockading states provided many cases to support their position; for instance, in the air service agreement arbitration in *France v United States*, the tribunal held that the US was entitled to take countermeasures in response to those actions of France.[223] In 1980, the United States, the United Kingdom, France, the Netherlands, Switzerland and Austria suspended the landing rights of Poland and the Soviet Union in response to the Polish government's imposition of martial law and suppression of protests.[224] Furthermore, in 2016, the EU deprived North Korean carriers from landing in, taking off from, or overflying European Union territory as a response to its nuclear and ballistic missile programme.[225] Also, a recent example that might be added here – since it might also be used as evidence against Qatar's claim – is the EU's total closure of its airspace to all Russian-owned, registered or controlled aircraft in response to the Russia invasion of Ukraine.[226]

However, the arguments of the blockading states are not quite compelling, as they can easily be challenged and refuted. To begin with, the first argument concerning their entitlement to a broad 'free standing' right under the Riyadh Agreements, even if not consistent with the Convention, which they are somehow suggesting that such right goes beyond the Chicago Convention, is problematic under Article 82.[227] Article 82 of the Chicago Convention obliges states to set aside or modify any obligations that conflict with the Convention. It creates a legal framework that prioritizes the Convention's provisions over conflicting agreements, including more recent agreements like the Riyadh Agreement. In this context, the blockading states' interpretation of their rights under the Riyadh Agreement is weakened, as the Convention requires alignment of all obligations to ensure consistency with its terms. Although Article 82 does not automatically void contrary obligations, it requires states to reconcile such conflicts to maintain compliance with their obligations under the Convention. As a result, any conflicting provisions under the Riyadh Agreement would be unenforceable

[222] ibid 90.
[223] ibid 93.
[224] ibid 94.
[225] ibid 95.
[226] 'EU Adopts New Set of Measures to Respond to Russia's Military Aggression against Ukraine' European Council <https://www.consilium.europa.eu/en/press/press-releases/2022/02/28/eu-adopts-new-set-of-measures-to-respond-to-russia-s-military-aggression-against-ukraine/> accessed 4 May 2022.
[227] Chicago Convention (n 42) art 82.

to the extent that they contradict the Chicago Convention's requirements, underscoring the primacy of the Convention in regulating international airspace.[228] Therefore, the blockading states' interpretation of the terms and rights under the Riyadh Agreements is deficient, as it overlooks the normative authority of earlier obligations under the Chicago Convention, which restricts the scope of actions they can take. When interpreting conflicting obligations in international law, several principles guide the resolution process. Harmonious interpretation is the preferred approach, aiming to reconcile conflicts between treaties so that they coexist without undermining each other.[229] This method operates on the presumption that states do not intend to create irreconcilable commitments when entering into multiple treaties, thus promoting compliance with all obligations wherever possible. Furthermore, the principle of lex specialis (which is discussed in this section). Another key principle is the rule of lex posterior, which generally allows later treaties to override earlier conflicting ones.[230] However, Article 82 of the Chicago Convention represents an explicit exception to this principle, as noted in the ILC Report on the Fragmentation of International Law, which identifies such clauses as preserving the normative power of the earlier treaty.[231] Therefore, even when newer agreements like the Riyadh Agreement are in conflict, the primacy of the earlier treaty (Chicago Convention) is maintained to ensure legal coherence in international civil aviation. Additionally, Article 30 of the Vienna Convention provides a formal framework for addressing conflicts between successive treaties on the same subject.[232] It emphasizes the need for compatibility but allows the later treaty to prevail if reconciliation is not possible, except when clauses, such as those in Article 82, preserve earlier commitments. In these cases, conflicting obligations under newer agreements must be set aside to maintain compliance with established international standards, reinforcing the overarching objective of a coherent international legal order.

[228] Milde M, 'Chicago Convention - 45 Years Later: A Note on Amendments Air Law' (1989) 14 Annals of Air and Space Law 214.
[229] Johannes Hendrik Fahner and Matthew Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration' (2019) 68 International and Comparative Law Quarterly 749.
[230] Paulson S, 'On the Status of the Lex Posterior Derogating Rule' (1983) 5 Liverpool Law Review 5.
[231] International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (13 April 2006), para 268.
[232] Vienna Convention on the Law of Treaties (n 34) Art. 30.

Second, the examples given regarding state practice are mainly irrelevant to the discussion or have a specific nature that is not analogous to the GCC crisis. For instance, *France v United States* was not about the Chicago Convention; rather, it was a bilateral matter concerning landing rights granted through bilateral arrangements between both countries under what is generally known as an air service agreement, and the same is true for the Poland and Soviet Union case. In the North Korea example, the EU qualified those measures as complementary to, as well as in compliance with, paragraph 21 of U.N. Security Council Resolution 2270, which was adopted on 2 March 2016, and this is not in the form of countermeasures.[233] Therefore, these examples of state practice are not compelling evidence due to their irrelevance to the issue at hand.

1.4.6 Conclusion

The lawfulness of countermeasures is rooted in international law, as it is a tool of self-help and an enforcement mechanism used against wrongdoing states to implement state responsibility for breaches of international law. However, there are limitations and conditions that must be respected in order to avoid any abuse of such measures. In essence, the pre-existence of the internationally wrongful act of the wrongful state is a prerequisite for the lawfulness of countermeasures, which could simply turn countermeasures as unlawful if turned out that they were not taken in response to a wrongful act. After considering the measures taken against Qatar, it turned out that they fail to meet the criterion of the pre-existence of wrongfulness and were based merely on allegations that are highly subjective, from single sources or interested sources and not the product of a court-like process; finally, they did not meet the requirement of consistency and concordance. On this basis, these measures are unlawful, as they were not taken in response to an internationally wrongful act. The legality of the measures of the blockading states, even if the existence of the wrongfulness of Qatar is assumed to have occurred, can be challenged on the basis of a failure to adhere to

[233] 'S/RES/2270 (2016)' United Nations Security Council <https://www.un.org/securitycouncil/s/res/2270-%282016%29> accessed 21 May 2022; 'EU Restrictive Measures against North Korea' European Council <https://www.consilium.europa.eu/en/policies/sanctions/history-north-korea/> accessed 21 May 2022.

the conditions of countermeasures including, but not limited to, the principle of proportionality.

As illustrated earlier, when comparing the gravity and the seriousness of the alleged violation of Qatar and the response of the blockading states, one can find that the response was not commensurate with the alleged violation on qualitative or quantitative levels. As demonstrated, they did not meet the appropriateness criteria in either the aims of such measures or in the method used to achieve them. Furthermore, the issue of collective countermeasures raised some concerns over the permissibility of GCC measures. Such an issue is very debatable, as international law and state practice do not take a firm position on their legality; and at a minimum, however, collective countermeasures are normally linked to serious breaches of communitarian norms. This leads to the question whether the collective countermeasures taken against Qatar fall under this category. The blockading states could not produce acceptable legal evidence to prove the mere existence of the wrongful acts, let alone proof of the seriousness and gravity of such acts. Therefore, it can be said that the lawfulness of the collective countermeasures in the GCC crisis is quite questionable due to the absence of evidence concerning the wrongful acts in the first place, as well as the failure to meet the criteria for the seriousness of a breach that would entail the use of collective countermeasures. Finally, although the claim of Qatar that the Chicago Convention is considered a non-discriminatory system that excludes the application of countermeasures in reliance on Article 55 of the ARSIWA has some truth and logic, especially considering the special nature of international civil aviation. However, it is quite difficult to assert nor to deny such a claim, as it is a grey area in international law and, with some uncertainty, a feature of state practices. Such a claim could be true in some situations where the derogation from the Convention has no legal basis, while it might not be the case in others.

2 Chapter 2: Qatar-Bahrain FIR conflict and its impact on the delineation of FIRs in the GCC region

2.1 Introduction

As discussed in the previous chapter, among the measures taken by the blockading states was the closing of their airspace as well as their FIRs over both territories and the high seas. This prohibition, which extended to all Qatar-registered aircraft, denied the use of the airspace over their territories and over international waters that fell under Bahrain's FIR; it also banned them from flying to or from the blockading states' airports or over their territorial air space. This closure was in the form of Notices to Airmen (NOTAMs)[234] from the blockading states' respective civil aviation authorities. The first NOTAM, sent by Saudi Arabia, cancelled authorisation for any Qatar-registered aircraft to land at its airports.[235] Saudi Arabia then issued another NOTAM prohibiting all Qatar-registered aircraft from flying over its air space.[236] Later on the same day, it issued another NOTAM requesting all non-Saudi registered aircraft using its airspace to fly to or from Qatar to coordinate with its Civil Aviation Authority.[237] Likewise, the Republic of Yemen issued a NOTAM similar to Saudi Arabia's first NOTAM.[238] The UAE followed suit and issued a NOTAM that banned all Qatar-registered aircraft from overflying the UAE FIR, which includes its territory and a large portion of the high seas in the Arabian Gulf, banned Qatar-registered aircraft from using all aerodromes in the UAE and requested non-UAE-registered aircraft flying to or from Qatar using its air space to obtain approval from its Civil Aviation Authority by providing a flight manifest[239] 24 hours before departure.[240] Egypt's position was no different from those taken by the others. Its NOTAM

[234] A NOTAM is a notice containing variety of information concerning the air navigation facilities and services. For example, regulations regarding entry into and transit through the airspace of each state in which operations will be carried out, what aerodromes, heliports, navigation aids, meteorological services, communication services and air traffic services are available, as well as the procedures and regulations associated with them. It also includes any change affecting the operation of these facilities and services and must give notice of any airspace restrictions or hazards likely to affect flights. See more at Ruwantissa Abeyratne, *Air Navigation Law* (Springer 2012) <http://link.springer.com/10.1007/978-3-642-25835-0> accessed 28 October 2020; Federal Aviation Administration, 'What Is a NOTAM?' <https://www.faa.gov/about/initiatives/notam/what_is_a_notam> accessed 6 November 2022.

[235] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), ICAO Response to Preliminary Objections (A), Exhibit 5 Annex 25, 14–15.

[236] ibid.

[237] ibid.

[238] ibid. Saudi Arabia is the de facto authority over Yemen.

[239] A flight manifest is a list of the passengers and crew of an aircraft compiled before departure based on flight check-in information.

[240] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), ICAO Response to Preliminary Objections (A), Exhibit 5 Annex 25.

banned Qatari aircraft from everywhere in its FIR, which covers both its territory and a portion of the Mediterranean high seas.[241] The last NOTAMs were from Bahrain, and they had the severest effect on Qatar. The first NOTAM banned all Qatar-registered aircraft from flying over Bahraini air space.[242] Another specified that Qatari aircraft could only use two entry and exit routes in Bahrain FIR.[243] The significance of these measures lies (as illustrated in Figure 1) in the fact that

> Bahrain FIR fully encompasses Qatar's territory and much of the high seas surrounding it, this had the effect of closing off the rest of the airspace over the Arabian Gulf high seas. Bahrain also informed Qatar of its intent to establish a so-called 'buffer zone' adjacent to its territorial waters, threatening to intercept militarily any Qatar-registered aircraft entering it.[244]

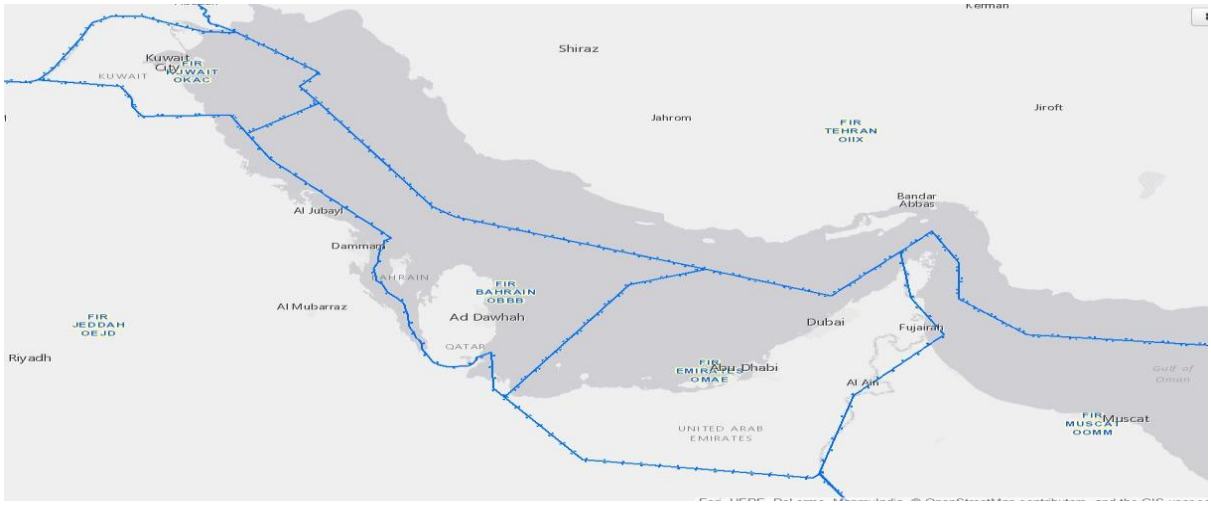

Figure 1 The distribution of FIRs in the Arabian Gulf at the beginning of the GCC crisis

These measures had a huge impact on Qatar on different levels and caused widespread disruption for all carriers operating to and from Qatar. For example, more than 70 flights operated by several carriers were cancelled on the first day of the air restrictions,[245] and tens of thousands of bookings for flights to and from Qatar were cancelled in the first week as a

[241] ibid.
[242] ibid.
[243] ibid.
[244] Counter-Memorial of the Government of the State of Qatar (n 17) 15. See also Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) , ICAO Response to Preliminary Objections (A), Exhibit 3, Annex 25, Letter from Abdulla Nasser Turki AlSubaey, Chairman of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO, 2017/15984 (8 June 2017).
[245] ibid Counter-Memorial of the Government of the State of Qatar (n 17) Vol. IV, Annex 73.

result of the issuance of these NOTAMs.[246] From a safety and security perspective, some of these NOTAMs put the safety of five aircraft at risk. For instance, on the first day of the air restrictive measures, these five flights were flying over Yemeni air space, and the issuance of the Yemeni NOTAM was back-timed which resulted in these flights being required to urgently change their routes, leading to the filing of two air safety occurrence reports.[247] However, the practical impact of these NOTAMs was to deprive Qatar of the overflight of international air space over the high seas that fall under the blockading states' FIRs, especially the Bahrain FIR. As illustrated in Figure 2, the national air carrier of Qatar – Qatar Airways – had, before the abovementioned NOTAMs, access to 13 air traffic services (ATS) routes[248] for flight to and from Doha, including over the blockading states' territories.[249]

[246] ibid Vol. IV, Annex 77.

[247] ibid 16–17. Air Safety Occurrence reports are reports that states are obligated to file regarding any events which have or could have significance concerning aviation safety. These could range from accidents and serious incidents to less severe situations per the provisions of ICAO Annex 13 on aircraft accident and incident investigation. Chicago Convention (n 42).; SKYbrary Aviation Safety, 'Safety Occurrence Reporting' <https://www.skybrary.aero/articles/safety-occurrence-reporting> accessed 10 November 2022.

[248] Per Annex 11 of the Chicago Convention and ICAO regulations, ATS routes are specific routes designed for the purpose of 'channelling the flow of air traffic as necessary for the provision of air traffic service, … which include an ATS route designator, the track to or from significant points (waypoints), distance between significant points, reporting requirements and, as determined by the appropriate ATS authority, the lowest safe altitude.' See SKYbrary Aviation Safety, 'ATS Route' <https://www.skybrary.aero/articles/ats-route> accessed 14 November 2022 .

[249] Counter-Memorial of the Government of the State of Qatar (n 17) 18.

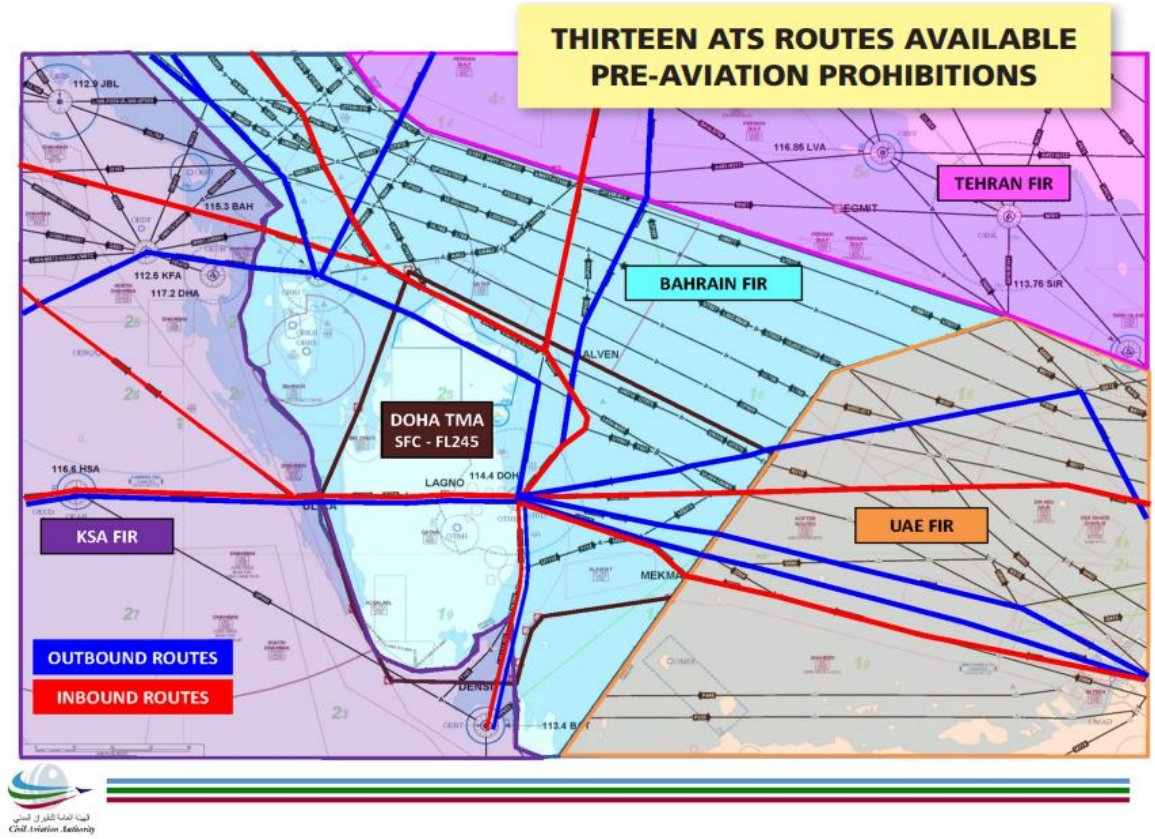

Figure 2 Thirteen ATS Routes Available Pre-Aviation Prohibitions

However, after these NOTAMs, Qatar-registered aircraft had two ATS routes (as shown in Figure 3), both over the high seas within Bahrain FIR.[250] Qatar appealed to ICAO to intervene, and as a result, Bahrain, Egypt and the UAE issued NOTAMs to modify the scope of their previous NOTAMS, limiting application to their national air space.[251] Also, on 11 June 2017, Bahrain amended two ATS routes to and from the west over the high seas within its FIR.[252] Qatar tirelessly sought contingency routes over UAE and Bahrain territories; however, these endeavours failed until 22 June 2017, when Bahrain – only – approved two additional ATS airways, both within its FIR.[253] On 31 July 2017, ICAO Council held an extraordinary session-,as per Qatar's request and 'urg[ed] all ICAO Member States to continue to collaborate, in particular, to promote the safety, security, efficiency and sustainability of international civil

[250] ibid.
[251] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) , ICAO Response to Preliminary Objections (A), Exhibit 5 Annex 25.
[252] ICAO Council, 'First ATM Contingency Coordination Meeting for Qatar, Summary of Discussions' , ICAO Doc. ACCM/1 (6 July 2017), Appendix A, Annex 26 of Counter-Memorial of the Government of the State of Qatar (n 17) 9–10.
[253] ibid 14–20.

aviation'.[254] This worked to break the positions of both the UAE[255] and Egypt as they approved additional contingency routes over the high seas within their FIRs.[256] Finally, after dialogue, appeal between Qatar and the blockading states and the intervention of the ICAO Council, the ATS routes increased to seven as of 4 February 2019, as reflected in Figure 4.[257]

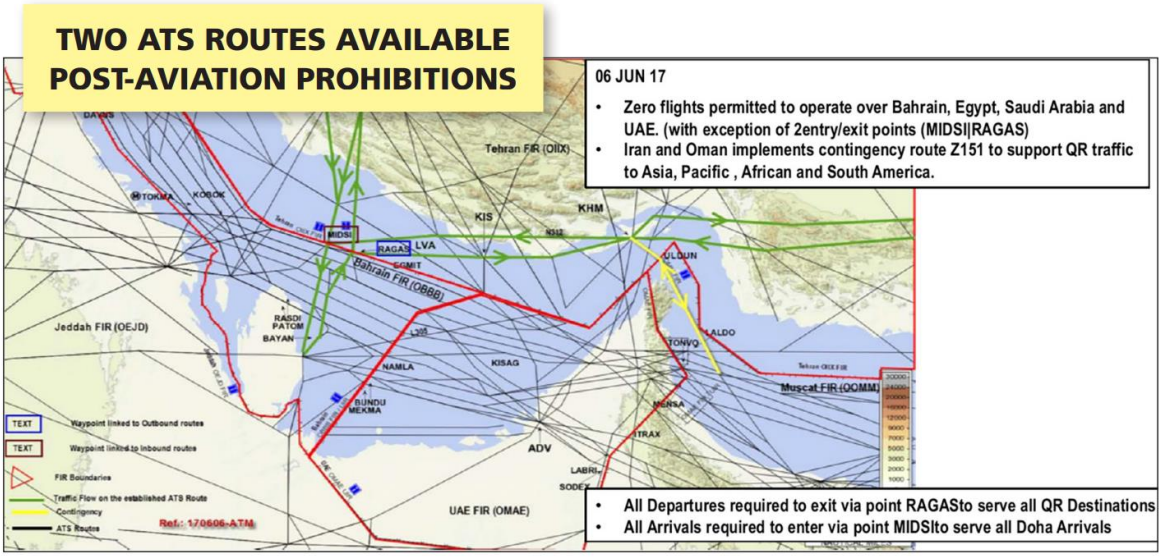

Figure 3: Two ATS Routes Available Post-Aviation Prohibitions

[254] ICAO, 'Supporting Implementation Strategies – Legal and External Relations Services – Settlement of Differences' <https://www.icao.int/annual-report-2017/Pages/supporting-implementation-strategies-legal-and-external-relations-services-settlement-of-differences.aspx> accessed 14 November 2022.

[255] Appendices of Working Paper 14640: 'Contingency Arrangements and ATM Measures in the MID Region by Kingdom of Bahrain, Arab Republic of Egypt, Kingdom of Saudi Arabia and United Arab Emirates (2017) Annex 135 of Counter-Memorial of the Government of the State of Qatar' (n 17) 16.

[256] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) , ICAO Response to Preliminary Objections (A), Exhibit 10 Annex 25.

[257] ICAO Council, Third ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/3 (5–6 Sept. 2017), Annex 135 of Counter-Memorial of the Government of the State of Qatar (n 17) para, 6.12.1; ICAO Council, Fourth ATM Contingency Coordination Meeting for Qatar, Summary of Discussions, ICAO Doc. ACCM/4 (28 April 2018) Annex 135 of Counter-Memorial of the Government of the State of Qatar (n 17).

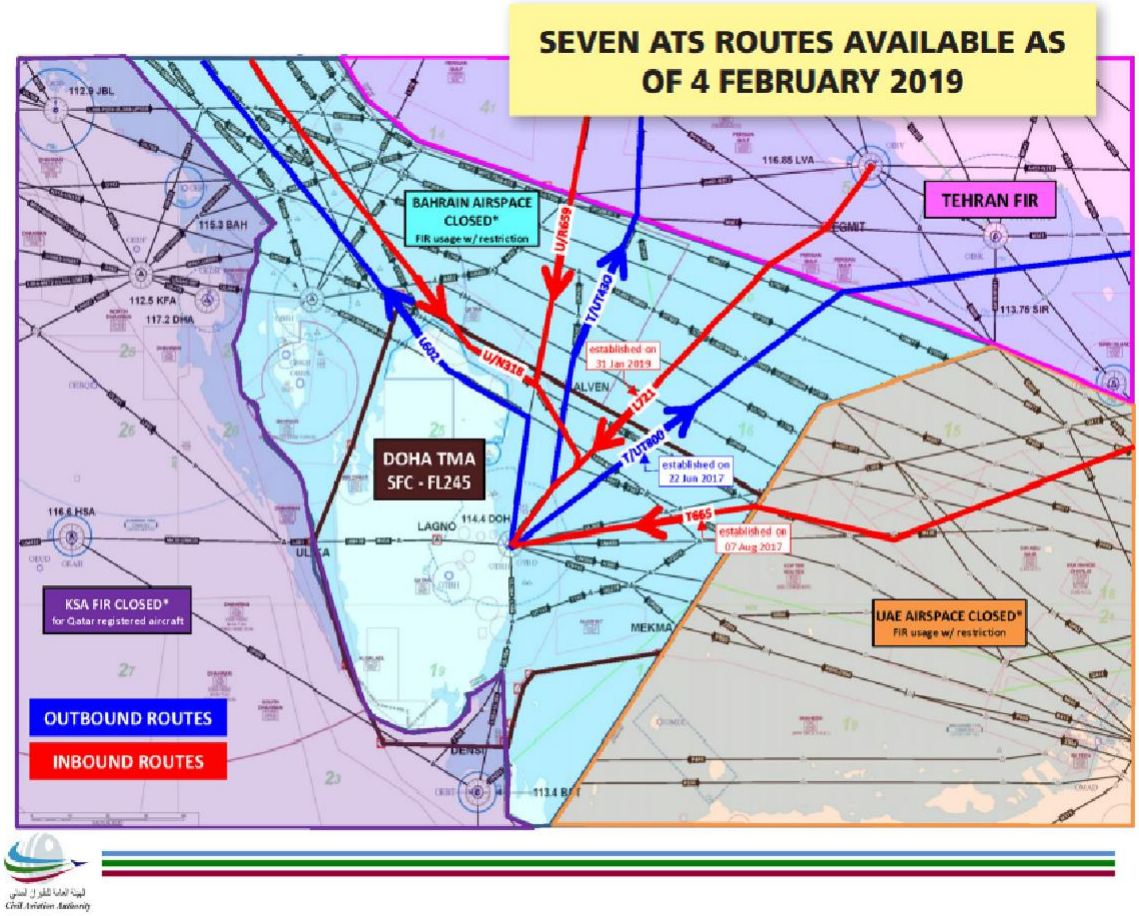

Figure 4 Seven ATS Routes Available as of 4 February 2019

The first part of this chapter will be a presentation of the international rules and regulations applicable to FIRs, their definitions, how they are being delineated, their legal implications and the extent to which they create obligations for states. The second section will address what Bahrain called the buffer zone, as mentioned above, by discussing the two types of zones in international law: air defence identification zones (ADIZ) and no-fly zones. Analysis of their objectives, states' practices and legality in international law (e.g. the Chicago Convention, UNCLOS and customary international law) will be given to determine the legality of Bahrain's conduct. The final section will discuss the impact of the GCC crisis on the distribution of FIRs in the Arabian Gulf, which is the establishment of Doha FIR, which has been taken from Bahrain FIR by a decision of the ICAO Council.

2.2 Flight information regions[258]

2.2.1 Preliminary considerations

In its preamble, the Chicago Convention states that one of its main aims is to develop a set of principles and rules that promote international civil aviation through air traffic services being conducted in a safe and orderly manner.[259] These traffic services are outlined in Article 28 of the Convention, which states:

> Each contracting State undertakes, so far as it may find practicable, to: (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention.[260]

It emphasises that such services are conducted in accordance with provisions established under the Convention.[261] This standardisation is vital in civil aviation to ensure the uniformity of regulations regarding international air navigation services. Therefore, ICAO, through its council, has adapted what is known as the International Standards and Recommended Practices (hereafter, SARPS) and designates these SARPS as annexes to the Convention. One of these is Annex 11, which concerns the issue of air traffic services (ATS). It must be noted that the term FIR is not mentioned in the Convention; it is a concept founded and developed by ICAO, after which ICAO embodied the regulations regarding FIRs into different sets of enactments: SARPS as annexes to the Convention, the Procedures for Air Navigation Services (PANS) and Regional Supplementary Procedures (SUPPS). Each one of these regulations has a different legal status in terms of its obligatory nature. The way to understand it is to address an initial issue here, that is, the legislative power of ICAO in the sense of its quasi-legislative law-making power.[262] This quasi-legislative power is reflected in many articles of the Convention, such as Article 37,[263] in which each member state 'undertakes to collaborate in

[258] The objective of this chapter is to delve into the legal intricacies surrounding FIRs, with a specific focus on aspects of legal significance, particularly regulations pertaining to states' responsibilities. To achieve this aim, the discussion will strategically incorporate essential technical aspects of FIRs, ensuring a comprehensive exploration of the subject.

[259] Chicago Convention (n 42). See also Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 3-9.

[260] Chicago Convention (n 42) art 28.

[261] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 345.

[262] This point will be discussed thoroughly in chapter 4 of this thesis, where the subject of ICAO power to adjudicate the GCC crisis is addressed.

[263] Abeyratne, 'The Legal Status of the Chicago Convention and Its Annexes' (1994) 19 Air and Space Law 121.

securing the highest practicable degree of uniformity in regulations, standards, procedures and organization in relation to aircraft, personnel, airways and auxiliary services in all matters'.[264] Also, Article 54 (I) states that one of the mandatory functions of the ICAO Council is to adopt international standards and recommended practices, to designate them as annexes to the Convention and to notify all member states of actions taken.[265] Article 37, mentioned above, provides three types of regulations under the Chicago system: standards, recommended practices and procedures. However, the Convention does not supplement any definition to any of these regulations, though the ICAO assembly, in its first session, at the adoption of Assembly Resolution A1-31, supplied the definitions of standards and recommended practices:[266]

> 'Standard' means any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention.[267]
>
> 'Recommended Practice' means any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavour to conform in accordance with the Convention.[268]

At first glance, these two definitions seem similar; however, there are significant differences between them. First, 'uniform application of [the standards] is recognized as necessary for the safety or regularity of international air navigation,' whereas the application of the recommended practice is labelled as only 'desirable'. Second, recommended practices are related only to the efficiency of air navigation. Third, the wording of the standards requires contracting states to conform to their application, while recommended practices request

[264] Chicago Convention (n 42) Art 37.
[265] ibid art 54(I). Article 90 (Adoption and Amendment of Annexes) is another example of the Council's possession of quasi-legislative power. See also R Abeyratne, 'Terror in the Skies: Approaches to Controlling Unlawful Interference with Civil Aviation' (1997) 11 International Journal of Politics, Culture, and Society 259.
[266] ICAO, 'All Archived Assembly Meetings (1st to 34th)' <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a01> accessed 21 November 2022. See also ICAO, 'Making an ICAO Standard' <https://www.icao.int/safety/airnavigation/pages/standard.aspx> accessed 21 November 2022
[267] ibid.
[268] ibid.

contracting states to merely endeavour to apply. Fourth, when compliance with the standards is impossible, the states are obligated to notify the ICAO Council under Article 38 of the Convention, while no such obligation is found with the recommended practices.[269] Another striking difference between them is that the standards are identified by the words 'contracting States shall', which makes them mandatory, while recommended practices are identified by 'contracting States may', which conveys that they are only an 'advisory and recommendatory connotation'.[270] Both SARPS are designed as annexes pursuant to Article 54(I) of the Conventions; however, these annexes do not have the same status as the Convention itself. The annexes are adopted by the ICAO Council through a two-thirds majority of its members and can only bind member states if they so consent, with the only exception being Annex 2. Contracting states, pursuant to Article 38, have the flexibility to deviate from all annexes to the Convention except Annex 2, the Rules of the Air, which relate 'to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention, and deviations from these rules may not be made in so far as they relate to flight over the high seas.'[271] Article 12 clearly states that over the high seas, the rules shall be those established by the Convention, which is the appropriate authority over the high seas where it is not subject to any state's sovereignty.[272]

With regard to the legal status of the PANS and SUPPS, they are regulatory materials hierarchically inferior to the SARPS, as they are not part of the annexes to the Convention. As mentioned above, Article 37 gives ICAO the ability to adopt procedures to supplement the SARPS,[273] and they take the form of the PANS and SUPPS.[274] The PANS are approved by the Council and contain in general a detailed material and basic principles governing the application and operation of SARPS.[275] One of the major differences between the PANS, the

[269] Although one of the ICAO documents requires that any significant differences be filed with ICAO under Article 38 of the Convention, whether standards or recommended practices, thus suggesting that SARPS are also mandatory in nature. See ICAO, 'Aeronautical Information Services Manual', ICAO Doc 8126-0 AN/872/3. Available at <https://standart.aero/en/icao/book/doc-8126-aeronautical-information-services-manual-en-cons> accessed 23 November 2022.
[270] Abeyratne (n 263) 121.
[271] ICAO, Doc. 7310-C/846, Proceedings of the Council, 3rd Session, 26, 28.
[272] EJ Molenaar, 'Airports at Sea: International Legal Implications' (1999) 14 International Journal of Marine and Coastal Law 371. See also Abeyratne, Air Navigation Law (n 234) 22-23.
[273] Chicago Convention (n 42) Art 37.
[274] Buergenthal T, Law-Making in the International Civil Aviation Organization (Syracuse University Press 1969) 114–115.
[275] ICAO, 'Rules of Procedure for the Conduct of Air Navigation Meetings and Directives to Divisional-Type Air Navigation Meetings', Part II, Rule 3.1, Doc. 8143-AN/873 (1983). See also J Liu, 'The Role of ICAO in Regulating the Greenhouse Gas Emissions of Aircraft' (2011) 2011 Carbon & Climate Law Review 417.

SUPPS and the SARPS is that the first two do not obligate contacting states to notify ICAO under Article 38 in case of noncompliance.[276] The SUPPS are also created to be operating procedures, but they differ from the PANS in terms of their application, as they are intended to be applied in specific flight information regions, while the application of the PANS is intended to be worldwide. The PANS and SUPPS are approved by the Council, unlike the annexes, and they are not mentioned in the Convention; therefore, they are just mere recommendations with no legally binding power upon states.[277]

2.2.2 Flight information regions

To start with, all airspace on the globe is divided into FIRs. These regions are managed and controlled by the authority of each state, with responsibility under ICAO to deliver information services to all aircraft flying within their FIRs. The term FIR is not found in the Chicago Convention. However, Annex 11 to the Convention defines FIRs as 'an airspace of defined dimensions within which flight information service and alerting service are provided'.[278] It should be noted that there are no rules with regard to the size of each FIR; therefore, FIRs vary in size. Generally speaking, small countries have one FIR above their airspace (territorial airspace), while larger states could have their airspace divided into any number of FIRs. Also, coastal states have FIRs consisting of their air space above both their land as well as their territorial sea. The oceans and the highs seas are divided into two or more FIRs, and each state's responsibilities can be assigned or delegated by ICAO to the controlling authorities of the neighbouring coastal states or states that border that FIR.[279] Moreover, FIRs can be divided vertically into a lower section (the FIR proper) and an upper section (which is referred to as, the upper information region (UIR).[280] The United Kingdom's FIRs and UIRs, for example,

[276] Ibid ICAO Doc. 8143-AN/873.

[277] M Sheffy, 'The Air Navigation Commission of the International Civil Aviation Organization – Part I – A Study of Its Functions and Powers and an Outline of Its Main Fields of Activity' (1958) 25 Journal of Air Law and Commerce 281; E Pepin, 'ICAO and Other Agencies Dealing with Air Regulation' (1952) 19 Journal of Air Law and Commerce 152; N Kaienburg and P Wysk, 'The Binding Effect of ICAO Regulations Air Law' (2018) 67 Zeitschrift fur Luft- und Weltraumrecht – German Journal of Air and Space Law 38; PS Dempsey, 'Blacklisting: Banning the Unfit from the Heavens Section I: Leading Articles' (2007) 32 Annals of Air and Space Law 29; AO Adediran, 'States' Responsibility Concerning International Civil Aviation Safety: Lessons from the Malaysia Airlines Flight MH17 Air Crash' (2014) 14 Issues in Aviation Law and Policy 313.

[278] Chicago Convention (n 42) Annex 11.

[279] Nicholas Grief, 'The 26 Legal Principles Governing The Control of National Airspace and Flight Information Regions and Their Application to the Eastern Mediterranean' (EU Rim Policy and Investment Council Ltd 2009) 2, <https://erpic.org/wp-content/uploads/2017/02/the-legal-principles-governing-the-control-of-national-airspace-and-flight-information-regions-and-their-application-to-the-eastern-mediterranean-2009.pdf> accessed 17 January 2021.

[280] ibid.

consist of three FIRs: London, Scottish and Shanwick Oceanic. London FIR encompasses both England and Wales, while Scottish FIR covers Scotland and Northern Ireland, and finally the Shanwick Oceanic FIR covers 700,000 square miles of airs pace over the Northeast Atlantic.[281]

It is very important to understand the link between the FIR and the concept of air traffic management (ATM). ATM consists of multiple systems assisting aircraft from take-off till landing at its destination; these systems include air traffic services (ATSs), air traffic flow management (ATFM) and air space management (ASM).[282] First, the ATS is mainly for preventing collisions between aircraft and is generally performed by air traffic controllers who provide advice and other necessary information to ensure flight safety. All of the services of the ATS are embodied in three areas: air traffic control (ATC) services, flight information services and alerting services.[283] Second, ATFM is responsible for regulating the flow of aircraft and avoiding congestion. The objective of ASM is to manage the air space between its users (whether civil or military).[284] The boundary of ATM generally follows the boundary of the FIR, and the state providing these services exercises control over or has regulatory control over aircraft operating over such boundaries, and these boundaries could be over the high seas or other states' territory.

2.2.3 Control areas and control zones

FIRs are governed by the principles, rules and recommendations contained in Annex 11 to the Chicago Convention on Air Traffic Services. According to Annex 11, all aircraft fly under either what are called instrument flight rules (IFR) or visual flight rules (VFR). IFR is applicable when the pilot is unable to navigate visually and dictates how aircraft are to be operated under such conditions, while VFR is applicable when the pilot navigates visually, provided that the visibility flying condition is entertained where there are no clouds or other obstacles. Furthermore, to ensure that aircraft are operating safely, FIRs are generally divided into different classes, each with different rules, flight procedures and services to be provided; some are controlled air

[281] NATS, 'Introduction to Airspace' <https://www.nats.aero/ae-home/introduction-to-airspace/>accessed 25 January 2021.
[282] SKYbrary Aviation Safety, 'Air Traffic Management (ATM)' <https://www.skybrary.aero/index.php/Air_Traffic_Management_(ATM)> accessed 11 February 2021.
[283] Abeyratne, Air Navigation Law (n 234) 47.
[284] SKYbrary Aviation Safety (n 282).

space and others uncontrolled. [285] For example, UK air space is divided into five classes – A, C, D, E and G – all of which fall under the category of controlled air space except class G, which is uncontrolled air space. In this class, aircraft can fly freely when and where they wish and are not mandated to take services from air traffic control unless the pilot wants to; will any flight in this class be typically under VFR. The remainder of the classes have rules and requirements with which aircraft and pilots must comply. For instance, pilots are under obligation to obtain clearance from the ATC to enter these air spaces, and they must follow the instructions of the ATC.[286]

Furthermore, controlled air space is further categorised into different types: control zones (CTZs), control areas (CTAs), airways, upper air routes and restricted areas, and the services to be provided on each type depend on where the aircraft is.[287] CTZs are air spaces in the vicinity of airports extending from the surface of the earth upwards to a designated upper limit, normally 2000 feet. Clearance must be obtained from ATC to enter CTZs, and aircraft must follow ATC's instructions. CTAs are air spaces extending up from a specified altitude, usually from the top of a CTZ; this type is important, as it gives protection to aircraft taking off from airports. Airways are predetermined routes on which aircraft are obligated to fly between departure and destination. The width of an airway is generally eight nautical miles (14 kilometres), and the altitude separation between aircraft is at least 500 feet when aircraft are operating under VFR and 1000 feet when they are operating under IFR.[288] Upper air routes are areas of airspace above the airways, extending vertically from 25,000 feet to 46,000 feet, and any aircraft flying in those areas are subject to ATC services.[289] Restricted areas are areas from which aircraft are prohibited for safety reasons.[290]

[285] Michael N Schmitt, 'Aerial Blockades in Historical, Legal, and Practical Perspective' in Michael N Schmitt (ed), Essays on Law and War at the Fault Lines (T M C Asser Press 2012) 273, <https://doi.org/10.1007/978-90-6704-740-1_6> accessed 28 October 2020.
[286] NATS (n 281).
[287] ibid.
[288] Federal Aviation Administration, 'En Route Operations', *Instrument Procedures Handbook*, <https://www.faa.gov/sites/faa.gov/files/regulations_policies/handbooks_manuals/aviation/instrument_procedures_handbook/FAA-H-8083-16B_Chapter_2.pdf>.
[289] NATS (n 281).
[290] ibid.

2.2.4 Services provided within FIRs

Since safety is a paramount issue in international civil aviation, Annex 11 contains safety requirements to be implemented by states and the type of information to be provided by service providers on each FIR. These services include:

> significant meteorological (SIGMET) information, changes in the serviceability of navigation aids and in the condition of aerodromes and associated facilities and any other information likely to affect safety. IFR flights receive, in addition, information on weather conditions at departure, destination and alternate aerodromes, collision hazards to aircraft operating outside of control areas and control zones and, for flight over water, available information on surface vessels. VFR flights also receive information on weather conditions which would make visual flight impractical.[291]

The other purpose of FIRs, as previously mentioned, is to provide services such as giving notification to the appropriate authorities about aircraft that require search and rescue (SAR) aid, as well as assisting the authorities concerned as needed.[292]

2.2.5 Delineation of FIRs

One of the main concerns of the topic of FIRs is how they are assigned or distributed among states. As previously mentioned, the convention does not mention FIRs at all except in Annex 11, which only recommends that the delineation of FIRs be based on technical, rather than national, considerations and 'be delineated to cover the whole of the air route structure to be served by such regions'.[293] This recommendation seems to be an attempt to discourage states from basing FIRs on nontechnical concepts of political or national sovereignty and drive their focus to the technical, operational and safety concerns upon which ICAO's provisions on air navigation are primarily built.[294] On the other hand, the delineation of FIRs over the high seas

[291] Abeyratne, Air Navigation Law (n 234) 9.
[292] Chicago Convention (n 42) Annex 11.
[293] ibid 2.9.2.
[294] However, such a task seems very difficult in the light of the cruciality of the concept of sovereignty to states and the legal stature of that recommendation in Annex 11, from which states can easily deviate: Article 38 of the convention gives contracting states the discretionary power to depart from its regulation. The same can be said with regard to the ICAO Air Traffic Services Planning Manual, which also emphasises that the FIRs covering the airspace of states and their territorial waters should be delineated based on operational purposes. The manual also contains recommendations for how many FIRs states should have depending on their sizes and the route structure. Although ICAO's approach to the delineation seems technically appropriate, it is merely a recommendation with no legal power to go against Article 1 of the Chicago Convention, which gives states exclusive sovereignty over their air space, and which is something on which states will never compromise. The

or any portion of air space with undetermined sovereignty is established in accordance with the regional air navigation agreements approved by the ICAO Council, as stated by Annex 11.[295] Both types will be assigned by ICAO to one or more neighbouring states that have the technical ability to provide the required services. It must be noted that such an assignment does not confer sovereignty or jurisdiction on the state accepting such responsibilities over the air space of high seas or regions of undetermined sovereignty. In addition, ICAO has established nine air navigation regions to which all FIRs around the globe belong: the Africa–Indian Ocean Region (AFI), the Asia Region (ASIA), the Caribbean Region (CAR), the European Region (EUR), the Middle East Region (MID), the North American Region (NAM), the North Atlantic Region (NAT), the Pacific Region (PAC) and the South American Region (SAM).[296] One of the roles of these regions is to develop an air navigation plan based on technical and operational considerations. In addition, as mentioned above, the delineation of the high seas is determined by the advice of these regions to the ICAO Council.[297]

2.2.6 Delegation of responsibility for FIRs

It is worth mentioning that the management of an FIR is a very complicated issue which entails great technical ability as well as having the essential infrastructure. Such as air traffic units, flight information centres and qualified human resources, not to mention proper planning for the implementation of air traffic services, all of which are the responsibility of each state to ensure safe, orderly and expeditious movement of air traffic for both national and international aircraft. In addition, having the ability to coordinate between civil and military usage of air space requires a system for such integration. Above all, states have obligations regarding their FIRs and other assigned responsibilities to provide air traffic services in accordance with the standards, practices and recommendations of the convention and its annexes.[298]

Given how burdensome the handling of FIRs is, countries with limited financial, technical and operational abilities tend to delegate the responsibilities of the management of their FIRs to

result is that every state has its own FIR, and any newly independent state claims its right to have one based on the concept of sovereignty and national boundaries rather than any other consideration.

[295] Chicago Convention (n 42) Annex 11 2.1.2.

[296] ICAO, 'Present Regional Structure' <https://www.icao.int/secretariat/RegionalOffice/Pages/ro-structure.aspx> accessed 1 February 2021.

[297] Chicago Convention (n 42) Annex 11 2.1.2.

[298] Chicago Convention (n 42) Art 28.

other countries or third-party service providers.[299] Such delegation of the management of air space is reached through bilateral agreements among the parties based on negotiation. It is essential to note that the delegation is merely a delegation of the functional responsibilities of air navigation service management and not a delegation of national sovereignty over air space.[300] The delegation agreement is construed not as degrading state sovereignty over air space but rather as an act of such sovereignty based on free will and consent that can be terminated at any time.[301] There are numerous examples of such conduct. For instance, there is a delegation agreement between the USA and Canada.[302] The air service provider of Denmark handles part of Scotland's air space due to superior radar coverage, and the management of the air space of Tonga and Samoa is delegated to New Zealand.[303] In the agreement between Spain and Portugal, the latter provides air traffic services to the former.[304] The UK, Denmark, Norway and Sweden have established similar arrangements.[305] While the delegation arrangement is legally permissible, the delegating state is still liable and is under a legal obligation, per Article 28 of the Convention. Such liability is, however, limited to effective supervision of the services provided and ensuring that services are properly done in accordance with international standards and practices.

2.2.7 The escape clause

As mentioned earlier, once a state is assigned an FIR, it incurs the responsibility of providing ATS in accordance with the provisions of both the Convention and its annexes (SARPS). Such obligations stem from Article 28, which obligates the contracting states of the Convention to

> (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the

[299] Civil Air Navigation Services Organization (CANSO), 'Air Space Sovereignty Working Paper in Worldwide Air Transport Conference (ATCONF) Sixth Meeting' (2013) ATConf/6-WP/80 2, <https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf.6.WP.080.1.en.pdf> accessed 2 February 2021.

[300] Endang Puji Lestari, 'The Delegation of State Sovereignty Over Air Space in the Implementation of Air Navigation: The Analysis of the Agreement between Indonesia and Singapore on Management of the Batam and Natuna Flight Information Region' (2017) 11 Fiat Justisia 179.

[301] ICAO working paper (n 299).

[302] ibid.

[303] ibid.

[304] Lestari (n 300) 180.

[305] ibid.

> standards and practices recommended or established from time to time, pursuant to this Convention.[306]

However, this obligation is not absolute, as it gives some sort of discretion to states to comply as much as they find practicable.[307] The same formula is used in Article 22: member states 'agree to adopt all practicable measures … to facilitate and expedite navigation'.[308] It is also found in Article 37:

> Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in. regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.[309]

Therefore, states have discretionary power when it comes to applying regulations relating to the provision of ATS. This is understandable, as in reality, not all states have the capability to comply with all ICAO regulations or requirements; therefore, such an escape clause is necessary.[310] Nevertheless, this escape clause is subject to Article 38, which gives any state that finds adherence to ICAO's policy impractical the opportunity to give notice to ICAO of the difference between what is recommended or required by ICAO and the practice prevalent in that state.[311] This is the only option available to states that provide ATS within FIRs: either comply or file a difference.

2.2.8 The applicability of the escape clause to the GCC crisis

With that said, the question arises as to whether the restrictions imposed on Qatar, including the denial of ATS over the high seas, were in accordance with those provisions. To answer this question, the issue must be analysed from three different perspectives: 1) restrictions imposed over the high seas, 2) restrictions imposed over territorial air space over Qatar and 3) restrictions over the blockading states' air space. Concerning the first category, as illustrated in the previous section, the NOTAMs of the blockading states included denial of access to Qatar-registered aircraft to airspace over the high seas that falls under their respective FIRs. Article 12 of the Convention establishes very clearly that the only rules applicable over the

[306] Chicago Convention (n 42) Art 28 (a).
[307] ibid.
[308] ibid Art 22.
[309] ibid Art 37.
[310] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 180.
[311] ibid 278.

high seas are those established under the Convention, specifically Annex 2.[312] This annex is mandatory, without any exceptions, not even under Article 38 of the Conventions, as ruled by the ICAO Council: '[T]he Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention.'[313] This is because the high seas are international spaces that are not subject to state sovereignty[314] and a state entrusted with ATS responsibility is not thereby given the right to misuse or discriminate against air space users.[315]

Second, restrictions were imposed on Qatar over its air space that fell under Bahrain FIR. It goes without saying that such restrictions violated the sovereignty of other states and in contravention with the Convention, namely Articles 1, 2 and 12.[316]

Third, restrictions were imposed on Qatar over the blockading states' territories. In this regard, Article 12 states that the applicable rules are those of the state over which the aircraft is flying; however, the same article says, '[E]ach contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention.'[317] Therefore, whenever a state cannot comply with this article with regard to the third category, it is obligated to file a difference under Article 38.[318] Such notification must be communicated immediately to ICAO, after which ICAO will immediately notify all member states about this difference. However, the notification of difference does not pardon states from continuing their obligation under Article 37, wherein they are required to 'collaborate in securing the highest practicable degree of uniformity in

[312] Chicago Convention (n 42) Art 12.
[313] ibid Annex 2 v. See also Adediran (n 277) 18; PS Dempsey, 'The Future of International Air Law in the 21st Century' (2015) 64 Zeitschrift fur Luft- und Weltraumrecht – German Journal of Air and Space Law 216; BF Havel and GS Sanchez, 'Do We Need a New Chicago Convention' (2011) 11 Issues in Aviation Law and Policy 9; J Hornik 'Article 3 of the Chicago Convention' (2002) 27 Air and Space Law 188; D Marshall, 'Unmanned Aerial Systems and International Civil Aviation Organization Regulations Complying and Flying: Legal and Technical Issues Relating to the Operation of Unmanned Aerial Systems' (2009) 85 North Dakota Law Review 701.
[314] ibid Art 1, 2.
[315] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 178- 184.
[316] Chicago Convention (n 42). This aspect relating to state sovereignty and its relation to the concept of FIR is thoroughly discussed in chapter 3.
[317] Chicago Convention (n 42) Art 12.
[318] RR Gipson, 'The Chicago Convention Should Not Be Used to Create Criminals Section I: Leading Articles/Articles de Fond: Part A: Air Law/Droit Aerien' (2017) 42 Annals of Air and Space Law 87; D Howard, 'Points of Connection: Relating ICAO Annex 14 to Spaceports Section I: Leading Articles: Space Law' (2013) 38 Annals of Air and Space Law 289; SS Kalsi, 'Aircraft Noise Abatement via Annex 16 of the Chicago Convention – A Viable Alternative' (1974) 9 Texas International Law Journal 13; TA Rolf, 'International Aircraft Noise Certification Comment' (1999) 65 Journal of Air Law and Commerce 389.

international regulations, standards, and procedures'.[319] Nevertheless, the blockading states did not file any differences, nor did it comply with the Convention which could be understood as their non-compliance with the Convention was not related to the impracticably of such regulations but just their intention to deny ATS to Qatari carriers. This triggers another issue: the discrimination between carriers based on nationality: The Chicago Convention is considered to be a non-discriminatory regime with tightly set legal parameters, especially in relation to air navigation services.[320] This is, as discussed thoroughly in the previous chapter,[321] reflected in Articles 9, 11 and 35, all of which repeatedly state that the Convention must be applied without distinction between aircraft nationalities. Article 9 gives member states the right to prohibit flight over certain areas or the whole of its territory on an exceptional basis during emergencies, incidents threatening public safety or times of military necessity, provided that the restriction applies to all parties without any discrimination based on the nationality of the aircraft. So, if states are not allowed to discriminate over their own territory, it is more evident that they are not allowed to discriminate over the high seas that fall under their FIRs.

2.2.9 Conclusion

States entrusted with FIRs are responsible for the non-discriminatory provision of ATS therein in accordance with the SARPS annexes of the Convention. If a state needs to deviate from these SARPS, it can submit a notification of difference in accordance with Article 38 to ICAO. It's important to highlight that deviations are generally allowed, except for Annex 2, which strictly prohibits any deviation, particularly concerning ATS over the high seas. The blockading states' actions appeared to be noncompliant with Articles 1, 2, 12, 28, 37 and 38 of the Convention and its annexes. Also, they did not file differences or notify ICAO with regard to the impossibility of their compliance with any of the provisions of the Convention or its annexes. Therefore, the escape clause does not apply to their actions, which means the restrictions imposed on Qatar, including the denial of ATS over the high seas, were not in accordance with the abovementioned provisions.

[319] ibid art 37. See also Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 133.
[320] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 120.
[321] Under section 1.4.5, the applicability of Article 55: lex specialis in the GCC crisis.

2.3 Zones in international law

As mentioned in the previous chapter, Bahrain unilaterally introduced what it called a buffer zone adjacent to its territorial waters and verbally threatened that Qatar-registered aircraft entering that zone would be met with miliary interception. This resulted in the shifting of all of Qatar's aircraft operations to Iranian FIRs.[322] This zone was over international waters, which are open to access by all states; therefore, this conduct poses a question about the legal status of such zones. To answer this question, two main zones will be discussed: air defense identification zones (ADIZs) and no-fly zones. This will lead to the topic of the position of international law, particularly the Chicago Convention, concerning the establishment of these zones, their permissibility and application. In the process, a conclusion will be drawn with regard to the legality of Bahrain's buffer zone.

2.3.1 Air defence identification zones

Annex 15 to the Chicago Convention defines ADIZs as specially designed airspaces with defined dimensions over land or water which might not be over the territorial sovereignty of a state, 'in which ready identification, location and control of all aircraft is required in the interest of national security'.[323] An ADIZ is often regarded as an identification zone that requires military or civil aircraft to report flight plans before entering that country's territory. An ADIZ is a means of realising a country's sovereignty over its airspace by using it as a way of monitoring the airspace's security and as a strategy of self-defence against external threats.[324] An ADIZ's application does not aim to expand state sovereignty in regions above the high seas.

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[322] ICAO Response to Preliminary Objections (A), Letter from Adbulla Nasser Turki AlSubaey, Chairman of Qatar Civil Aviation Authority, to Dr. Olumuyiwa Benard Aliu, President of ICAO, 2017/15984, at Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 25, Exhibit 3, 970.

[323]Abeyratne, Air Navigation Law (n 234) 11. The United States federal regulations have a similar definition. See Office of the Federal Register NA and RA, '14 CFR 99.11 – ADIZ Flight Plan Requirements' <https://www.govinfo.gov/app/details/CFR-2012-title14-vol2/https%3A%2F%2Fwww.govinfo.gov%2Fapp%2Fdetails%2FCFR-2012-title14-vol2%2FCFR-2012-title14-vol2-sec99-11> accessed 3 January 2023. The United States has four ADIZs: Contiguous US ADIZ, Alaska ADIZ, Guam ADIZ, and Hawaii ADIZ. In the United States the ADIZ applies only to commercial aircraft intending to enter US airspace. The United States does not recognise the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace, nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter US airspace. Accordingly, US military aircraft not intending to enter national airspace should not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the United States has specifically agreed to do so. See *The Commander's Handbook on the Law of Naval Operations* (Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard 1995).

[324] Mohammad Owais Farooqui and others, 'A Legal Analysis of the Air Defense Identification Zone (ADIZ) with Special Reference to the East China Sea Air Defense Identification Zone' (2023) 19, 276.

Rather, it is a security measure that necessitates the identification of aircraft entering a country.

The definition of an ADIZ, as provided by Annex 15 of the Chicago Convention, implies that each state has an air space area over water or land that it has to protect as a way of protecting its security interests. The United States created the first ADIZ jointly with Canada in 1950[325] to establish reasonable conditions for how people and aircraft entered US territory. The ADIZ was established as a zone that offered an early warning system and proactive defense measures to assist in detecting potential hazards to national security.[326] If an aircraft enters a country's ADIZ without prior notification, that country may use fighter jets to identify and determine whether the aircraft poses any threat.[327] ADIZs have played important roles in wars, such as the Cold War, where the Soviet Union and the US relied on them to ensure they were not surprised by fighter jets or other enemy aircraft passing through their national airspace.[328] Several countries, such as South Korea, Japan, Russia, Canada, Vietnam, Taiwan and Canada, have created ADIZs. Most countries have established ADIZs by providing GPS coordinates, as China did in 2013.[329] However, it should be noted that an ADIZ is not a binding agreement covered by international treaties, as countries may have overlapping ADIZs. For example, the Chinese ADIZ overlaps the South Korean and Japanese zones.[330]

A. Justification for ADIZs

The September 11, 2001, bombing is among the events that have been used to justify ADIZs. After the bombing, ADIZs gained popularity as security tools for managing weapons sent through domestic airspace.[331] States generally try to justify their usage of ADIZs on general international law principles and theories, such as the theory that all states are sovereign and

[325] Office of the Staff Judge Advocate, 'Air Defense Identification Zones' (2021) 97 International Law Studies 9 <https://digital-commons.usnwc.edu/ils/vol97/iss1/3> accessed 3 January 2023. This ADIZ covers multiple zones, including the Contiguous U.S. ADIZ (with Canada), Alaska ADIZ, Guam ADIZ, and Hawaii ADIZ.
[326] H Bakhtiar, 'Air Defence Identification Zone (ADIZ) in International Law Perspective' (2017) 56 Journal of Law, Policy and Globalization 20.
[327] IE Rinehart and E Bart, 'China's Air Defense Identification Zone (ADIZ) Note' [2015] China's Air Defense Identification Zone (ADIZ) 23.
[328] Ibid 1; Z Papp, 'Air Defense Identification Zone (ADIZ) in the Light of Public International Law' (2015) Pecs Journal of International and European Law 33.
[329] JA Patnigere, 'Whose Airspace Is It Anyway: Decoding the ADIZ Enigma' (2017) 9 Law Review, Government Law College 44.
[330] Trent M, 'Overview of Air Defense Identification Zones in East Asia' (Federation of American Scientists 2020) 10 <https://www.jstor.org/stable/resrep26130.6> accessed 3 January 2023.
[331] Abeyratne, Air Navigation Law (n 234) 11.

equal [332] and can legitimately control their territory however they see fit. Article 1 of the Chicago Convention recognises that every state has complete and exclusive sovereignty over the airspace above its territory. This sovereignty extends only to the airspace above its territory which is deemed to be the land areas and the territorial waters adjacent thereto under the sovereignty, suzerainty and protection of that state.[333] ADIZ requirements compel aircraft to abide by certain rules when entering sovereign airspace. These ADIZ requirements can be regarded as conditions that promote a state's protection. The justification for ADIZs 'lies theoretically in the precautionary principle',[334] which asserts that the absence of empirical or scientific evidence should not preclude states from taking action to prevent harm before it occurs.[335] The precautionary principle asserts that countries are justified in establishing ADIZs if they are doing so as a form of self-defence.[336] In the mid-20th century, states justified the use of ADIZs using the principle of necessity,[337] which describes the circumstances that forced countries to commit certain actions that were not within the provisions of international law.[338] They also invoked the self-preservation principle, which entails a nation taking preventive measures against its enemies and ensuring that it does not face any external attacks. The 9/11 attacks and the subsequent quest to create a comprehensive ADIZ are examples of self-preservation.

Different countries offer different justifications for ADIZs; China is one such country with a different justification for ADIZ. In 2013, to defend its sovereignty and protect its security, China

[332] Lamont CK, 'Conflict in the Skies: The Law of Air Defence Identification Zones' (2014) 39 Air and Space Law 187–202. See also, JW Lee, 'Tension on the Air: The Air Defense Identification Zones on the East China Sea' (2014) 7 Journal of East Asia and International Law 274–282.
[333] Chicago Convention (n 42) Art 37.
[334] 'The precautionary principle (a moral and political concept) states that if an action or policy might cause severe or irreversible harm to the public, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who would advocate taking the action. The precautionary principle is most often applied in the context of the impact of human actions on the environment and human health where the consequences of actions may be unpredictable.' See Abeyratne, Air Navigation Law (n 234) 13.
[335] Abeyratne, Air Navigation Law (n 234) 13.
[336] ibid 15. Another justification for ADIZs that states use in establishing ADIZs is the social contract theory. The social contract principle allows the citizen to give the state the duty of ensuring their security. The principle is underpinned by philosophical theories that make the state in charge of maintaining social order. The social contract theory justifies the historically important assumption that legitimate government can only be derived from the citizens. Thomas Hobbes created the social contract theory as a way of showing citizens' authority in the management of state functions. The state has a duty to protect its citizens using scientific and precautionary methods. ADIZs are regarded as a precautionary method used by the state to take care of the citizens and ensure they are safe from external threats. See Abeyratne, Air Navigation Law (n 234) 14; Lamont (n 332); Lee (n 332).
[337] ibid.
[338] Papp (n 328) 45.

established a new ADIZ[339] over the East China Sea, which covers more than 300 miles of Chinese territory and covers countries such as Japan, Taiwan and South Korea.[340] China set up an ADIZ to provide early warning systems for the country's national air defences.[341] China claimed that this was set up in such a way that the freedom of all other aircraft will still be there per the requirements of international law.[342] However, China will identify and investigate any aircraft entering the zone without prior notice. It also warns that emergency defensive measures will be taken by China's armed forces against any violations of the rules of its ADIZ.[343]

The United States designed its ADIZ as a protective measure against its external and internal enemies. The US was the first country to have an ADIZ as a way of providing early warning systems against the Soviet Union, declaring the ADIZ in 1950 at a time when it was engaged in a war. The September 11, 2001, attacks on New York and Washington DC reinforced the need to have an ADIZ as a protective measure against aircraft entering US territorial airspace.[344] According to the US rules, an individual operating an aircraft entering an ADIZ must file a flight plan, have a two-way functional radio and frequently provide their position in the air space.[345] The US ADIZ is strictly applicable to aircraft outbound, inbound and within US territory and airspace.

Japan has one of the largest exclusive economic zones (EEZs) and is made up of about 6800 islands; the US military initiated the establishment of a Japanese ADIZ in 1951 following the conclusion of World War II.[346] Subsequently, in 1969, airspace management authority over the ADIZ was transferred to Japan.[347] Since 1969, Japan has expanded its ADIZ after the US returned the Daito and Ryukyu Islands to them, and it now reaches the islands of Senkaku and Yonaguni. The US–Japan Okinawa Reversion Treaty made the US government return the

[339] Trent (n 330) 10.
[340] Papp (n 328) 31.
[341] Lamont (n 332) 188.
[342] Pilger, Michael. *ADIZ Update: Enforcement in the East China Sea, Prospects for the South China Sea, and Implications for the United States* Vol 2 (US-China Economic and Security Review Commission 2016) 7.
[343] Rinehart and E Bart (n 321) 40; E Burke, 'In Line or Out of Order: China's Approach to ADIZ in Theory and Practice' (2017) 7 < In Line or Out of Order? China's Approach to ADIZ in Theory and Practice (dtic.mil) > accessed 30 January 2023.
[344] Chicago Convention (n 42) Annex 15.
[345] *The Commander's Handbook on the Law of Naval Operations* (Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard 1995).
[346] Office of the Staff Judge Advocate (n 325) 9.
[347] ibid.

islands to the control of the Japanese government. Japan is an example of a state that uses the ADIZ exclusively for national security purposes.[348] It uses the zone as a precautionary measure against an external threat to its stability. The state's ADIZ is found outside the territory of the EEZ. The Japan Air Self-Defense Force (JASDF) often utilises warplanes to intercept aircraft that seek to enter Japanese airspace without prior notification.

Taiwan is an example of a state that has the ADIZ as a national security measure. Taiwan's ADIZ covers the East China Sea and the Taiwan Strait. A large part of Taiwan's ADIZ is in its territory. Taiwan's control over its national airspace came at a time when China created a new ADIZ covering most of Taiwan's territory. Taiwan abides by the new ADIZ regulations, as it is part of the East China Sea Peace Initiative.

South Korea is another country that has established an ADIZ for national security purposes, being one of the first to do so in the 20th century. South Korea's ADIZ was established during the Korean War as the country sought to protect itself from Chinese and Soviet aircraft. During the Cold War, any aircraft that sought to enter Korea's ADIZ had to submit its information and flight plans to the Minister of Defence.[349] Nonmilitary aircraft were allowed to submit their flight plans to the Land Affairs Minister. The South Korean government compelled all the aircraft in South Korean territory to abide by certain conditions:[350] the aircraft had to have two-way radio communications for communicating with air traffic control, and it needed to use a secondary surveillance radar (SSR) transponder, as provided by the air traffic controller. The purpose of such conditions was to eliminate all possible sources of insecurity.

Indonesia is another country with a comprehensive ADIZ, having established its ADIZ in the mid-20th century as a precautionary security measure.[351] The Indonesian ADIZ covers areas such as Lombok, Bali, Madura, Java and South Sumatra. Indonesia has also been using the

[348] Lowell Bautista and Julio Amador, 'Complicating the Complex: China's ADIZ' [2013] University of Wollongong Faculty of Law, Humanities and the Arts – Papers (Archive) 1; Trent (n 330) 10.
[349] LR Dyahtaryani and E Al, 'Law Construction for ADIZ Implementation beyond the Airspace Sovereignty from the Perspective of Defense Strategy' (2021) 12 Turkish Journal of Computer and Mathematics Education (TURCOMAT) 678.
[350] Lamont (n 332) 196.
[351] AF Devi, 'The Air Defense Identification Zone (ADIZ) Indonesia in Order to Ensure Security in the Air Region Jurisdiction of National Jurisdiction' (2022) 8 Strategi Pertahanan Udara <https://jurnalprodi.idu.ac.id/index.php/SPU/article/view/1047> accessed 30 January 2023; Evan Laksmana, 'Is an Indonesian Air Defense Identification Zone Forthcoming?' (Asia Maritime Transparency Initiative, 10 April 2018) <https://amti.csis.org/indonesian-adiz-forthcoming/> accessed 30 January 2023.

ADIZ to manage aircraft in its airspace,[352] compelling all aircraft entering its territory to submit information about the nature of the flight and the personnel on the flights. It regards such processes as necessary for establishing an effective aviation system.[353]

B. The legality of ADIZ under international law

Before addressing the legality of the ADIZ, its main features have to be outlined, and a clear conclusion can be reached on its legality. Its main features can be summarised as follows:

> (1) the areas of ADIZs are designated by States, usually based on their national laws; (2) the purpose of establishing ADIZs is mainly for the national security of the coastal States; (3) coastal ADIZs can be divided into two parts, one is overlapping with the territorial airspace of a State, one is extending seaward outside the territorial airspace; (4) the applicable scope of ADIZs are all aircraft or civil aircraft within it; and (5) the identification obligation of ADIZs, including but not limited to the radio requirement, the flight plan requirement, the position report requirement, the transponder requirement, and the logo identification, is one of the most significant features of ADIZs.[354]

Also, it must be mentioned that there is no clear position in international law on the legal status of ADIZs.[355] As mentioned earlier, ADIZs were promoted after the 9/11 attacks and the announcement of China that it was establishing its ADIZ in 2013.[356] Since the Convention does not elaborate on the matter, states tend to base the legality of their ADIZs on general principles of international law, as seen in the previous section, as well as on deductions from different articles of the Chicago Convention. Similarly, the legality of ADIZs will be addressed by going through the articles of the Chicago Convention, and a distinction will be made between the establishment of territorial and extraterritorial ADIZs.

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[352] K Setiadi, 'Legalitas Air Defense Identification Zone (ADIZ) Indonesia berdasarkan hukum internasional' <https://repository.unpar.ac.id/handle/123456789/repository.unpar.ac.id/handle/123456789/13061> accessed 30 January 2023. See also, H Purwanto and L Yustitianingtyas, 'The Establishment of an Air Defense Identification Zone as an Opportunity in Enforcing the Sovereignty of the State and Law in Indonesia' (2019) 85 Journal of Law, Policy, and Globalization 71.

[353] ibid.

[354] Zheng P, 'Justifications and Limits of ADIZs under Public International Law' (2014) 14 Issues in Aviation Law and Policy 201.

[355] ibid 185.

[356] ibid.

C. Legality of ADIZ within territorial air space

Articles 1 and 2 of the Chicago Convention recognise states' exclusive sovereignty over their air space above their territories.[357] The territorial jurisdiction principle accords territorial state powers to the country adjacent to the airspace to enforce and enact relevant laws, so states have complete sovereignty over their territories, and establishing ADIZs with specific rules within them falls under this prerogative. The only concern here is that these prerogatives provided by the territorial jurisdiction principle are to be exercised within the framework provided by the Chicago Convention as a way of ensuring uniformity in the application of the law.[358] However, states are still free to opt out of this uniformity if they file a difference under Article 38, as explained in the previous section.[359] Article 11 of the Chicago Convention guides how a country manages its airspace, providing a framework that governs how aircraft arrive, depart or transit through various airspaces and rules that states use to accept or reject aircraft from their territories. It allows all contracting states to design regulations and laws on how they want their airspaces to look and gives each state the autonomy to decide what it does in its territory. Nevertheless, Article 11 states that these national air laws shall be applicable to foreign civil aircraft only when they are 'entering or departing from or while within the territory of that State',[360] which means that national regulations created under Article 11 are only applicable within the territorial airspace of that state but cease to apply outside of its territory.[361] Also, Article 6 of the Chicago Convention states that no scheduled flight is allowed to operate in the territory of another contracting state without special permission or other authorisation from that state.[362] Although aircraft from all the other contracting states have the right to make flights into or in transit nonstop across its territory and to make stops for nontraffic purposes without the necessity of obtaining prior permission, such flights are nevertheless:

> subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air

[357] Chicago Convention (n 42) Art 1& 2.
[358] ibid Art 37, 54(l) and 90.
[359] See section 2.1, Preliminary Considerations.
[360] Chicago Convention (n 42) Art 11.
[361] Zheng (n 354) 195.
[362] Chicago Convention (n 42) Art 6.

navigation facilities to follow prescribed routes, or to obtain special permission for such flights.[363]

Article 11 of the Convention asserts that contracting states are entitled to enact national laws for foreign civil aircraft engaged in international air transportation in relation to admission and departure from and to their territories. These national laws have priority over those rules applied over the high seas -Annex 2-. Therefore, ADIZ rules do not seem to be in violation of any of the abovementioned provisions with respect to territorial airspace, which suggests that ADIZ rules in the territorial air space of that state would have a sound legal basis under Articles 6 and 11 of the Chicago Convention.[364]

D. Legality of ADIZs outside of territorial air space

As previously stated at the beginning of this section, Article 12 of the Chicago Convention is clear that the rules applying above the high seas are only those established by the Convention – and, more clearly, those rules contained in Annex 2. This is the only annex to the convention whose rules are mandatory, and Article 37 does not apply to (reference to state's option to file a difference). Because of this many argue against the lawfulness of the ADIZ outside of territorial air space, since it is extra rules to those contained in Annex 2.[365] It is worth mentioning that the only deviation from Article 12 is found under Article 89, which allows a state total freedom of action in case of war or duly declared national emergency, both of which must be notified to the ICAO Council.[366] However, others also argue that even though Annex 2 is mandatory over the high seas and deviation is not allowed, ADIZs still have a legal basis as long as Annex 2 'ha[s] not been sabotaged substantially by the identification requirements of ADIZs [and] the freedom of aviation is unlikely to be infringed'.[367] Moreover, it is argued that the rules governing ADIZs are not inconsistent with the provisions of the Chicago Convention and its annexes and the identification requirements for ADIZs are analogous to those contained in the Convention. For instance, Article 20 of the Convention obliges every aircraft engaged in international air navigation to bear its appropriate nationality and registration

[363] Chicago Convention (n 42) Art 5.
[364] Zheng (n 354) 202.
[365] ibid 204.
[366] Chicago Convention (n 42) Art 89.
[367] Zheng (n 354) 205.

marks.[368] It is obligatory for all aircraft flying internationally to identify themselves; although this obligation was not created for ADIZs, ADIZs' identification requirements, such as logo identification, are similar and therefore not in conflict with the Chicago Convention. The same can be said with regard to the other ADIZ requirements, such as flight plan and position report. Section 3.3 of Annex 2 states:

> A flight plan shall be submitted prior to operating ... (d) any flight within or into designated areas, or along designated routes, when so required by the appropriate ATS authority to facilitate coordination with appropriate military units or with air traffic services units in adjacent States in order to avoid the possible need for interception for the purpose of identification; (e) any flight across international borders.[369]

Similarly, the provisions in Section 3.6.3 of Annex 2, the 'Position Reports',[370] are similar to the identification requirements for ADIZs, although they add extra reporting obligations in the sense that instead of reporting flight plans only to the designated ATC authority coordinated by ICAO under Annex 2, aircraft also have to do the same to the state establishing the ADIZ. This 'extra obligation' is not in conflict with Annex 2 of the Convention.[371] Furthermore, it is argued that an ADIZ could be partially justified in reliance on Article 4 (misuse of civil aviation) of the Convention, where it says, 'Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.'[372] The defenders of ADIZs assume that Article 4 is an obligation on states to protect civil aviation from being misused and an ADIZ could be a mechanism to achieve that goal.[373] This is also in line with the main aim of the Chicago Convention stated in its Preamble: international civil aviation is to be developed in a safe and orderly manner; that development 'can greatly help to create and preserve friendship

[368] Chicago Convention (n 42) Art 20; A Masutti, 'Proposals for the Regulation of Unmanned Air Vehicle Use in Common Airspace' (2009) 34 Air and Space Law 2.
[369] ibid Annex 2 section 3.3.1.2.
[370] 'Unless exempted by the appropriate ATS authority or by the appropriate air traffic services unit under conditions specified by that authority, a controlled flight shall report to the appropriate air traffic services unit, as soon as possible, the time and level of passing each designated compulsory reporting point, together with any other required information. Position reports shall similarly be made in relation to additional points when requested by the appropriate air traffic services unit.' Chicago Convention (n 42) Annex 2 section 3.6.3.
[371] Zheng (n 354) 207.
[372] Chicago Convention (n 42) Art 4.
[373] Abeyratne R, 'In Search of Theoretical Justification for Air Defence Identification Zones' (2012) 5 Journal of Transportation Security 93.

and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security'.[374]

E. The limitation of military interception within ADIZs

In general, military interception with the intention of diverting civil aircraft from its route or forcing a landing at a specified airport is the possible consequence of any noncompliance with an ADIZ's rules. This aspect of military interception was also present in the GCC crisis, when Bahrain threatened to use military interception against any Qatar-registered aircraft that entered its designated 'buffer zone'.[375] Sometimes, the interception could involve the use of force, as suggested by US interception procedures.[376] Because of this, the Chicago Convention prohibits any use of force against civil aircraft, including in ADIZs, and regulates and restrains interception of civil aircraft, as pursuant to Article 3 *bis* (a):

> 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.[377]

Also, Annex 2 of the Chicago Convention Attachment A, which is mandatory over the high seas, gives comprehensive rules and guidance concerning the interception of civil aircraft, stating that interception, if not avoidable, should be used as a last resort. It also states:

> If undertaken, the interception should be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to effect a landing at a designated aerodrome. Practice interception of civil aircraft is not to be undertaken.[378]

The only exception to Article 3 *bis* is the right to self-defence contained in Article 51 of the UN Charter. This means that if an interception of a civil aircraft within an established ADIZ forces

[374] Chicago Convention (n 42) Preamble.
[375] Counter-Memorial of the Government of the State of Qatar (n 17).
[376] Zheng (n 354) 212.
[377] Chicago Convention (n 42) 3 *bis* (a). See also SA Kaiser, 'Legal Considerations about the Loss of Malaysia Airlines Flight MH 17 in Eastern Ukraine' (2015) 40 Air and Space Law 109.
[378] Chicago Convention (n 42), Annex 2, attachment A 2.1.

that aircraft to change its original route, and if this conduct is not in accordance with the right of self-defence, the interception may be in violation of Article 3 *bis* (a) of the Chicago Convention and the rules outlined in Annex 2.

2.3.2 No-fly zones

A no-fly zone is a zone established by a state or group of states where overflight is prohibited. These are generally, though not necessarily, associated with wartime.[379] The consequence of noncompliance with such a zone under specific circumstances might be severe and end with the shooting down of the violating aircraft. No-fly zones have been used in wars between states as expressions of state sovereignty over their own territories and as a form of sanction imposed by the UNSC.[380] No-fly zones can be temporarily or permanently established on all of the territorial air space of a state for security concerns. It could also be temporarily established upon the high seas as a form of 'defense bubble'.[381] Historically, there have been many examples of no-fly zones imposed upon states such as Iraq, Libya, Bosnia and Herzegovina and others.[382] However, the legality of no-fly zones per se is debatable[383] in international law, especially when they are established over the high seas.[384]

[379] T Stein, 'No-Fly-Zones: The Howard Gilman International Colloquium on Air and Missile Warfare: Section IV: Exclusion Zones' (1997) 27 Israel Yearbook on Human Rights 193.

[380] In Resolution 670 paragraphs 3 and 4, the UNSC, acting under Chapter VII of the Charter, decided that all states shall 'deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait also that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly their territory' (1990) USC (45th, 'Resolution 670 (1990)' <https://digitallibrary.un.org/record/97522> accessed 15 January 2023; paragraph 4 (a) of Resolution 748 the UNSC took the same measures against Libya (1992) USC (47th, 'Resolution 748 (1992)' <https://digitallibrary.un.org/record/196976> accessed 15 January 2023.

[381] Stein (n 379) 193.

[382] ibid 194. Also, UN Security Council Resolution 688, S/RES/688 (April 5, 1991) which authorised he establishment of a no-fly zone over Iraq to protect Iraqi civilian populations from aerial attacks by restricting the Iraqi government's ability to operate aircraft in certain regions. The no-fly zones were enforced through military means, including aerial patrols and interceptions of unauthorized aircraft. Also, United Nations Security Council (UNSC) Res 1973 (17 March 2011) UN Doc S/RES/1973 which sought to prevent the Libyan government from conducting aerial attacks on civilians. Also, United Nations Security Council (UNSC) Res 816 (31 March 1993) UN Doc S/RES/816, United Nations Security Council (UNSC) Res 844 (18 June 1993) UN Doc S/RES/844, and United Nations Security Council (UNSC) Res 943 (23 September 1994) UN Doc S/RES/943, these resolutions collectively authorised the imposition of no-fly zones over Bosnia and Herzegovina in response to the escalating conflict during the Bosnian War. The primary objectives were to safeguard civilians from aerial attacks conducted by Serbian forces and to enforce the arms embargo imposed on the warring factions, aiming to alleviate the humanitarian impact of the conflict.

[383] Supporters generally base their arguments on the act of self-defence and measures of self-protection. This was covered earlier in the ADIZ section.

[384] SL Silliman, 'The Iraqi Quagmire: Enforcing the No-Fly Zones Symposium: Responding to Rogue Regimes: From Smart Bombs to Smart Sanctions' (2001) 36 New England Law Review 773.

Article 9 of the Chicago Convention addresses the issue of no-fly zones on territorial air space by giving contracting states the right to prohibit or restrict flight over certain areas within their territories for reasons of military necessity.[385] They also have the right to temporarily prohibit flight over the whole of their territorial air space 'in exceptional circumstances or during a period of emergency, or in the interest of public safety'.[386] In both scenarios, prohibition or restriction must be applicable without any distinction of nationality regarding the aircraft of all other states, and notification must be given to the ICAO Council.[387] Also, Annex 15 of the Convention provides a supplementary definition to the zones mentioned in Article 9: prohibited area, restricted area and danger area. A *prohibited area* is a territorial airspace, whether over land or water, with specified boundaries over which aircraft are prohibited from flying.[388] A *restricted area* is a territorial airspace, whether over land or water, with specified boundaries above which aircraft are restricted in accordance with certain specified conditions.[389] A *danger area* is a territorial airspace, whether over land or water, with specified boundaries, in which hazardous activities may exist at certain times that could pose a potential danger to aircraft flying over it.[390] Generally, as decided by the ICAO Council at the ninth meeting of its thirteenth session in 1951, the establishment of these areas is issued in advance through a NOTAM by the concerned state.[391]

With regard to the legality of establishing no-fly zones over the high seas, it is questionable whether a legal basis for such conduct can be found in international law.[392] The high seas are beyond state sovereignty, and hence the applicable law that must be complied with is international law, not the national laws of states. The position of the high seas under UNCLOS

[385] Chicago Convention (n 42) Art 9(a).
[386] ibid Art 9(b).
[387] Stein (n 379) 203; LS Dushkes, 'The Chicago Convention: FAA's Action Barring Foreign Carriers from Operating DC-10 Aircraft in United States Airspace Held Improper' (1982) 7 Air Law 101. See also, Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 137- 144.
[388] Chicago Convention (n 42) Annex 15 Aeronautical Information Services 1–8; Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 137.
[389] Chicago Convention (n 42) Annex 15 Aeronautical Information Services 1–9.
[390] ibid 1–4.
[391] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 137.
[392] It is important to note that this does not encompass situations where no-fly zones are explicitly authorized by the UNSC. When the UNSC authorizes a no-fly zone, it provides a specific legal basis under the authority of Chapter VII of the UN Charter, and the legality of such actions is determined by the terms and conditions outlined in the UNSC resolution.

is that the high seas are open to all states equally and all states enjoy a bundle of freedoms,[393] among which are freedom of navigation and freedom of overflight.[394] The Chicago Convention confirmed that, as has been discussed earlier, over the high seas, the rules that must be followed and applied are those contained in the Convention, which limits states' national laws to their territories while urging them to endeavour to the highest level possible of uniformity in regulations, standards and procedures.[395] Therefore, establishing no-fly zones over the high seas would be in conflict with the international treaties just mentioned. The only deviation that might allow a state to not adhere to the abovementioned provisions is available under Article 89 during war or duly declared state of national emergency; on such occasions, states' freedom of action shall not be affected by the Convention.

2.3.3 Conclusion

With the position of international law with respect to the establishment of zones having been stated, it can be said that that Bahrain's unilateral establishment lacks a legal basis for the following reasons. First, its establishment was not done through the formal channel of issuance through a NOTAM; instead, it was issued through verbal conversation, which seems to contradict the decision made by the ICAO Council at the ninth meeting of its thirteenth session in 1951.[396] Second, Bahrain did not declare a national emergency, nor was there any war that could justify deviation from the provisions of the Chicago Convention.[397] Third, this buffer zone was established above air space adjacent to its territory above the high seas, which by default falls outside Article 9 of the Conventions, which explains that states have the

[393] T Parejo-Navajas, 'Rationale for an Holistic Approach to the Land Adjacent Sea in Response to Challenges Arising from Technological Development and the Effects of Global Warming: Planning in the Aquitorium' (2012) 21 European Energy and Environmental Law Review 54; R Pereira, 'On the Legality of the Ship-Source Pollution 2005/35/EC Directive – The Intertanko Cases and Selected Others' (2008) 17 European Energy and Environmental Law Review 377; J Waverijn and C Nieuwenhout, 'Swimming in ECJ Case Law: The Rocky Journey to EU Law Applicability in the Continental Shelf and Exclusive Economic Zone' (2019) 56 Common Market Law Review 1628.

[394] UNCLOS Art 87. See R Abeyratne, 'Aeronautical Consequences of Missile Testing by the Democratic People's Republic of Korea' (2006) 31 Air and Space Law 424; WP Heere, 'Problems of Jurisdiction in Air and Outer Space' (1999) 24 Air and Space Law 76; P Manzini and A Masutti, 'The Application of the EU ETS System to the Aviation Sector: From Legal Disputes to International Retaliations' (2012) 37 Air and Space Law 320; M Mashayekhi, 'The Present Legal Status of Deep Sea-Bed Mining' (1985) 19 Journal of World Trade Law 232; RS Mehta, 'The Continental Shelf: No Longer a Terra Incognita to the EU' (2012) 49 Common Market Law Review 1406.

[395] Chicago Convention (n 42) Art 37.

[396] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 137.

[397] Chicago Convention (n 42) Art 89.

right to establish such zones above their territories. This immediately put that zone in conflict with the applicable international treaties concerning the freedom of access to the high seas and freedom of overflight and navigation.[398] Fourth, even if this zone had been over Bahrain's territorial air space and there had been a national emergency or military necessity falling within the application of Article 9 of the Convention, it would still have been in violation of the Convention, as the right enshrined in Article 9 must be exercised without distinction of nationality to aircraft of all other states. In the matter at hand, Bahrain targeted only Qatar-registered aircraft; therefore, that zone seems to violate Article 9, even in a hypothetical scenario. Also, if states are not allowed to distinguish between the nationalities of the aircraft of other states when restricting or prohibiting flight over their territories, it stands to reason that they are not allowed to make the same distinction over the high seas, which are open to all states. Fifth, the objective behind establishing that zone was not the same as that behind establishing ADIZs, as it was a denial of access to international waters rather than an identification requirement. Even if the zone in question was to be categorised as a legitimate ADIZ, it still failed to meet the non-discrimination criterion of the Chicago Convention. Finally, the establishment of that zone did not seem to be in line with ICAO's resolution from the 39th session of its assembly, at which states were urged to avoid adapting 'unilateral and extraterritorial measures that may affect the orderly, sustainable and harmonious development of international air transport'.[399]

2.4 The impact of the GCC crisis on the distribution of FIRs in the Arabian Gulf

2.4.1 Introduction

As shown in Figure 1, Bahrain had a huge FIR compared to its own size and that of its neighbour Qatar. It retained control of most of the air space over the Arabian Gulf between Kuwait and the United Arab Emirates, all of which falls under Bahrain FIR. Qatar was totally dependent on Bahrain for all air navigation services, even over its sovereign territory. The rationale behind this distribution was that both states were protectorates of Great Britain until

[398] UNCLOS Art 87 & Chicago Convention (n 42) Art 12.

[399] ICAO, 'ICAO Assembly Resolutions of Its 39th Session' Appendix A <https://www.icao.int/Meetings/a39/Pages/resolutions.aspx> accessed 19 January 2023 III-3. See also, 'Annex III ICAO – Agenda of the Third Air Transport Conference (22 October–7 November 1985)' (1986) 11 Air Law 54; R Abeyratne, 'Carbon Offsetting as a Trade Related Market Based Measure for Aircraft Engine Emissions' (2017) 51 Journal of World Trade 437.

their independence in 1971.[400] Britain had dominated the region for more than 150 years; this domination evolved from economic influence on political control.[401] During those days, the FIR had been established in accordance with the location of the military radars that Britain had installed.[402] So, the FIRs in the region were established for military efficiency as Britain saw fit. Another explanation for the disproportional distribution of the FIRs is that the states in the Arabian Gulf are in close proximity, so if every state had its own FIR, it would be technically burdensome for pilots of aircraft, as they would need to contact a new controller every 20 minutes.[403] Moreover, in 1973, Bahrain, Qatar, Abu Dhabi and Oman had only one air carrier – Gulf Air, the national carrier of all of those states at that time and now the national carrier of Bahrain – and each government took a quarter share.[404] With this spirt of cooperation and sharing and membership in the GCC, as well as the good relations between Qatar and Bahrain, the need for a redistribution of FIRs was not called for. Also, handling an FIR is a very burdensome task requiring infrastructure to be in place as well as financial, technical, and operational abilities, so it was convenient to leave the FIR distribution as it was. For these reasons, FIRs were distributed as shown in Figure 1. However, the issue of the disproportional nature of the FIR distribution came under the spotlight when the blockading states launched their air restrictions, resulting in all Qatar-registered aircraft being denied access to Qatar's own territory, as well as air space over international waters, because it all fell under Bahrain FIR. The blockading states also banned Qatar-registered aircraft from flying to or from their airports or over their territorial air space. This unprecedented crisis led Qatar to ask ICAO for the redistribution of FIRs in the Arabian Gulf region, including its own disproportionate FIR. This section will address the issue of the amendment of FIR distribution

[400] International Court of Justice, 'Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain): Memorial of the State of Qatar' 12 <https://www.icj-cij.org/public/files/case-related/87/7023.pdf> accessed 6 February 2021.

[401] S Morayef, 'The British in the Gulf: An Overview' (13 August 2014) <https://www.qdl.qa/en/british-gulf-overview> accessed 22 January 2023.

[402] BA Macheras, 'How Airspace Is Distributed in the Gulf' (Gulf Times, 24 October 2018) <https://www.gulf-times.com/story/610574/how-airspace-is-distributed-in-the-gulf> accessed 22 January 2023.

[403] Times Aerospace, 'Qatar's New FIR Set to Fly' <https://www.timesaerospace.aero/features/atm-and-regulatory/qatars-new-fir-set-to-fly> accessed 22 January 2023.

[404] Ulrichsen KC, 'Gulf Airlines and the Changing Map of Global Aviation' 5 < https://www.bakerinstitute.org/sites/default/files/2015-06/import/CME-pub-GulfAviation-062515.pdf> accessed 6 February 2023. However, the situation changed when Qatar and Abu Dhabi followed Dubai and established their own national airlines, resulting in their withdrawal from Gulf Air in 2003 and 2005, respectively. Also, Oman followed suit and established its national carrier in May 2007. At that point, Gulf Air became the national airline for Bahrain.

by discussing the procedure for the amendment of regional air navigation plans (ANPs), the justification of such amendment and finally the emergence of Doha FIR as one of the main impacts of the GCC crisis.

2.4.2 Procedure for the amendment of regional air navigation plans

To start with, the 'ANPs have so far been developed to set forth, in detail, the facilities, services and procedures required for international air navigation within a specified region(s) and they also contained planning and guidance material.'[405] The ANPs aim to define the planning and implementation of air navigation systems in a particular region.[406] When states are assigned responsibility for providing air navigation facilities and services within a specific area,[407] the ANPs are used as repository documents for such assignments.[408] Also, ANPs include requirements that states have to implement concerning facilities and services.[409] The regional ANPs, as decided by the ICAO Council in 2014, are published in three volumes.[410] Our concern here in this section is Volume I, which contains many elements, among which is the responsibility of the state to provide air navigation facilities and services outlined in Article 28 of the Convention and, more importantly, the boundaries of the FIRs in that specific region.[411] Amendment to the elements in Volume I, including any change in the boundaries of FIRs, requires approval by the ICAO Council.[412] Should any change occur to the FIRs' boundaries, it is likely to be subject to the ANP amendment procedure upon recommendation by the

[405] ICAO, 'Regional Air Navigation Plan' <https://www.icao.int/nacc/pages/namcar-eanpv1.aspx> accessed 23 January 2023.
[406] ibid.
[407] Such services have to be in accordance with Article 28 of the Chicago Convention, which states, 'Each contracting State undertakes, so far as it may find practicable, to: (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention; (b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention; (c) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.'
[408]ICAO, 'ICAO Doc 7300 Ninth Edition Doc 7300' <https://www.icao.int/publications/pages/doc7300.aspx> accessed 23 January 2023.
[409] For more reading about the objectives of ANPs, see ICAO Regional Air Navigation Plan (n 405).
[410] ICAO, 'ICAO MID Air Navigation Plan (Doc 9708), MID EANP – Volume I' <https://www.icao.int/MID/Documents/eANP/MIDeANP%20VOL%20I.pdf> accessed 23 January 2023.
[411] It should be noted that there are nine air navigation regions to which all FIRs around the globe belong. These regions are established by ICAO as follows; Africa–Indian Ocean Region (AFI), Asia Region (ASIA), Caribbean Region (CAR), European Region (EUR), Middle East Region (MID), North American Region (NAM), North Atlantic Region (NAT), Pacific Region (PAC) and South American Region (SAM). See more in section 2, Delineation of FIRs.
[412] ICAO MID Air Navigation Plan (Doc 9708) (n 410).

relevant ICAO regional office.[413] Additionally, the volume sets forth the procedure for the amendment of the regional ANPs at which the FIR boundaries are listed. The justifications for such an amendment could be that the regional ANPs are no longer serving the present or foreseen requirements of international civil aviation or that a state is unable to implement specific elements contained in the regional ANP.[414] If a state[415] intends to have any change in the regional ANPs, including FIR boundaries, it should:

> propose to the Secretary General, through the Regional Office accredited to that State, an appropriate amendment to the plan, adequately documented; the proposal should include the facts that lead the State (or group of States) to the conclusion that the amendment is necessary. Such amendments may include additions, modifications or deletions.[416]

The secretary general will study the proposal, and if further coordination is deemed necessary, the secretary general will present the proposal with all the needed documents to the relevant planning and implementation regional group (PIRG). The opinions of the PIRG will then be sent to 'the originating State, and the proposed amendment will be uploaded via the ANP web based platform for processing proposals for amendment for approval by the Council'.[417] Then, the proposal will be circulated through the regional office[418] to all states of the region affected by that amendment so they can present their comments or objections and to user states and international organisations outside the region that may be concerned with the proposal; they may also be invited to attend ICAO meetings. Any state or international organisation that wishes to comment, agree or object must send their position, well supported by reasons, via the ANP web-based platform or by correspondence to the regional office. If no objection is raised, the proposal will then be sent to the President of the Council, who is authorised to approve the amendment on behalf of the Council. Such an approved amendment will be reflected in the concerned Volume I of the regional plan.[419] However, if any objection is raised and remains even after further consultation, the issue will be documented for discussion by

[413] ibid at 0-3.
[414] ibid Appendix A 0-A-1.
[415] There are cases where the proposals for the amendment of Volume I of the regional plan may be initiated by the secretary general through the relevant regional office at which amendment need to occur. Such a scenario is possible provided that the affected state(s) agree on the proposal. ICAO MID Air Navigation Plan (Doc 9708) (n 410) 0-A-2.
[416] ibid 0-A-1.
[417] ibid.
[418] In Qatar's case, the regional office is the Middle East Regional Office (MID).
[419] In Qatar's case, it will be the ICAO MID Air Navigation Plan (Doc 9708); see (n 410).

the relevant PIRG and, if the matter remains unsolved, it will ultimately be sent to the Air Navigation Commission for formal consideration.[420] If the Commission accepts the amendment, whether in its original form or any other form, it will present that conclusion to the Council. Once amendments to Volume I of the regional plan are approved in accordance with the abovementioned procedures, they will be published in the ANP web-based platform in due time.[421]

2.4.3 Qatar's proposal

On 12 January 2020, Qatar initiated a proposal for the amendment of the ANP of the Middle East Region (Doc 9708, Volume I) relating to the establishment of a Doha FIR and a Doha search and rescue region (SRR), as illustrated in Figure 5.[422] The main reason Qatar provided for its amendment was that the FIRs boundaries contained in the Air Navigation Plan Middle East Region (Doc 9708) had ceased to serve the best interests of flight operation in the Middle East Region, and delineation of FIRs was the pressing need.

[420] ICAO MID Air Navigation Plan (Doc 9708) (n 410) 0-A-2.
[421] ibid.
[422] ICAO, 'MIDANPIRG/18 and RASG-MID/8 Meetings, Proposal For Amendment (PFA) of the ICAO MID ANP – Volume I (Serial No. MID ANP-I 20/01 – ATM/SAR).' <https://www.icao.int/MID/MIDANPIRG/Documents/MID18%20and%20RASGMID8/WP%2027-%20HQ%20PFA%20MID%20ANP-I%2020-01ATM-SAR%20full%20.pdf> accessed 23 January 2023.

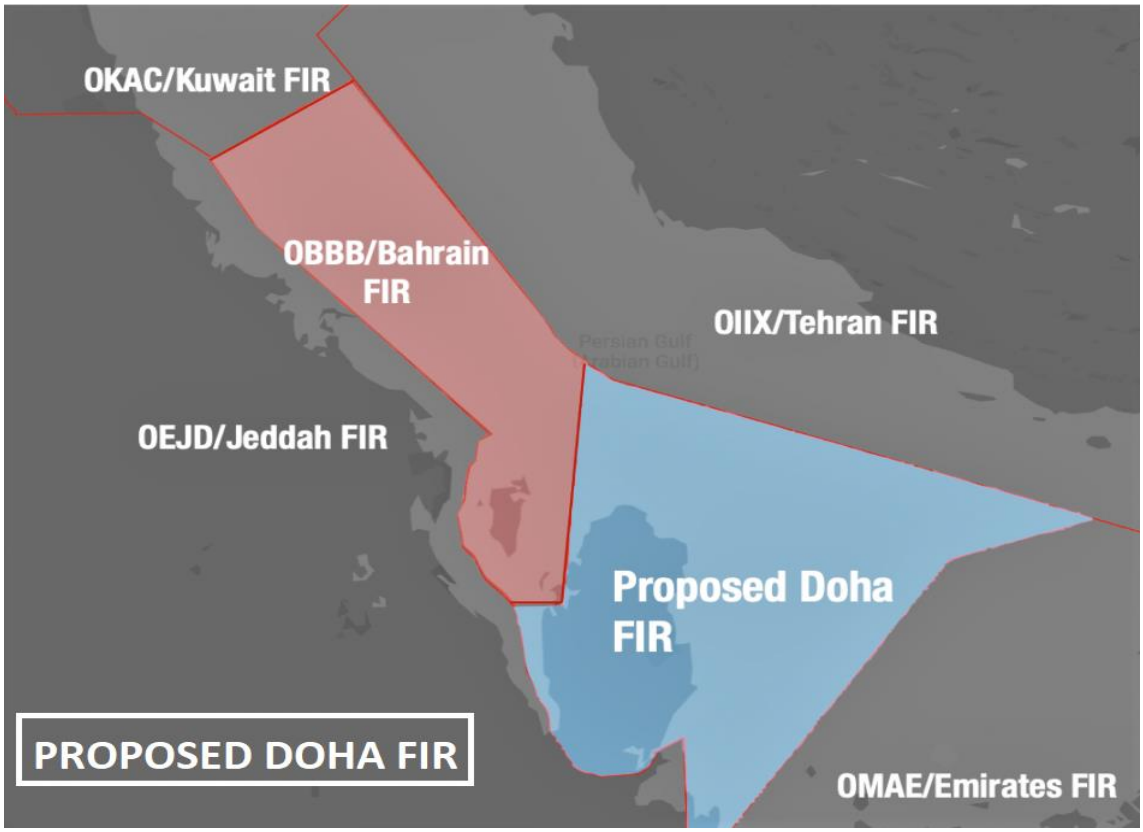

Figure 5 Qatar's proposal for its new FIR

The proposal claims to seek safety enhancement and improvement to the efficiency and economy of flight operations through the following benefits:

> a) reduction of complexity and coordination related to traffic to and from Qatar airports and simplification at interfaces; b) improved sectorization design ensuring optimized approach and departure procedures and trajectories to/from Qatar; c) improved coordination between civil and military stakeholders sharing airspace within the boundaries of the proposed FIR, including the introduction of FUA procedures ensuring optimum use of airspace and potential implementation of additional ATS routes and conditional routes; d) facilitate traffic flow with less restrictions, including opportunities to define additional user preferred routes, and support continuous climb and descent operations (CCO and CDO); e) facilitate the seamless provision of ATS services within the whole vertical stratum above Qatar; f) facilitate opportunities to accommodate direct routings without ACC coordination with third ACC; g) optimized integration of regional network of traffic flows to/from Qatar with Bahrain departures to the east and north-east; h) optimal distribution of work load between Bahrain ACC and Qatar ATS units. Performance of air navigation operations can be maximized by means of the deployment of state of the art CNS/ATM infrastructures, providing opportunities for mutual support, including with respect to contingency planning and implementation; i)

> provide an operational environment conducive to handling future regional traffic growth in the most effective manner; j) remove reliance on delegation of air navigation services outside of Qatar, coordination of which has proved historically challenging, thereby simplifying regulatory oversight, regulation, air traffic control service provision and, in some instances, coordination; and k) alignment of FIR and SRR boundaries, simplifying overall ATS and SAR responsibilities, and taking the opportunity to support the provisions of effective SAR services more directly from facilities available to Qatar covering the whole proposed FIR/SRR.[423]

Although the safety of flight operations is of utmost importance to all states, it is understood that the main basis for the proposed amendment was the state sovereignty principle. The measures taken against Qatar during the GCC crisis were severe and led, as outlined in the introduction of this chapter, to Qatar being prevented from freely using its own air space as well as a portion of the high seas that were within Bahrain FIR. The amendment was intended to give Qatar control over its territory as well as access to the international air space over the high seas, which Qatar did not have, placing Qatar at Bahrain's mercy on this matter and any future matter.[424] Another strong basis on which Qatar justified its proposal was the non-discrimination principle, safeguarded by the Chicago Convention, which Bahrain was alleged to have violated during the GCC crisis. Also, the current distribution of FIRs in the region is disproportional to the size of both Qatar and Bahrain. The element of disproportionality is seen not only in both countries' sizes but also in their national carriers' operational sizes. Qatar owns Qatar Airways, which is one of the largest airlines in the world,[425] flying to more than 150 destinations,[426] with an estimated 324 daily movements[427] (departures and arrivals combined) and 234 planes.[428] In comparison, Gulf Air, the national carrier of Bahrain, has only 33 planes and significantly fewer operations and movements.[429] This illustrates the

[423] ibid Appendix A (d), Originators' reasons for amendment.
[424] Special reference is to be given to the buffer zone that Bahrain created for preventing Qatar from using specific airspace over international waters.
[425] J Pearson, 'Snapshot: A Day In The Life Of Qatar Airways Operations' (Simple Flying, 29 July 2021) <https://simpleflying.com/qatar-airways-operations-1-day/> accessed 29 January 2023.
[426] Qatar Airways, 'About Qatar Airways' <https://www.qatarairways.com/en/about-qatar-airways.html> accessed 29 January 2023.
[427] Pearson (n 425).
[428] Qatar Airways, 'Fleet' <https://www.qatarairways.com/en/fleet.html> accessed 29 January 2023.
[429] Planespotters.net, 'Gulf Air Fleet Details and History' <https://www.planespotters.net/airline/Gulf-Air> accessed 29 January 2023.

disadvantages that Qatar faces under the current FIR delineation and gives Qatar's proposal more legitimacy.

2.4.4 Position of the blockading states regarding Qatar's proposal

As per the amendment procedure mentioned above, Qatar's proposal was circulated to the affected states, the blockading states among them, for comment, agreement or objection. Naturally, Bahrain, supported by Saudi Arabia, the UAE, Egypt and Yemen, strongly opposed the proposal entirely, arguing that the current arrangement and FIR boundaries are satisfactory and well established. Bahrain recalled its role and long experience and capabilities in providing ATS for over five decades of excellent management of all of its responsibilities within Bahrain FIR.[430] Bahrain claimed that Qatar's proposal lacked technical, operational, safety and efficiency justifications that would improve the current service level and that introducing a new FIR would not promote safety but would reduce the safety level in the region. Moreover, the introduction of an additional ATS unit in a region with many conflicts and high-density, complex traffic, such as the Middle East, would make coordination between ATS units more complicated and put more workload on controllers and pilots, ultimately affecting safety.[431] Furthermore, Qatar's proposal would result in the fragmentation of the FIRs in the region, splitting the air space structures into smaller FIRs, which would affect safety in that FIR and all adjacent FIRs in the region. Qatar's proposal would then contradict 'the region's vision to ensure a safe and efficient flow of air traffic'.[432] The unspoken truth behind Bahrain's objection was that the proposal would weaken Bahrain's dominance in the region as a major air navigation service provider while giving Qatar independence in this field. Moreover, Bahrain would lose all monetary revenue for providing ATS for all users within its FIR, including Qatar. This seems more terrifying for Bahrain, considering the history of rivalry with Qatar.

[430] ICAO, 'Bahrain's Technical Arguments for the Objection to the Proposal for Amendment of the ICAO MID ANP – Volume I, for the Establishment of Qatar FIR Originated by Qatar, for Consideration by the MIDANPIRG in Accordance with the Procedure for the Amendment of MID ANP Volume.' <https://www.icao.int/MID/MIDANPIRG/Documents/MID18%20and%20RASGMID8/WP%2048%20-%20Bahrain%20Objection%20to%20PfA.pdf> accessed 23 January 2023.

[431] ibid.

[432] ICAO (n 422) 3.

2.4.5 ICAO's decision

It is worth mentioning that following the application of Qatar for the MID ANP to be amended, the ICAO MID Office created the Task Force on Qatar's Amendment of MID Air Navigation Plan Proposal (QANPP TF), consisting of Bahrain, Iran, Kuwait, Oman, Qatar, Saudi Arabia, the UAE and international air transport association (IATA), with the objective of reaching a consensus at the regional level with regard to the proposed amendment. For this reason, two meetings of the task force were held (QANPP TF/1, 8–10 January 2019, and QANPP TF/2, 13–14 April 2019, at the ICAO MID Office, Cairo, Egypt), and for many months, discussions took place at the bilateral level between ICAO and the members of the task force.[433] However, an agreement could not be reached, as both sides – Bahrain and its allies and Qatar – insisted on their positions, which meant that the issue would need to be taken to the Air Navigation Commission according to the procedures outlined above. The matter moved from the regional level to the ICAO Council level on 21 June 2021 in its 223rd session. Upon the report of the Air Navigation Commission,[434] the Council agreed in principle with the establishment of Doha FIR as proposed by Qatar, covering its own territorial air space extending to contiguous airspace over the high seas.[435] The Council backed its decision on Qatar's right to withdraw from its delegation arrangements with Bahrain by saying that Bahrain had been delegated to provide ATS over Qatar's territory in accordance with paragraphs 2.1.1 of Annex 11 to the Chicago Convention.[436] In addition, the Council acknowledged that Qatar's proposal to have its own FIR over its territorial airspace with access to the high seas is in line with Article 1 of the Chicago Convention, which is the prevalence of the principle of state sovereignty over any technical consideration, and Assembly Resolution A40-4, Appendix G.[437] Furthermore, the Council admitted that the aim of the proposal is to support the development of civil aviation for Qatar as well as for the MID region. However, the Council did not grant final approval;

[433] ICAO (n 422).

[434] In this the commission stated that Qatar 'possesses the capabilities and qualifications necessary to manage air traffic safely and effectively'. A Macheras, 'What Does the ICAO's Decision Mean for Qatar's Airspace?' (Doha News, 13 July 2021) <https://dohanews.co/what-does-the-icaos-decision-mean-for-qatars-airspace/> accessed 26 January 2023.

[435] ICAO, 'ICAO Council 223rd Session C-DEC 223/9,Proposal for Amendment of the Air Navigation Plan – Middle East Region, Concerning the Establishment of a Doha Flight Information Region (FIR)/Search and Rescue Region (SRR)' (2021) <https://www.icao.int/about-icao/Council/Council%20Documentation/223/C-DECs/C.223.DEC.09.EN.pdf> accessed 26 January 2023.

[436] Chicago Convention (n 42) Annex 11.

[437] ICAO, 'The 40th Session of the ICAO Assembly Adopted Resolution A40-4, Appendix G' <https://www.icao.int/Meetings/a40/Documents/Resolutions/a40_res_prov_en.pdf> accessed 26 January 2023.

instead, it called upon Qatar, Bahrain and the other concerned stakeholders in the MID region to discuss cooperatively under the umbrella of the President of the Council and to agree to the technical arrangements for the implementation of the Doha FIR. The outcome of these discussions will be reported to the ICAO Council at its 224th session for final approval.[438]

However, despite the Council's agreement in principle with the establishment of Doha FIR, the efforts that were made by the President of the Council and the high-level consultations amongst the stakeholders in the region, a consensus could not be reached by all the parties. Consequently, the ICAO Council, in its 225th session, agreed to take in a transitional proposal made by the President of the Council contained in the oral report before the Council.[439] The proposal was about establishing Doha FIR using a phased approach as a way of resolving most of the concerns expressed by the opposing parties. The proposal consists of two phases: In phase one, Doha FIR will cover all of air space above Qatar's territorial land and water, with extension to the high seas to the east as far as the UAE FIR border with unlimited altitude control (orange colour, as shown in Figure 6). The high seas from the north of Qatar, as far as the Iran FIR will be controlled up to 24,500 feet above sea level (blue colour, as shown in Figure 6). In phase two, in two years' time, if the implementation of phase one is successful, the blue colour area will be controlled by Doha FIR at unlimited altitude.[440]

[438] ICAO Council 223rd Session (n 435).
[439] ICAO, 'ICAO Council 225th Session C-DEC 225/10 ,Proposal for Amendment of the Air Navigation Plan – Middle East Region, Concerning the Establishment of a Doha Flight Information Region (FIR)/Search and Rescue Region (SRR)' (2022) <https://www.icao.int/about-icao/Council/Council%20Documentation/225/C-DEC/C.225.DEC.10.EN.PDF> accessed 26 January 2023.
[440] ibid.

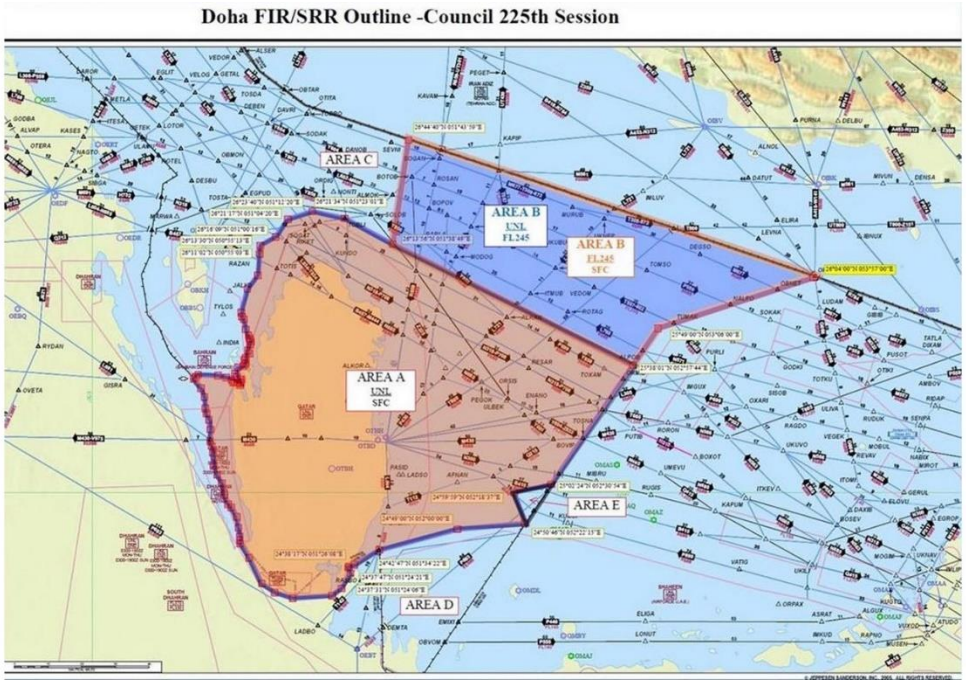

Figure 6: Doha FIR/SRR outline- ICAO Council propoasl in its 225th Session

2.4.6 Conclusion

Whether the position of the blockading states with regard to the safety or technical elements of Qatar's proposal was right or wrong, the true argument behind their objections was far beyond technicality or safety concerns; rather, they aimed to deprive Qatar of ATS independence. Bahrain's denial of access to Qatar-registered aircraft over Qatar's territory, as well as over international air space above the high seas, was not justifiable. Bahrain might argue by presenting the outstanding history of its level of service, but its actions against Qatar during the crisis negated all of that. It is also not surprising that Bahrain would refuse a proposal to establish a Doha FIR that would deprive Bahrain of monetary revenue for providing ATS for all users within its FIR, including Qatar. It seems that both views with regard to Qatar's proposal were subjectively built; however, the argument of Qatar prevailed, as it was based on sovereign right over its territory, safeguarded by the Chicago Convention, Article 1, and supported by the action of the blockading states themselves, as they gave clear evidence of how FIRs can be misused and abused. One of the significant effects of the emergence of Doha FIR is that 70% of the flights operating to the UAE will pass through Qatar's FIR, which gives Qatar great leverage in the future that will deter the blockading states,

especially Bahrain and the UAE.[441] Also, Qatar's position will be strengthened as a regional aviation player in the region, especially with Qatar having newly joined the ICAO Council, a testimony to its contributions and efforts in the civil aviation industry.[442]

[441] FL360aero, 'Historic! Operational Agreements on Activating Doha Flight Information Region (FIR) Effective Sept. 8 Has Been Signed!' <https://fl360aero.com/detail/historic-operational-agreements-on-activating-doha-flight-information-region-fir-effective-sept-8-has-been-signed/1056> accessed 29 January 2023.

[442] ICAO, 'Assembly 41st Session' <https://www.icao.int/Meetings/a41/Documents/A41%20Election%20of%20the%20Council%20Results%20Part%20III.pdf> accessed 29 January 2023; 'Qatar Wins ICAO Council Membership' (Ministry of Transport, 4 October 2022) <https://mot.gov.qa/en/news-events/news/qatar-wins-icao-council-membership> accessed 29 January 2023.

3 Chapter 3: The concept of state sovereignty and flight information regions

3.1 Introduction

The notion of state sovereignty over territory is something upon which international law is built. It is a fundamental principle on which states will never compromise and that they will always protect, as it forms an essential aspect of their statehood. However, throughout history, the concept has undergone many developments and different definitions and interpretations, some with limited and some with wide applications, and it has faced a number of challenges, among which is the concept of flight information regions and their delineation. FIRs are not delineated based on national boundaries, a situation deemed by many to be in conflict with state sovereignty and a challenge that should be treated as a violation of state sovereignty and of all treaties that cherish and recognise that concept. While this violation is debatable, this chapter will focus on the concept of state sovereignty and its relationship to the concept of the FIR. The first part will deal with the concept of sovereignty itself, its status and its content and scope. The focus will be upon its territorial dimension and in particular its application and limitation of the airspace of states, outer space and finally the high seas. The second part will address the practical application of FIRs and disputes between states over them, which will finally be addressed as determining factor that determines whether a contradiction between these two concepts exists.

3.2 State sovereignty in international law: Its scope and limitations

The concept of sovereignty, like all other concepts, is a product of its history. Although the term sovereignty is relatively modern, the concept dates back to the time of Aristotle, who described it as the 'supreme power in the state'.[443] The origin of the concept of sovereignty[444] is generally attributed to the 1648 Treaty of Westphalia.[445] The significance of this treaty is

[443] Curtis Johnson, 'The Hobbesian Conception of Sovereignty and Aristotle's Politics' (1985) 46 Journal of the History of Ideas 331. See also M Tutunaru, 'General Considerations Regarding the Concept of Constituent Power' (2021) 15 Journal of Law and Administrative Sciences 54; E Engle, 'Beyond Sovereignty? The State after the Failure of Sovereignty Articles & Essays' (2008) 15 ILSA Journal of International & Comparative Law 34.

[444] Although others argue as Croxton does ('The Peace of Westphalia of 1648 and the Origins of Sovereignty') that the treaty has no clear statement on the principle of sovereignty other than a recognition of authority of others over their territories, it was on this ground that scholars identified this treaty to be the origin of the notion of sovereignty.

[445] The Peace of Westphalia, concluded in 1648 in Münster (Germany), ended the Thirty Years War, which started with an anti-Habsburg revolt in Bohemia in 1618 but became an entanglement of different conflicts concerning the constitution of the Holy Roman Empire, religion, and the state system of Europe. See also E Engle, Beyond Sovereignty (n 443) 38.

that it recognised the full territorial sovereignty of each member state of the Roman Empire.[446] It is also believed that, following the conclusion of this treaty, sovereignty became a core element to the political thoughts of scholars like Machiavelli, Bodin and others.[447] The term sovereignty was originally derived from the Latin word *superanus*, which means 'supreme' or 'paramount'.[448] Since it came into existence and throughout its history, the term has been defined variably from many different perspectives and across different disciplines, such as political science, sociology and law, and the definition varies accordingly. Also, the variation can be seen when the term is defined from the dimension of 'the holder of that sovereignty'[449] or from the absoluteness feature of sovereignty itself or from the internal or external perspective. Nevertheless, when considering the definitions of sovereignty, one will find that most of these definitions share a similar core meaning and orbit around the supremacy and absoluteness of authorities within a territory. For instance, Jean Bodin, whose name is synonymous with the principles of sovereignty and statehood, defined sovereignty as the supreme authority of the state, 'not limited either in power, or in function, or in length of time'.[450] Similarly, Grotius believed that sovereignty is so absolute that it is 'not subject to the control of any other power, so as to be annulled at the pleasure of any other human will'.[451] Although the core meaning of the term is the same, defining it is difficult because, as Weber said, the term itself resists definition.[452] Its meaning and application have been

[446] It also gave each prince the freedom to choose the religion for their state (one of three choices within Christianity).

[447] Daniel Philpott, 'Sovereignty' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/fall2020/entries/sovereignty/> accessed 21 November 2020.

[448] Arshid Dar and Ahmed Sayed, 'The Evolution of State Sovereignty: A Historical Overview' (2017) 6 International Journal of Humanities and Social Science Invention 8. See also J Maftei, 'Sovereignty in International Law: European and International Law' (2015) 2015 Acta Universitatis Danubius Juridica 57; S Zadorozhna, 'Jus Gentium and the Primary Principles of International Law: Non-EU National Law' (2019) 6 European Journal of Law and Public Administration 162; M Senn, 'Sovereignty – Some Critical Remarks on the Genealogy of Governance' (2010) 1 Journal on European History of Law 9.

[449] On this case it could be God or the king, etc.

[450] Jean Bodin, Bodin: On Sovereignty (Julian H Franklin ed, Cambridge University Press 1992) <https://www.cambridge.org/core/books/bodin-on-sovereignty/1265AACC6237BF32D1AB9C545B4B71F6> accessed 8 November 2020. See also JC Klausen, 'Jacques-Louis David's Adieux: The Micropolitics of Sovereignty at the Bourbon Restoration' (2016) 12 Law, Culture and the Humanities 285; M Cahill, 'Sovereignty, Liberalism and the Intelligibility of Attraction to Subsidiarity: Symposium on Subsidiarity' (2016) 61 American Journal of Jurisprudence 116.

[451] Hugo Grotius, 'The Rights of War and Peace' (1901) <https://oll.libertyfund.org/title/grotius-the-rights-of-war-and-peace-1901-ed> accessed 8 November 2020. See also JW Sap, 'The Role of Human Rights in Setting the Boundaries of Sovereignty and the Autonomy of the EU Legal Order' (2017) 9 Amsterdam Law Forum 51.

[452] Cynthia Weber, 'Review of Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty'; 'The New Sovereignty: Compliance with International Regulatory Agreements' (1997) 59 The

changing dramatically from antiquity until the current time, with, as Head described, having 'sloppiness' in its nature;[453] it is also claimed that it is impossible to be clearly defined at any of its stages of development.[454]

Naturally, the idea of sovereignty has changed over time, especially in the twentieth century, with the advancement of technology, economic development and its being subject to such things as international law, norms and courts. The term sovereignty has been forced to move to a new stage of its development, which could be conceived of as straining the traditional concept of sovereignty as absolute authority over a territory.[455] These limitations are believed to have limited the sovereignty of states when they were forced to do things they did not like. For instance, article 19 of the United Nations Convention on the Law of the Sea (UNCLOS) requires states to allow the innocent passage of ships or aircraft of other states into their territories 'so long as it is not prejudicial to the peace, good order or security of the coastal State.'[456] The right to innocent passage, although controversial,[457] advocates freedom of navigation: coastal states are obligated to not hamper innocent passage over their territorial waters when the purpose is to cross but not enter into their internal waters.[458] The importance of this right lies in the promotion of commerce and the necessity of trading among nations, as each coastal state needs commodities not produced in its land; no state claims self-sufficiency.[459] Another famous example that illustrates the limitations of the concept of sovereignty and undermines its application is one state's intervention in the internal affairs

Journal of Politics 310. LKS Panahi, 'Historical Comparison of Sovereignty in International Law' (2021) 9 Russian Law Journal 136.

[453] John W Head, 'Addressing Global Challenges through Pluralistic Sovereignty: A Critique of State Sovereignty as a Centerpiece of International Law' (2018) 67 University of Kansas Law Review 732.

[454] ibid.

[455] Stephen M Shrewsbury, 'September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty' (2003) 68 Journal of Air Law and Commerce 115.

[456] UNCLOS (n 36) art 19.

[457] KK Shang, 'Trespass to Airspace: How to Deter North Korea from Its Space Ambitions Student Contribution' (2013) 6 Journal of East Asia and International Law 221. See also GR Ballester, 'The Right of Innocent Passage of Warships: A Debated Issue' (2014) 54 Revista de Derecho Puertorriqueno 87.

[458] K Buntoro, 'Rethinking Nusantara Indonesia: Legal Approach Regional Integration III' (2015) 13 Indonesian Journal of International Law 499. See also J Lee, 'Exercising the Right of Innocent Passage in the Territorial Sea: The Korean Supreme Court Decision 2017Do9982, May 7, 2021 Notable Cases' (2022) 21 Journal of Korean Law 149; CM Seymour, 'Navigating the South China Sea: Analyzing the Current Dispute over Sovereignty, Maritime Zones, and Maritime Rights Student Notes' (2022) 19 South Carolina Journal of International Law and Business 195.

[459] William K Agyebeng, 'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea' (2006) 39 Cornell International Law Journal 31.

of another sovereign state to safeguard the fundamental principles of human rights.[460] Although the non-intervention principle is one of the most fundamental international law principles,[461] the United Nations Security Council conducted a military intervention in Libya in 2011 to protect the civilians from the oppression of its tyrannical ruler and defend fundamental human rights.[462] This intervention challenges the traditional understanding of sovereignty as absolute authority, as it involves a blatant violation of the concept of sovereignty itself. However, it is important to recognize that the authorization by the UNSC provides a legal framework that allows for such interventions within the international community without resulting in a breach of this principle.

Furthermore, another striking issue that led many of today's researchers to question the existence of the concept of sovereignty is that states do not have the ultimate freedom and power to issue laws as they wish; instead, they are obligated by international treaties to apply laws they might not like or regulations that undermine their power and limit rights that used to be unlimited. Little wonder these scholars and researchers are sceptical about sovereignty when it is well known that the most important manifestation of the sovereign state is the power to make law (legislative), execute that law (executive) and apply that law in its territory (judicial).[463] However, states are obligated to comply with international treaties, and they must amend their national laws according to those treaties. For example, the Chicago Convention governs civil aviation laws and regulations; all states have to comply with it and adjust the laws in their territories according to it and any laws the International Civil Aviation Authority (ICAO) passes.[464] Furthermore, the right to use force 'in support of national interest' – which, according to Lauterpacht, is one of 'the most important elements in national sovereignty as originally conceived' – is limited by the United Nations Charter to self-defence and occasions authorised by the Security Council.[465] It is notable that although the United Kingdom believed that its vital interest was threatened by Nasser's nationalisation of the Suez

[460] A Peters, 'Humanity as the A (Alpha) and (Omega) of Sovereignty Special Anniversary Article' (2009) 20 European Journal of International Law 513.
[461] Jianming Shen, 'The Non-Intervention Principle and Humanitarian Interventions under International Law' (2001) 7 International Legal Theory 1, 32.
[462] MNS Sellers, 'Intervention under International Law Symposium: The International Law and Politics of External Intervention in Internal Conflict: Introduction' (2014) 29 Maryland Journal of International Law 7.
[463] Eli Lauterpacht, 'Sovereignty – Myth or Reality?' (1997) 73 International Affairs (Royal Institute of International Affairs 1944-) 137. See also Peters (n 460) 518.
[464] Chicago Convention (n 42) art 37.
[465] Lauterpacht (n 463) 143.

Canal in 1956, it was forced to end its attack on Egypt because it was a violation of the UN prohibition of the use of force and because of pressure from the United States on the UK's currency, all of which was due to the acceptance by the UK itself of this 'major degree of outside control'.[466] These are just a few examples, among many others, where states have accepted limitations on their national sovereignty.

The question arises here as to why sovereign states would give up their unlimited rights and supreme sovereignty and accept these limitations. The answer could be that there are many benefits that states obtain when adhering to such treaties and international organisations. Lauterpacht has eloquently listed some of the benefits that states obtain:

> In exchange, they may receive certain benefits. These are sometimes intangible, in the sense that the benefits derived from a commitment to observance of human rights, though politically real and significant, are not generally measurable in economic terms. Often, however, the impact of the limitations may be measurable. An enhancement of security by the acceptance of a limitation on the right to resort to force or by acceptance of verification procedures in respect of disarmament measures can also be assessed in terms of reduced expenditure on national defence. Acceptance of obligations under the Articles of Agreement of the International Monetary Fund is reflected in the benefits accruing from currency stability and exchange support in times of pressure. Acceptance of regulations established by the World Health Organization or by the International Civil Aviation Organization leads to more effective control or suppression of disease and greater safety in air navigation. Participation in the schemes of tariff reduction adopted under the General Agreement on Tariffs and Trade is balanced by greater access for domestic producers to foreign markets.[467]

On the other hand, states' subjection to international treaties and organisations can be seen as their actual exercise of sovereignty in deciding whether to enter an agreement.[468] This point was stressed by the PCIJ: '[T]he right of entering into international engagements is an attribute of State sovereignty'; these restrictions under international agreements do not constitute a surrender of state sovereignty.[469] To arrive at a common ground, it is important

[466] ibid 143–144.
[467] ibid.
[468] OA Hathaway, 'International Delegation and State Sovereignty The Law and Politics of International Delegation' (2008) 71 Law and Contemporary Problems 115–150.
[469] 'The SS "Wimbledon", United Kingdom and Ors and Poland (Intervening) v Germany, Intervention, Judgment, (1923) PCIJ Series A No 1, ICGJ 234 (PCIJ 1923), 28th June 1923, League of Nations (Historical) [LoN]; Permanent

to distinguish between two aspects of sovereignty: internal sovereignty, in which a state has ultimate sovereignty over its own territory and its own nationals, and international or external sovereignty, in which the relations between states and treaties cannot be ignored. With this distinction, we might be able to combine the traditional definition of sovereignty at the internal level, Bodin's school, with the new approach to sovereignty, in which a state recognises its situation and its membership in international organisations and adheres to its obligations for its own benefit and that of other states.[470] In fact, these two aspects of sovereignty are coequal and coexistent, as the international recognition of a state's external sovereignty is 'dependent upon the existence and reality of the government's internal sovereignty'.[471]

Finally, it is important to understand that the sovereignty concept, regardless of all the changes it has been through and all the developments and limitations that have been put on it, still exists as an extremely important element of international law respected and cherished by all states. With all the limitations they have accepted, whether through treaties or other international obligations, states are still sovereign in the eye of international law, and that quality of statehood is not affected.

3.2.1 The concept of sovereignty in international law

There has been a recent debate among states over the concept of sovereignty, whether it is a legal rule or just a political principle. In 2018, while talking about cyber and international law in the 21st century, UK Attorney General Jeremy Wright stated that the UK perceives the principle of sovereignty as a political principle, not as a legal one. He further clearly stated: '[T]here is no such rule as a matter of current international law.'[472] The implication of that

Court of International Justice (Historical) [PCIJ]' (Oxford Public International Law) <https://0-opil-ouplaw-com.catalogue.libraries.london.ac.uk/view/10.1093/law:icgj/234pcij23.case.1/law-icgj-234pcij23?prd=OPIL> accessed 7 November 2020. See also S Besson, 'State Consent and Disagreement in International Law-Making. International Legal Theory' (2016) 29 Leiden Journal of International Law 304; T Endicott, 'The Logic of Freedom and Power' in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (Oxford University Press 2010) 245.

[470] Gerard Kreijen and others, *State, Sovereignty, and International Governance* (Oxford Univ Press 2002) 32. See also Koesrianti, 'International Cooperation among States in Globalized Era: The Decline of State Sovereignty' (2013) 3 Indonesia Law Review 273.

[471] Gerard Kreijen and others (n 470).

[472] 'Speech of Attorney General Jeremy Wright, Cyber and International Law in the 21st Century' (*GOV.UK*) <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> accessed 1 April 2021. See also K Macak, 'On the Shelf, but Close at Hand: The Contribution of Non-State Initiatives to International Cyber Law Symposium on Dan Efrony & Yuval Shany, A Rule Book on the Shelf? Tallinn Manual 2.0

approach is that the violation of state sovereignty per se, if it occurs, will be a violation of a merely political principle and will not be deemed a breach of international law, and therefore, there will be no legal consequences for such violations based on the concept of sovereignty per se. However, this position is totally rejected per international law, customary international law and states' practices. Given these debates and their potential implications, this section aims to establish the legality of sovereignty as a stand-alone international legal principle. To better understand the legal implications, it is essential to distinguish between treating sovereignty as a principle or as a rule, as this distinction carries significant legal consequences in international law. Traditionally, sovereignty is recognized as a fundamental principle that underpins the rights and responsibilities of states. While some posit that sovereignty is merely a political principle with no direct legal consequences, this view overlooks its dual role as both a principle and a foundation for specific legal rules within international law. Moreover, principles, including sovereignty, establish broad normative standards that shape international legal obligations, even if they are not always translated into specific rules.[473] Legal principles generally provide the overarching framework within which rules are developed, generating obligations by setting the context for interpreting and applying specific rules.[474] Unlike rules, which offer clear prescriptions and direct legal consequences, principles are broad and adaptable, allowing for context-specific applications.[475] In this context, principle of sovereignty, in particular, supports the formulation of rules like the prohibition on the use of force and the prohibition on intervention.[476] The ICJ has noted that legal principles and rules are often used interchangeably, indicating that principles can embody rules due to their broad, fundamental

on Cyberoperations and Subsequent State Practice: Essay' (2019) 113 AJIL Unbound 84; C Pray, 'It's the Principle: Defining Sovereignty in the Context of Cyber Operations Comment' (2020) 7 National Security Law Journal 287; PR Stephenson, 'International Private Law as a Model for Private Law Jurisdiction in Cyberspace' (2019) 7 Legal Issues Journal 130; MN Schmitt and DE Johnson, 'Responding to Hostile Cyber Operations: The "in-Kind" Option' (2021) 97 International Law Studies Series. US Naval War College 111; E Taichman, 'Defend Forward & Sovereignty: How America's Cyberwar Strategy Upholds International Law' (2021) 53 University of Miami Inter-American Law Review 74; S Aravindakshan, 'Reflections on Information Influence Operations as Illegal Intervention' (2021) 3 NLUD Journal of Legal Studies 130.

[473] Tsagourias N, 'The Legal Status of Cyberspace: Sovereignty Redux?' in Nicholas Tsagourias and Russell Buchan (eds), Research Handbook on International Law and Cyberspace (2nd edn, Edward Elgar 2021) 19.

[474] Ibid.

[475] Ibid 20.

[476] Ibid 21. See also, Buchan R and Navarrete I, 'Cyber Espionage and International Law' in Nicholas Tsagourias and Russell Buchan (eds), Research Handbook on International Law and Cyberspace (Edward Elgar Publishing 2021) https://china.elgaronline.com/edcollchap/edcoll/9781789904246/9781789904246.00021.xml accessed 12 May 2024.

character.[477] Treating sovereignty primarily as a principle does not reduce its legal significance. Instead, it emphasizes its foundational nature, as principles often inform and shape the application of rules. This interpretation maintains sovereignty's legal weight and enforceability, confirming its central role in the international legal order. The next step in determining the legality of the principle of sovereignty is to identify the sources of international public law. The question is usually answered by referring to article 38 of the Statute of the International Court of Justice, which says that the primary sources of public international law are 'a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; [and] b. international custom, as evidence of a general practice accepted as law'.[478] It is on treaties and customary international law that international public law is built. Consequently, the legality of state sovereignty will be examined based on these sources.

3.2.2 The concept of state sovereignty is the cornerstone of international treaties

Treaties, written documents negotiated by their signatories and containing binding obligations on them, are the first source of international law.[479] Treaties are often deemed to contain the unwritten rules of customary law, the typical example being the 1969 Vienna Convention on the Law of Treaties. The second source of international law is customary international law, which is, as article 38 of the ICJ Statute defines it, 'a general practice accepted as law'.[480] When these sources are considered for the sake of proving the legality of the concept of a state's sovereignty, one will find that this concept is regarded both as a primary rule of international law[481] and a fundamental legal principle upon which international conventions are built and that ultimately form international customary law. An

[477] Nicaragua case (n 78) para 251.
[478] 'Statute of the Court' (*International Court of Justice*) <https://www.icj-cij.org/en/statute#CHAPTER_II> accessed 6 April 2021.
[479] Frans G von der Dunk, 'Customary International Law and Outer Space' in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 349 <https://www.cambridge.org/core/product/identifier/9781316544624%23CN-bp-11/type/book_part> accessed 16 December 2020.
[480] 'Statute of the Court' (n 478). See also R Goel and V Jain, 'Conflict between Customary Law and Treaty Law' (2022) 5 Issue 4 International Journal of Law Management & Humanities 626; J d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 International Community Law Review 254; S Dayal and A Katiyar, 'Customary International Law: Whether Relevant in the Modern World or Not' (2021) 4 Issue 2 International Journal of Law Management & Humanities 3061.
[481] Sean Watts and Theodore Richard, 'Baseline Territorial Sovereignty and Cyberspace' (2018) 22 Lewis & Clark Law Review 795.

illustration of this can be found, for instance, in the Paris Convention of 1919, which stated in its first article the recognition of its contracting states of the principle of territorial sovereignty. It uses the word 'recognise' to emphasise that 'sovereignty over airspace was a customary principle of international law which existed apart from the Convention and did not come into existence because of it'.[482] Then came the Chicago Convention on Civil Aviation of 1945, which stated the exact principle in its first article: 'The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.'[483] In addition, the Geneva Convention on the Continental Shelf asserts that the sovereignty of a coastal state includes the territorial water and airspace above it. Moreover, the UNCLOS followed all these conventions in establishing the principle of territorial sovereignty in its article 2. All of these treaties firmly established undoubtably the legality of the principle of state territorial sovereignty, which results in the formation of customary international law as an 'international custom of a general practice accepted as law'.[484] Furthermore, the United Nations Charter stresses the principle of equal sovereignty among member states, which reflects customary international law.[485]

The principle of sovereignty also plays a fundamental role in international jurisprudence, as there are numerous ICJ cases in which the court upheld the principle of territorial sovereignty as a fundamental principle and as a stand-alone international legal principle, regarding the violation of which as a breach of international obligation. To begin with, in 1946, an explosion of mines occurred near British warships passing across the Corfu Channel in the territorial water of Albania. Subsequently, the UK launched Operation Retail in Albanian territorial waters without Albania's approval on the basis of self-help. The matter was brought before the ICJ, and the court rejected the justification of self-help and held that the UK had violated the sovereignty of Albania, as the minesweeping was against the will of the Albanian government.[486] The court emphasised the importance of the concept of territorial sovereignty, which must be respected among independent states. Another famous example

[482] Jeswald W Salacuse, 'The Little Prince and the Businessman: Conflicts and Tensions in Public International Air Law' (1979) 45 Journal of Air Law and Commerce 814.
[483] Chicago Convention (n 42) Art 1.
[484] 'Statute of the Court' (n 478).
[485] Wouter G Werner, 'State Sovereignty and International Legal Discourse' in Ige F Dekker and Wouter G Werner (eds), *Governance and International Legal Theory* (Springer Netherlands 2004) 155 <https://doi.org/10.1007/978-94-017-6192-5_5> accessed 3 April 2021.
[486] Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 36.

is the case of Nicaragua, where the ICJ upheld the principle of territorial sovereignty and concluded that action of the United States against Nicaragua was a 'breach of its legal obligations under customary international law not to use force against another state, not to intervene in its affairs, not to violate its sovereignty'.[487] The court also considered unauthorised overflight over a state by another state to be a direct infringement of the principle of territorial sovereignty, which the US was in breach of under international customary law.[488] The final illustration is in the 1986 *Rainbow Warrior* affair, when agents of the French government attacked a civilian vessel in the internal waters of New Zealand. The case was brought by both parties before the Secretary General of the United Nations, which clearly stated that 'the attack against the Rainbow Warrior was indisputably a serious violation of basic norms of international law. More specifically, it involved a serious violation of New Zealand sovereignty and of the Charter of the United Nations.'[489] The ruling upheld the sanctity of the legality of the concept of sovereignty as a fundamental principle of international law as well as international customary law.

Therefore, the concept of sovereignty has very deep roots in international law, which in turn is derived from the general and consistent practices of states, the violation of which has been regarded as a breach of international obligation. Its old legal history and deep roots result in this concept being an accepted binding legal principle. It is therefore translated into respected fundamental principles in international treaties, international courts' judgments and states' practices.

3.2.3 Territorial sovereignty

While state sovereignty represents the overarching authority of a state, territorial sovereignty specifically refers to control over its geographic territory. State sovereignty encompasses political, economic, and legal autonomy, whereas territorial sovereignty pertains strictly to the physical space where the state exercises its jurisdiction. The two concepts are interrelated but

[487] Nicaragua case (n 78) 136, para 292. See also JL Czernecki, 'The United Nations' Paradox: The Battle between Humanitarian Intervention and State Sovereignty Comment' (2002) 41 Duquesne Law Review 396-397.
[488] Ibid para 251.
[489] 'Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair Decision of 30 April 1990, 201. See also G Palmer, 'Settlement of International Disputes: The Rainbow Warrior Affair' (1989) 15 Commonwealth Law Bulletin 593; D Svantesson and others, 'On Sovereignty' (2023) 17 Masaryk University Journal of Law and Technology 61-62.

distinct, with territorial sovereignty forming the foundation of state sovereignty. As has been established in the previous section, sovereignty means supreme authority over a territory. It is important to discuss in this section the aspect of territoriality, as it is the field where sovereignty is being exercised. Both the principle of sovereignty and the principle of territoriality are essential pillars of international law.[490] They are so interrelated that sovereignty is founded upon the existence of territory, and without it, the state does not exist.[491] The term territory refers to the spatial dimension where states have exclusive exercise of power and rights.[492] Generally, scholars associate territory and the concept of ownership of property, which has its root in Roman law.[493] According to this analogy, the owner of property owns the land and its soil and subsoil and the airspace over that land, and he has the exclusive right to his property and its resources and can do whatever he wants with it. The same goes for the state over its territory.[494] The question arises here as to what the boundaries of the territorial sovereignty of states are. In brief, territorial sovereignty extends to land boundaries (mainland) and the airspace above that land (the subject of airspace and outer space will be dealt with separately in the next section), while coastal states own certain zones of the sea,[495] all of which are governed by the UNCLOS. According to the UNCLOS, the sea is divided into five different zones, each with different legal status. Internal waters include all littoral areas, such as rivers, ports and harbours; the state has complete sovereignty and

[490] Giovanni Distefano, 'Theories on Territorial Sovereignty : A Reappraisal' [2010] Journal of Sharia and Law 28. See also J Fitzpatrick, 'Sovereignty, Territoriality, and the Rule of Law' (2001) 25 Hastings International and Comparative Law Review 307.

[491] Malcolm N Shaw (ed), 'Territory', *International Law* (8th edn, Cambridge University Press 2017) 361. The aspect of territory is a vital pillar of the statehood of any country as stipulated by the Montevideo Convention, which explains that a state should have a 'defined territory'. However, in reality, having boundary disputes among states or having an undefined territory do not preclude state from existence, as is the case with Palestinian, Israel, Albania etc. See Eugene Kontorovich, 'Israel/Palestine – The ICC's Uncharted Territory Debate' (2013) 11 Journal of International Criminal Justice 980.

[492] Janosch Prinz and Conrad Schetter, 'Conditioned Sovereignty: The Creation and Legitimation of Spaces of Violence in Counterterrorism Operations of the "War on Terror"' (2016) 41 Alternatives: Global, Local, Political 122.

[493] Shaw (n 491) 364. See also G Kegel and I Seidl-Hohenveldern, 'On the Territoriality Principle in Public International Law' (1981) 5 Hastings International and Comparative Law Review 249; L Cotula, 'Land, Property and Sovereignty in International Law' (2016) 25 Cardozo Journal of International and Comparative Law 226.

[494] The analogy of territory to property rights has faced many objections, as not many existing states can claim a legitimate 'clean historical' title to their current land, which generally was obtained either through conquest or a transfer from another state that cannot prove its original acquisition of that territory. Second, the territory of a state is not property privately owned by its government, unlike property privately owned by an individual; one of the main features of state territory is that unlike private property, the state has jurisdictional rights over its territory.

[495] Distefano (n 490) 27. See also L Chircop, 'Territorial Sovereignty in Cyberspace after Tallinn Manual 2.0' (2019) 20 Melbourne Journal of International Law 351. See also D Svantesson and others (n 489) 39-40.

exclusive jurisdiction on this zone. The territorial sea zone extends 12 nautical miles from their baseline;[496] the legal status of this zone is almost the same as for the previous one, with some limitations, such as innocent passage.[497] The contiguous zone extends 24 nautical miles from the baselines as an area between the high seas and the territorial sea. The exclusive economic zone (EEZ) is also an intermediate zone, starting from the baseline to 200 nautical miles into the sea. The importance of this zone is that it gives the coastal state the right of exploration and exploitation of any natural resources in this zone. The high seas are the area of the sea beyond 200 nautical miles from the coast. (The high seas will be covered in a separate section.)

3.2.4 Mode of acquisition of territory

As Shaw stated, '[t]he essence of territorial sovereignty is contained in the notion of title.' Therefore, in discussions of the concept of territoriality the question of how territories are obtained or acquired must be addressed.[498] The five modes of acquiring a territory have their roots in Roman law:[499] occupation of *terra nullius*, prescription, cession, accretion and subjugation.[500] Occupation of *terra nullius* is the process of acquiring an unowned territory that belongs to no one.[501] Australia is a good example, as it was considered terra nullius by the British, and therefore Britain vested its ownership over it on that basis.[502] Prescription is 'exercise of de facto sovereignty' over the territory of others for a very long period of time.[503] Cession is the peaceful transfer of a territory from one state to another based on mutual consent and agreement between both states. The acquiring state will possess the title of that

[496] UNCLOS (n 36) art 3. see Also, JN Moore, 'UNCLOS Key to Increasing Navigational Freedom: The Federalist Society and the Heritage Foundation: United Nations Convention of the Law of the Sea (UNCLOS): Should Conservatives Support or Oppose Ratification?' (2007) 12 Texas Review of Law & Politics 466; D Cluxton, 'The Chicago Convention 1944 in an UNCLOS 1982 World: Maritime Zones, Continental Shelves, Artificial Islands, and Some Other Issues' (2019) 41 University of La Verne Law Review 168.
[497] This point is dealt with in the previous section.
[498] Shaw (n 491) 364.
[499] ibid 417.
[500] ibid.
[501] Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 Law and History Review 95. See also W Erlank, 'Rethinking Terra Nullius and Property Law in Space' (2015) 18 Potchefstroom Electronic Law Journal 2503.
[502] ibid.
[503] R Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription' (2005) 16 European Journal of International Law 46. See also N Duxbury, 'Acquisitive Prescription and Fundamental Rights' (2016) 66 University of Toronto Law Journal 476; MJ Kelly, 'Quiescent Sovereignty of U.S. Territories' (2021) 105 Marquette Law Review 509.

territory as well as all rights the previous state had over that land.[504] Accretion is a geographical change that results in the formation of, for example, new islands, alluvions, deltas or the like. If the new formation of land occurs within the territory of a state, it will form a part of that territory, as was the case when an island in the Pacific emerged due to the eruption of a volcano in 1986; the newly born island was located in Japanese territory and was therefore considered Japanese territory.[505] Finally, subjugation or conquest is where the territory is occupied after the original owner has been defeated.

It is understood that when states claim title to a territory, they intend to claim to have legitimate rights over that territory. These territorial rights, as Simmons emphasised, can be categorised into three categories: rights over the persons within the state's jurisdiction, rights over persons outside the state's jurisdiction and rights over a geographical territory.[506] For instance, based on the first category, states claim the exclusive right of jurisdiction over those within their territory to be the exclusive law creator (legislative power) and to have the power to enforce these laws and be obeyed by those who are within their jurisdiction. Based on the second category, states claim the right to noninterference in their internal affairs by outsiders and the right of self-determination. Finally, state rights over territory comprise a bundle of claims that include the following:

> (a) rights to exercise jurisdiction (either full or partial) over those within the territory, and so to control and coerce in substantial ways even non-citizens within it; (b) rights to reasonably full control over land and resources within the territory that are not privately owned; (c) rights to tax and regulate uses of that which is privately owned within the state's claimed territory; (d) rights to control or prohibit movement across the borders of the territory (which, of course, involves as well certain quite direct "rights against aliens" from our second category); and (e) rights to limit or prohibit "dismemberment" of the state's territories, by

[504] 'No. 864 – Sovereignty over Island of Palmas (Miangas).' (1925) 33 League of Nations Treaty Series 446. See also A Banji, 'Consequences of Cession as a Mode of Acquiring Territories in International Law' (2011) 15 Nigerian Law Journal 86.

[505] Shaw (n 491) 372. See also S Yu, 'On the Sovereignty Legitimacy of Island-Building' (2016) 3 Legal Science 23; DE Howland, 'State Title to Territory – The Historical Conjunction of Sovereignty and Property' (2020) 11 Beijing Law Review 864; M Nasir and WSA Wan Dahalan, 'The Implementation of Sovereignty Theory on the Interest of Malaysia in the History of Spratly Island's Disputes' (2017) 66 Journal of Law, Policy and Globalization 11; H Hu, 'A Philosophical Inquiry into the Concept of Territorial Sovereignty: A New Analytical Framework of the Territorial Disputes in the China Seas' (2020) 4 Cardozo International & Comparative Law Review 503.

[506] A John Simmons, 'On the Territorial Rights of States' (2001) 11 Philosophical Issues 300.

> prohibiting unencumbered transfer of land to aliens, alienation of land to "the common", or private or group secession.[507]

All rights in these categories are derived from either property rights theory or the state's legislative, adjudicative, enforcement or metajurisdictional[508] power,[509] all of which constitute the conception of state sovereignty over a particular territory.[510] If any of these rights are affected, the state's sovereignty over that territory is also affected.

3.2.5 State sovereignty over airspace

As has been established in the previous section, the state's territory includes three geographical dimensions: the area of the surface of the earth, the area beneath that surface and the space above that surface.[511] This section will address the third dimension, the airspace above the territory of a state, and will discuss the definition of airspace and its scope and vertical limits.

Before World War I, the question of how much sovereignty a state could exercise over its airspace was fiercely debated between two rival schools of thought. The first school, led by Fauchille and others, who applied the notion of the high seas to the airspace concept, advocated for full liberty of air navigation and considered airspace a *res communis* that could never be acquired exclusively but could be used and entertained by everyone.[512] It might be right to say that this school arose because states then had no technology that would enable them to possess the airspace and exclude other states from using it. The other school, led by

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[507] Ibid 306.

[508] Metajurisdictional power gives the authority to some agents within a territory to determine who holds the power therein, so it is a power over a power. For instance, the right to secede is a metajurisdictional power.

[509] Anna Stilz, 'Why Do States Have Territorial Rights?' (2009) 1 International Theory 185. See also F Dietrich, 'Territorial Rights and Demographic Change Symposium on Theories of Territory beyond Westphalia' (2014) 6 International Theory 176; A Banai, 'Territorial Conflict and Territorial Rights: The Crimean Question Reconsidered: Special Issue: The Crisis in Ukraine' (2015) 16 German Law Journal 608; J Branch, 'How Should States Be Shaped: Contiguity, Compactness, and Territorial Rights' (2016) 8 International Theory 11.

[510] Simmons (n 506).

[511] John C Cooper, 'High Altitude Flight and National Sovereignty' (1951) 4 The International Law Quarterly 411.

[512] His proposal was that states should have a limit of 1,500 meters above their territories, which would be the maximum altitude to which they would have exclusive rights to the airspace. He subsequently revised his proposal to 500 meters in 1910. See also K De Silva, 'Struggle for Sovereignty in the Air Space: An Analysis of Regulatory Developments and Current Challenges in Establishing "Air Sovereignty"' (2023) 3 KDU Law Journal 82; JW Lee, 'Revisiting Freedom of Overflight in International Air Law: Minimum Multilateralism in International Air Transport' (2013) 38 Air and Space Law 356; VP Coglianti-Bantz, 'Disentangling the Genuine Link: Enquiries in Sea, Air and Space Law' (2010) 79 Nordic Journal of International Law 388; MN Widener, 'Local Regulating of Drone Activity in Lower Airspace' (2016) 22 Boston University Journal of Science and Technology Law 242.

Westlake and others, took the opposite view and advocated the traditional approach, in which states have absolute sovereignty over the entire airspace above their territories.[513] However, the debate finally ended with the signature of the first multilateral treaty, the Paris Convention of 1919.[514] Its first article stated: 'The High contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory'.[515] The convention clearly emphasised when using the word 'recognise' that exclusive sovereignty is a customary international law principle that existed before the Paris Convention.[516] One of the important features of the Paris Convention is that it recognises the right of innocent passage of foreign aircraft over the territory of a state, as stated in article 2, which is analogous to the right of innocent passage in maritime law.[517] However, the Paris Convention was viewed as vague[518] and incomplete, as it omitted the commercial side of international aviation.[519] Therefore, necessity pushed for the emergence of the Convention on International Civil Aviation, also known as the Chicago Convention of 1944, which had the aim of advocating freedom of the air from a commercial perspective rather than the sovereignty perspective.[520] The Chicago Convention followed the exact position of the Paris Convention on the exclusive and complete sovereignty of a state over the airspace of its territory and adjacent territorial waters.[521]

It is worth mentioning that there were two agreements annexed to the Chicago Convention. One was the Five Freedoms Agreement, which the United States advocated and which took a liberal approach to sovereignty; however, it failed, as only a few states supported it.[522] The

[513] Shrewsbury (n 455) 126; Widener (n 512) 242; H Liu and F Tronchetti, 'The Exclusive Utilization Space: A New Approach to the Management and Utilization of the Near Space' (2018) 40 University of Pennsylvania Journal of International Law 550.
[514] 'Convention Relating to the Aerial Navigation Dated 13th October 1919 Corrected Text' (1944) 1 International Convention Relating to the Regulation of Aerial Navigation Dated 13 October 1919, with the Annexes to the Convention and Protocols of Proposed Amendments 1.
[515] ibid art 1.
[516] Shrewsbury (n 455) 130.
[517] That right was subsequently known as the first freedom of right under the Chicago Convention system.
[518] Alison J Williams, 'A Crisis in Aerial Sovereignty? Considering the Implications of Recent Military Violations of National Airspace' (2010) 42 Area 52.
[519] Shrewsbury (n 455) 131.
[520] Chicago Convention (n 42).
[521] ibid art 1 & 2.
[522] Five freedoms of traffic rights (n 64).

other agreement received considerable support and was ratified, as it only covered the first and second freedoms of the air.[523]

Although both the Paris and Chicago Conventions asserted the principle of states' exclusive sovereignty over the airspace above their territories, neither defined what was meant by the term airspace, which resulted in a divergence of views among scholars and lawyers of international law. The delineation of states' boundaries on the surface of the earth helps to set a limit of state sovereignty; however, the problem lies in the third dimension of state sovereignty. It is quite logical to say that this problem did not occur to the drafters of these conventions at the time, but with the rapid advances of modern technologies, such as satellites that orbit at extremely high altitude over the airspace of states, jetliners in commercial aviation and missiles, as well as the idea of space tourism, which is something coming in the very near future. All of these developments have sparked the question of what the vertical limit of state sovereignty above its territory is.[524] Or, to put it another way, is there any upward limit to the national sovereignty of a state?

To illustrate this divergence of views created by the absence of the definition of airspace, I will address the position of one of the leading authorities in the field of air law, Professor John C. Cooper, who attended the Chicago conference and was the chairmen of one of the drafting committees.[525] During the years from 1951 to 1963, Professor Cooper continuously changed his position on airspace sovereignty.

In 1951, he published an article in which he presented two main ideas. First, the term airspace was only intended in its first use in the Paris Convention to cover the atmospheric region in which aircraft can derive their support from the reactions of the air, which was the definition of aircraft annexed to the Paris Convention after it came into effect.[526] Second, the vertical territory of a state should go upwards until the control of a state over its space becomes physically and scientifically impossible.[527]

[523] The first and second rights are explained in (n 64).
[524] Albert I Moon Jr, 'A Look at Airspace Sovereignty' (1963) 29 Journal of Air Law and Commerce 328. See also MK Caswell, 'Need for Vertical Delineation of Air Space: Can Google's Project Loon Survive without It? Comments' (2015) 24 Tulane Journal of International and Comparative Law 207.
[525] Dean N Reinhardt, 'The Vertical Limit of State Sovereignty' (2007) 72 Journal of Air Law and Commerce 75.
[526] Cooper (n 511) 413.
[527] Ibid 418.

However, due to the impracticality of that position, in 1956, he proposed another solution by suggesting a redrafting of article 1 of the Chicago Convention with a three-region setup system. The first region, which he called the 'territorial space', was where states have full sovereignty up to the maximum altitude at which aircraft operate. The second region, the 'contiguous space', is what he called the region up to 300 miles in height above the surface of the earth. All flights except military flights have the right of transit in this region when landing and taking off. Finally, the space beyond the 'contiguous space' is free for use and passage for all flights and users.[528] Although the suggestion seemed practical, at least from Cooper's perspective, it provoked many objections, one of which was that the boundaries of a territorial region seemed almost impossible to determine, according to Moon. Also, what would the situation be in the case of an aircraft that could fly at both extremely high altitude and at the level of commercial aircraft?[529] It is important to note that setting a specific altitude limit based on an aircraft's flying capabilities could be circumvented with new advanced technologies that would raise the maximum possible altitude of the aircraft. The result was that the idea failed.[530] To be fair to Professor Cooper, the absence of natural boundaries that define airspace is one of the fundamental obstacles that face the concept of the vertical sovereignty of states as a whole, and not just his proposal.

In 1963, Cooper acknowledged that airspace as commonly defined and used had 'uncertain boundaries';[531] he then accepted the definition of airspace as the extent of space from the earth's surface to 80,000 metres over it.[532] Although the limit seemed to be a practical solution to the problem, but what is the basis for that limit other than arbitrariness? Yet, it is a reasonable way to avoid the impossibilities of drawing a line between different atmospheres where there are no natural boundaries.[533]

[528] John Cobb Cooper, 'Legal Problems of Upper Space Evolution of International Law in the 20th Century: International Air Law' (1956) 50 American Society of International Law Proceedings 91. See also E Pepin, 'The Legal Status of the Airspace in the Light of Progress in Aviation and Astronautics' (1956) 3 McGill Law Journal 76.
[529] Moon (n 524) 335.
[530] Reinhardt (n 524) 114.
[531] John Cobb Cooper, 'Aerospace Law – Subject Matter and Terminology' (1963) 29 Journal of Air Law and Commerce 90.
[532] ibid 91.
[533] Moon (n 524) 336.

The same criticism was directed at other writers, such as C. W. Jenks, who argued that the atmosphere ends as the maximum altitude for states' upward sovereignty.[534] Another criterion for setting limits of states' vertical sovereignty is that states have sovereignty as far as they have effective control of their airspace.[535] However, that limit failed because of the question of how this control could be established. Would it be by the mere claim of a state or by the military use of each state? How can this be done or demonstrated? Moreover, this notion disadvantages weak and small states that do not have the capabilities and power of larger states, and it works against the equal sovereignty of states and poses uncertainty for civil aviation and international laws, as there would be no uniform limit.

A proposal by Dr Gbenga Oduntan that is quite similar to Cooper's was for a multilevel sovereignty system with an altitude limitation of 55 miles.[536] He rejected all low-altitude theories, claiming that low altitudes would put the interests of states with activities in space at the mercy of surrounding states as they pass over them on the way into and out of space.[537] A different direction taken by Reinhardt was that state sovereignty over its airspace should be analogous to the level of territorial waters that existed in the UNCLOS, which is a 12-nm altitude limit; the space above that limit will be treated the same as space over international waters and not subject to state sovereignty.[538]

The variety of positions regarding vertical sovereignty at the state level is no different from the positions mentioned above by scholars, as states took different positions and definitions of their vertical sovereignty over their airspace. To name a few examples, in 2002, Australia amended its National Airspace System and defined its upper limit at 60,000 feet for Class A airspace.[539] The UK practically considers the limit to be the maximum any aircraft can operate,

[534] Wilfred Jenks C, 'International Law and Activities in Space' (1956) 5 The International and Comparative Law Quarterly 113.
[535] HB Jacobini, 'Effective Control as Related to the Extension of Sovereignty in Space' (1958) 7 Journal of Public Law 115.
[536] Gbenga Oduntan, 'The Never-Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space' (2003) 1 Hertfordshire Law Journal 64. See also R Balleste, 'Worlds Apart: The Legal Challenges of Suborbital Flights in Outer Space' (2016) 49 New York University Journal of International Law and Politics 1057.
[537] ibid.
[538] Reinhardt (n 525) 135. See also Goodman TW, 'To the End of the Earth: A Study of the Boundary between Earth and Space' (2010) 36 Journal of Space Law 94.
[539] Reinhardt (n 525) 81. However, that does not mean that Australia gives up any claim of sovereignty above such limit. See also Caswell (n 524), 216.

but with no definition or ceiling to its upper space sovereignty.[540] The United States also does not have an upper limit; rather, it claims exclusive sovereignty of its airspace and covers all types of flights,[541] with no further definition of the term airspace while broadly defining aircraft to encompass high-altitude vehicles like rockets.[542]

It seems the only effective way to solve the problem of the limit of states' sovereignty over their airspace seems to be through an international agreement at the International Civil Aviation Organisation level, setting whatever altitude limit is suitable for all states. Such an agreement could make a distinction between civil aviation and military activities and set a limit accordingly. But do states want that, and how can civilian and military planes be distinguished in practice? The decisive factor for arriving at a solution is the willingness of states to find common ground and set a ceiling to their vertical limits of sovereignty. This could happen if they see the benefit of such a limit; otherwise, the problem cannot be solved, and states will continue the current practice, which is granting access to airspace through bilateral and multilateral agreements.

3.2.6 State sovereignty over outer space

There is a consensus among states that outer space is free for use by any state and not subject to any state territorial sovereignty, similar to the high seas, both of which fall under the concept of *res communis*.[543] Although everyone agrees on the freedom of outer space, problems arise, such as determining where outer space starts. Where does the airspace that is subject to states' territorial claims end? What is the definition of outer space and its boundaries? This section will address these questions, and this will eventually help draw a line, if such exists, to the upward limit of the territorial sovereignty of states.

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[540] Reinhardt (n 525) 82.

[541] John Cobb Cooper, 'Contiguous Zones in Aerospace – Preventive and Protective Jurisdiction Symposium on the Law of Outer Space' (1965) 7 United States Air Force JAG Law Review 17.

[542] '49 U.S. Code § 40102 – Definitions' (*LII / Legal Information Institute*) <https://www.law.cornell.edu/uscode/text/49/40102> accessed 20 December 2020.

[543] Z Miller, 'The Great Unknown of the Outer Space Treaty: Interpreting the Term Outer Space' (2017) 46 Denver Journal of International Law and Policy 361. See also Heintschel von W Heinegg, 'Neutrality and Outer Space Military Space Operations and International Law' (2017) 93 International Law Studies Series. US Naval War College 535; J Steele, 'Luxembourg and the Exploitation of Outer Space' (2021) 29 Nottingham Law Journal 34; S Sharma and S Pathak, 'Patenting of Outer Space Inventions: In the Crossroads of Territorial and Outer Space Law' (2022) 1 Dharmashastra National Law University Law Review (DNLULR) 177.

To start with, the idea of outer space being subject to state territorial sovereignty has been rejected by states since the early space age. This rejection was first embodied in the form of a nonbinding resolution, the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which was adopted by the United Nations General Assembly in 1962.[544] As clearly stated, the freedom of the outer space and the celestial bodies applies to all states equally; they are open to exploration and are not subject to 'national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.[545] This declaration later became the foundation upon which was built the Outer Space Treaty, which in its article 1 solidified the principle of the freedom of outer space and the principle of non-appropriation, as it belongs to all mankind and is open for access to every state equally.[546] However, neither the Declaration of Legal Principles nor the Outer Space Treaty has a definition of outer space or where it begins.[547] It is claimed that the omission of that definition, with its resultant ambiguity, was a deliberate move by the drafters because they considered that states have the habit of expanding their claims of sovereignty depending on the reach of their technologies; if new technologies with higher reach appear in the future, the claim of sovereignty will expand accordingly. Therefore, having a term such as outer space that can be adjusted according to the need is appropriate and better than having a rigid definition that may cause uncertainty as to the applicability of the outer space treaties.[548] Moreover, many states, including the United States, preferred not to have a demarcation of outer space, as there was no need for it. They reasoned that attempting to define outer space

[544] 'Legal Principles' <https://www.unoosa.org/oosa/en/ourwork/spacelaw/principles/legal-principles.html> accessed 27 December 2020.

[545] ibid. See also AJ Simon-Butler, 'Bifurcated Sovereignty and the Territorial Conception of the Province of All Mankind' (2019) 43 Journal of Space Law 9; K Taylor, 'Fictions of the Final Frontier: Why the United States Space Act of 2015 Is Illegal: Comments' (2018) 33 Emory International Law Review 659.

[546] '8843 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies. Opened for Signature at Moscow, London and Washington, on 27 January 1967.' (1967) 610 United Nations Treaty Series 205.

[547] Janosek DM, 'Innovative Thinking: Modernizing Outer Space Governance' (2020) 29 Catholic University Journal of Law and Technology 70. See also J Davalos, 'International Standards in Regulating Space Travel: Clarifying Ambiguities in the Commercial Era of Outer Space Comments' (2015) 30 Emory International Law Review 619.

[548] Jefferson H Weaver, 'Illusion or Reality – State Sovereignty in Outer Space' (1992) 10 Boston University International Law Journal 218. See also B Gupta and RS Roy, 'Sustainability of Outer Space: Facing the Challenge of Space Debris Global Law and Policy Developments: Outer Space' (2018) 48 Environmental Policy and Law 3; Y Zhao, 'Intellectual Property Protection in Outer Space: Reconciling Territoriality of Intellectual Property with Non-Territoriality in Outer Space' (2017) 7 Queen Mary Journal of Intellectual Property 145; SA Alsdaifat, 'Who Owns What in Outer Space: Dilemmas Regarding the Common Heritage of Mankind' (2018) 2018 Pecs Journal of International and European Law 25.

might trigger states to make excessive claims of sovereignty, and they feared that having too high a boundary might be an obstacle to space activity in the future. They also feared that having a defined boundary for outer space now might make it impossible to change in the future, as they hoped that a lower-altitude boundary might exist in the future.[549]

A. The absence of natural boundaries in airspace

The fundamental problem here is that there are no natural boundaries or lines that separate airspace, which can be subject to state territorial sovereignty, and outer space, which is free and available for any state's use. As an illustration, Professor Cooper stated that airspace lies in the lower part of the earth's atmosphere,[550] but where is that? Here lies the problem: the absence of specific and distinct natural boundaries. Scientifically, the earth's atmosphere is composed of four different layers of gases, namely, the troposphere, stratosphere, ionosphere and exosphere, each with different temperatures and features. The troposphere, which is the closest to the earth's surface, goes up to approximately 54,000 feet (16,200 metres) at the equator and 28,000 feet (8,400 metres) at the poles. The next layer, the stratosphere, starts in the upper region of the troposphere and extends to 60 or 70 miles (100 or 115 kilometres) above the surface of the earth. The ionosphere starts somewhere near the upper region of the stratosphere and extends upward to about 400 miles (640 kilometres) above the surface of the earth. Finally, the exosphere starts at somewhere at the upper level of the ionosphere and goes up until it gradually merges into outer space.[551] The exosphere is at the frontier of the earth's atmosphere, and technically it is part of it; however, in some ways, it forms part of outer space, as some satellites orbit in it.[552] As described, no atmospheric layer has a specific beginning or end, as each one of them starts somewhere near the unknown end of the previous layer until outer space is reached.

B. The demarcation between airspace and outer space

The uncertainty of the boundaries naturally affects outer space treaties and any previous laws concerning the definition of outer space and its application. Without defining the term outer

[549] Reinhardt (n 525) 113.
[550] Cooper (n 511) 414.
[551] ibid.
[552] 'Exosphere – Overview' (*UCAR Center for Science Education*) <https://scied.ucar.edu/shortcontent/exosphere-overview> accessed 28 December 2020.

space and knowing what its boundary is, how do we know where treaties regarding outer space apply? This is a critically important question given the huge differences in the legal status between the airspace, where states' exclusive sovereignty is exercised, and the legal status of outer space, where freedom of use is guaranteed to every state equally. Therefore, given the importance of this matter and due to the absence of natural boundaries, scholars started to think of alternative rationales for determining the demarcation of airspace and outer space; this resulted in the emergence of two schools of thought, spatialism and functionalism. *Spatialism* advocates setting a fixed measurable line at a certain altitude that separates airspace from outer space and disregarding the type of aircraft operating.[553] However, the supporters of this approach have suggested different proposals ranging from 20 to 1,500,000 kilometres;[554] all of these were described by the adversary school as arbitrary and premature and not suitable as criteria on which to base the definition of outer space.[555] This uncertainty and the absence of consensus, not only among writers and scholars but also among states, was the fundamental problem with this approach. On the other hand, *functionalism* suggests that the criteria for the delimitation of airspace and outer space be the nature of the craft and its activity rather than the location of that activity.[556] This simply means that if the aircraft in question is serving outer space functions, it is within the scope and the application of outer space laws and treaties, regardless of the location of its operation. If, however, it is serving aircraft functions, then it is subject to airspace laws, and the applicable law should be determined accordingly.[557] The functionalist approach is believed to be sufficient for at least determining the applicable law for traditional craft due to the different altitude levels between traditional aircraft (20 kilometres) and artificial satellites (96 kilometres).[558] While this approach seems practical, it faces huge challenges with

[553] Andrea J DiPaolo, 'The Definition and Delimitation of Outer Space: The Present Need to Determine Where "Space Activities" Begin' (2014) 39 Annals of Air & Space Law 628.
[554] ibid. See also PS Dempsey and M Manoli, 'Suborbital Flights and the Delimitation of Air Space Vis-a-Vis Outer Space: Functionalism, Spatialism and State Sovereignty Section I: Leading Articles/Articles de Fond: Part B: Space Law/Droit Spatial' (2017) 42 Annals of Air and Space Law 229; M Polkowska, 'Space Tourism Challenges' (2021) 45 Review of European and Comparative Law (RECoL) 176.
[555] Jinyuan Su, 'The Delineation Between Airspace and Outer Space and the Emergence of Aerospace Objects' (2013) 78 Journal of Air Law and Commerce 363.
[556] DiPaolo (n 553) 628. See also JJ Wolff, 'Space Law: What It Is and Why It Matters No. 3' (2020) 2020 Army Lawyer 68.
[557] Matthew T King, 'Sovereignty's Gray Area: The Delimitation of Air and Space in the Context of Aerospace Vehicles and the Use of Force' (2016) 81 Journal of Air Law and Commerce 431.
[558] Su (n 555) 363.

the emergence of new technologies and new vehicles that can operate in both airspace and outer space, which makes the criterion that the capabilities of the aircraft define the zones defective.[559]

The divergence of thought can also be seen clearly at the state level, as each has its idea of outer space. First, most states do not have in their national laws or practices anything related to the definition or delimitation of outer space,[560] according to the information submitted by states during the 44th session of the Working Group on Matters Relating to the Definition and Delimitation of Outer Space of the Committee on the Peaceful Uses of Outer Space (COPUOS).[561] On the other hand, few states have expressed their views on this matter in their national laws; for instance, the Australian Space Activities Amendment Act 2002 defines space activities as activities that occur at or are intended to occur at altitudes above 100 kilometres,[562] clarifying that the specification of that altitude does not imply an attempt to limit or define outer space.[563] Belarus divides its airspace into two areas: below 20,100 metres is what they call classified airspace, which is subject to domestic law, and from 20,100 and above is unclassified airspace, which is subject to international agreements.[564] Serbia can be an example of an extremely high level of altitude, as they choose radio frequencies as a criterion to define outer space; this results in defining outer space as starting 2 million kilometres from the earth.[565] This bizarre definition could never be accepted simply because artificial satellites orbit at much lower altitudes, and such altitudes are accepted by states as outer space. Such broad acceptance is claimed by Gorove to form an international customary law that the 'lowest perigee orbit of artificial earth satellites (currently, that would be approximately 100-110 km above sea level) lies at a point in outer space'.[566] This means that

[559] King (n 557) 420.
[560] Su (n 555) 361.
[561] 'LSC 2005' <https://www.unoosa.org/oosa/en/ourwork/copuos/lsc/2005/index.html> accessed 4 January 2021. See also R Nathwani, 'Privatisation of Outer Space' (2021) 2 Jus Corpus Law Journal 1277; L Lixinski, MM Losier and H Schreiber, 'Envisioning a Legal Framework for Outer Space Cultural Heritage' (2021) 45 Journal of Space Law 2.
[562] Industry, 'Space Activities Amendment Act 2002' <file:///C:/Users/User/Zotero/storage/9ZMYYHBM/C2004A01037.html> accessed 3 January 2021.
[563] Su (n 555) 362.
[564] ibid.
[565] ibid.
[566] Katherine M Gorove, 'Delimitation of Outerspace and the Aerospace Object – Where Is the Law' (2000) 28 Journal of Space Law 12. See also F Tronchetti, 'Regulating Sub-Orbital Flights Traffic: Using Air Traffic Control as a Model, Session 2: Legal Issues of Commercial Human Spaceflight' (2011) 54 Proceedings of the International Institute of Space Law 178; S Hobe, 'Legal Aspects of Space Tourism Conference on Security and Risk

a craft that orbits at an altitude of 100 kilometres is considered to be in outer space from both a legal and a scientific point of view and is therefore subject to the outer space treaty.[567] Also, DiPaolo argues that the customary practice of states indicates that outer space starts 'at an altitude as low as between 70 and 160 kilometres'.[568] It is interesting to note that in 1979, the Soviet Union proposed a similar delimitation, suggesting that space above 100/110 kilometres should be considered outer space.[569] It is still arguable that that altitude is agreed upon among states and thus creates binding international customary law. Finally, in 2017, the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, in its 57th session, proposed as its official position that the boundary between outer space and airspace should be the altitude of 100 km above mean sea level. It advocates 'passage rights for space objects during launching and re-entries, so long as those space activities are peaceful, are conducted in accordance with international law and respect the sovereign interests of the applicable territorial State or States'[570] and that these provisions be established through international instruments.

To sum up, the lack of boundaries between airspace and outer space will always be problematic, as it is essential to know where state sovereignty ends and free outer space begins and the significance of that boundary in the application of the Outer Space Treaty. Moreover, setting boundaries for outer space based on current factors would be arbitrary and difficult for states to agree on. This issue will be very difficult to solve until it becomes an acute issue for states, their interest in solving it clearly manifests, and absolute need drives a search for a solution; otherwise, the matter will remain unsolved.

Management in a New Space Era: Military, Commercial, and Tourism Dimensions' (2007) 86 Nebraska Law Review 442.

[567] King (n 557) 423.

[568] DiPaolo (n 553) 630.

[569] 'Draft Basic Provisions of the General Assembly Resolution on the Delimitation of Air Space and Outer Space and on the Legal Status of the Geostationary Satellites' Orbital Space' <http://digitallibrary.un.org/record/4022> accessed 4 January 2021. See also B Cheng, 'The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use' (1983) 11 Journal of Space Law 96.

[570] 'A/AC.105/C.2/L.302 – Promoting the Discussion of the Matters Relating to the Definition and Delimitation of Outer Space with a View to Elaborating a Common Position of States Members of the Committee on the Peaceful Uses of Outer Space: Working Paper Prepared by the Chair of the Working Group on the Definition and Delimitation of Outer Space of the Legal Subcommittee' (2017) <https://www.unoosa.org/oosa/oosadoc/data/documents/2017/aac.105c.2l/aac.105c.2l.302_0.html> accessed 30 March 2021. See also AU Agi, 'An Exposition of the Concept of Intellectual Property Protection in Outer Space' (2020) 1 Law and Social Justice Review 42; A Zalomir, 'Legal Implications of Outer Space Warfare (Part I)' (2020) 23 Romanian Journal of International Law 75.

3.2.7 Airspace over the high seas is beyond states' sovereignty

The importance of the subject of the high seas arises because they compose nearly 50% of the surface of the earth.[571] Such a vast space obviously requires a system of governance and a legal regime. As mentioned in a previous section, the legal regime of the world's seas and oceans is the UNCLOS. The UNCLOS lays down a comprehensive system in which the sea is divided into different zones, each with a different legal status and set of rules.[572] The part of the sea in question in this section is the high seas; its definition, legal status and governing principles will be addressed.

According to article 86 of the UNCLOS, the high seas are the water column beyond states' EEZs and beyond their territorial waters or seas.[573] The doctrine of the freedom of the seas applies to the high seas: they are open to use by all states equally. This doctrine was proposed by Grotius at the beginning of 1609; however, it was not accepted as an international law principle until the 19th century.[574] The high seas are considered *res communis*, the property of no one and owned by humankind as a whole. From this emerges the most fundamental principle: the high seas are not subject to any state's sovereignty and cannot be appropriated by any means, as clearly stated by article 137 of the UNCLOS:

> No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.[575]

The airspace above the high seas is also included in the prohibition of state claims of sovereignty, although the difference between maritime law and airspace law is that the airspace over the high seas is controlled by the ICAO. For that reason, the use of the high seas

[571] David Freestone, 'Modern Principles of High Seas Governance: The Legal Underpinnings' (2009) 39 Environmental Policy and Law 44.
[572] Check section 2, the territorial sovereignty.
[573] UNCLOS (n 36).
[574]George P Smith, 'The Concept of Free Seas: Shaping Modern Maritime Policy Within a Vector of Historical Influence' (1977) 11 The International Lawyer 355. See also S Chandra, 'Private International Law and Artificial Intelligence: A Critical Analysis of Jurisdictional Claims and Governance Technical Articles' (2021) 2 Indian Journal of Artificial Intelligence and Law 34.
[575] UNCLOS (n 36) art 137. See also MW Lodge, 'The Common Heritage of Mankind: The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas' (2012) 27 International Journal of Marine and Coastal Law 735; T Nishimura, 'The Legal Framework for Marine Genetic Resources: The Relationship between the UNCLOS and the Convention on Biological Diversity Regime: Special Articles about Nagoya Protocol' (2018) 21 Asian Business Lawyer 66.

is available to every state, whether coastal or landlocked, as long as such use is for peaceful purposes.[576] And since every state has the right to the high seas with different uses and purposes, the usage is governed by the principle of 'reasonable regard', which means that states have a duty, while exercising their freedom, to consider other states' interests and activities, as expressed by article 87 of the UNCLOS.[577]

It is very important to understand that the freedom of the high seas is not absolute.[578] Although article 87 gives a non-exhaustive list of freedoms, there are certain limitations and duties by which states are bound.[579] These freedoms include the freedom to navigate, overfly, lay submarine cables and pipelines, construct artificial islands and other installations permitted under international law, fish and conduct scientific research; all of these, as outlined above, must be exercised with reasonable or due regards principle. As an illustration of this limitation, we analyse the freedom to fish, to which all nationals of every state have access. However, article 116 of the UNCLOS states that such freedom is subject to 'their treaty obligations, the rights and duties and interests of the coastal states and the provisions of this section'.[580] Also, the airspace over the high seas is regulated, and all ICAO rules and procedures must be complied with by states, as stated in article 12 of the convention, as well as rules of the air stipulated in annex 2. Therefore, these freedoms are obviously not absolute but rather than a restrictive freedom.[581]

3.2.8 Conclusion

The concept of sovereignty, like all other concepts, is a product of its history. Since it came into existence, the term sovereignty has been defined variably from many different perspectives and across different disciplines, such as political science, sociology and law, and the definition varies accordingly. However, most of these definitions share a similar core meaning and orbit around supremacy and absoluteness of authority within a territory.

[576] Bernard Oxman, 'The High Seas and the International Seabed Area' (1989) 10 Michigan Journal of International Law 537.
[577] UNCLOS (n 36) art 87.
[578] IU Jakobsen and E Johansen, 'Efforts of the Arctic Council to Protect Sensitive Arctic High Sea Areas from the Impact of Shipping Nr. 471' (2016) 2016 Marius 26. See also Y Wang, 'Reasonable Restrictions on Freedom of High Seas by "Marine Protected Areas on the High Seas": An Empirical Research Issue Focus: Legal Control of Human Activities beyond National Jurisdiction' (2019) 12 Journal of East Asia and International Law 248.
[579] Freestone (n 571) 45.
[580] UNCLOS (n 36) art 116.
[581] Freestone (n 571) 45.

Regardless of all the changes it has been through and all the developments and limitations that have been put on it, it still exists as an extremely important element of international law respected and cherished by all states. States, even with all the limitations they have accepted, whether through treaties or international obligations, are still sovereign under international law, and the quality of their statehood has not been affected. Moreover, the concept of sovereignty undoubtedly has very deep roots in international law; it is derived from the general and consistent practices of states, and the violation of it has been regarded as a breach of international obligation. Its old legal history and deep roots results into making this concept is an accepted binding legal principle and is therefore translated into respected fundamental principle in international treaties, international courts' judgments and states' practices.

Both the principle of sovereignty and the principle of territoriality are essential pillars of international law, and they are so interrelated that sovereignty is founded upon the existence of territory; without it, the state does not exist. Territorial sovereignty extends to land boundaries (mainland) and the airspace above that land, while coastal states own certain zones of the sea, all of which are governed by the UNCLOS.

As for sovereignty over airspace and to what extent a state could exercise sovereignty over its airspace, this was the subject of a fierce debate between two rival schools of thought. The first school, applying the notion of the high seas to airspace, advocated full liberty of air navigation and considered airspace a *res communis* that can never be acquired exclusively and can be used and entertained by everyone. The other school took the opposite view, advocating the traditional approach, by which states have absolute sovereignty over the entire airspace above their territories. As has been shown, there is no consensus among scholars and states as to the vertical limits of states' sovereignty. In addition, it seems the only effective way to solve the problem of the limit of states' sovereignty over their airspace is through an international agreement at the International Civil Aviation Organisation level, setting whatever altitude limit is suitable to all states. Such an agreement could make a distinction between civil aviation and military activities and set a limit accordingly. But do states want that, and how can civilian and military planes be distinguished in practice? The decisive factor for arriving at a solution is the willingness of states to find common ground and set a ceiling to their vertical limit of sovereignty. This could happen if they see a benefit

to such a limit; otherwise, the problem cannot be solved, and states will continue using the current practice by which foreign aircraft are granted access to states' airspace only through bilateral and multilateral agreements.

With regard to a state's sovereignty over outer space, the situation is not very different from that of airspace; there is a consensus among states that outer space is free for use by all states and is not subject to any state territorial sovereignty. This is similar to the case of the high seas, as both the high seas and outer space fall under the concept of *res communis*. However, problems arise: Where does outer space start? This question sparked another heated debate and resulted in different views and positions at both the scholarly and state levels. The lack of boundaries between airspace and outer space will always be problematic, as it is essential to know where the boundary is between state sovereignty and free outer space as well as the significance of that boundary to the application of the Outer Space Treaty. Moreover, setting the boundary of outer space based on current factors would be arbitrary and difficult for states to agree on. This issue will be very difficult to solve until it becomes an acute issue to states, their interest in solving it clearly manifests, and absolute need drives a search for the solution; otherwise, the matter will remain unsolved. However, it seems there is a common understanding among states that the boundary between outer space and airspace should be 100 km above mean sea level, as proposed by the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space in its 57th session.

The final issue is the high seas, which are considered *res communis* owned by humankind as a whole and are not subject to any state's sovereignty. The freedom of the high seas is not, however, absolute, as there are certain limitations and duties by which states are bound.

3.3 The relationship between state sovereignty and FIRs

As has been established at the beginning of this chapter with regard to the concept of state sovereignty, which is the absolute authority of a state over its territory (including its land, its territorial waters, and the airspace over these areas), such power is embodied in the legislative, executive and judicial powers of that state, and that state is the only authority that should exercise control over its territory, whether regulatory, administrative or some other form. From this perspective, the relationship between the concept of state sovereignty and the concept of the FIR should be analysed to determine whether conflict between these two concepts exists.

This area is quite controversial, as two different views exist. The advocate of the first view says that FIRs have nothing to do with state sovereignty, as each state, even if its territory, whether land, water or both, falls under another state's FIR, its sovereignty over its territory is not affected at all. The FIR is just a technical and operational issue to promote international aviation safety and most important is the administration of that FIR for technical and safety considerations.[582] The basis for that view is recommendation 2.9 of annex 11, which states that the delineation of an FIR should be based on technical matters rather than national sovereign boundaries; therefore, the boundaries of the state and of the FIR may differ.[583] Also, when annex 11 speaks of the delegation of a particular state's responsibilities for an FIR regarding another state, it clearly states that the delegation does not mean a delegation of sovereignty; the status of that state's sovereignty is not affected at all.[584]

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[582] Pablo Mendes De Leon and Niall Buissing, *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*, vol 16 (Kluwer Law International BV 2019) <https://books.google.com.qa/books?id=BSysDwAAQBAJ&pg=PT214&lpg=PT214&dq=The+Speeding-up+Process+on+the+Realignment+of+Flight+Information+Region+(FIR)+in+Areas+A,+B,+C+from+Singapore+to+Indonesia+Issues+of+Sovereignty,+or+Safety,+or+Both&source=bl&ots=7iJS4evnPO&sig=ACfU3U2DVMoQgHQKQZHVd1676MwT1Xf2Mw&hl=en&sa=X&ved=2ahUKEwj6h5KAh6PuAhVZcCsKHTlIBcwQ6AEwAHoECAEQAg#v=onepage&q=The%20Speeding-up%20Process%20on%20the%20Realignment%20of%20Flight%20Information%20Region%20(FIR)%20in%20Areas%20A%2C%20B%2C%20C%20from%20Singapore%20to%20Indonesia%20Issues%20of%20Sovereignty%2C%20or%20Safety%2C%20or%20Both&f=false> accessed 11 January 2021.

[583] Chicago Convention (n 42) annex 11 2.9.

[584] This is where states willingly delegate their responsibilities to another and can at any time terminate such agreement; however, there are many cases where some of the territorial water or even land falls under another state's FIR; this is not a form of delegation. If annex 11 goes out of its way to say that the delegation is not delegation of sovereignty, what about the other type?

On the other hand, supporters of the other view assert that there is a conflict between the state sovereignty concept and FIRs.[585]

Generally, a state's FIR may encompass only its territory, a delegated FIR from another state, another state's territory without delegation from that state, or its own territory plus an assigned part of the high seas.[586] The first two situations typically do not raise sovereignty concerns. However, the latter two situations have sparked intense debate about the sovereignty issue. As explained above, the state responsible for a particular FIR exercises effective control in all four scenarios, provided they occur within its FIR. This control is viewed by some as infringing upon another state's supreme sovereignty over its own territory. Their argument is primarily based on article 1 of the convention, which is one of the most fundamental principles of not only the convention but also the whole of international law: the principle of sovereignty by which each state has exclusive and complete sovereignty over the airspace above its territory.[587] Furthermore, the basis of the rival view, as previously mentioned, is just a recommendation in annex 11 that can nowhere have the legal power to go against the state sovereignty of article 1 of the convention. Objectively, each view has its justification and its weakness as well; sometimes these can be theoretical and have no effect on practice, so to be able to verify the status of the FIR as against the state sovereignty, I will analyse the reality aspect of the FIR and its application, which will be the factor that will determine whether a violation of article 1 of the convention exists.

3.3.1 Disputes among states over FIRs

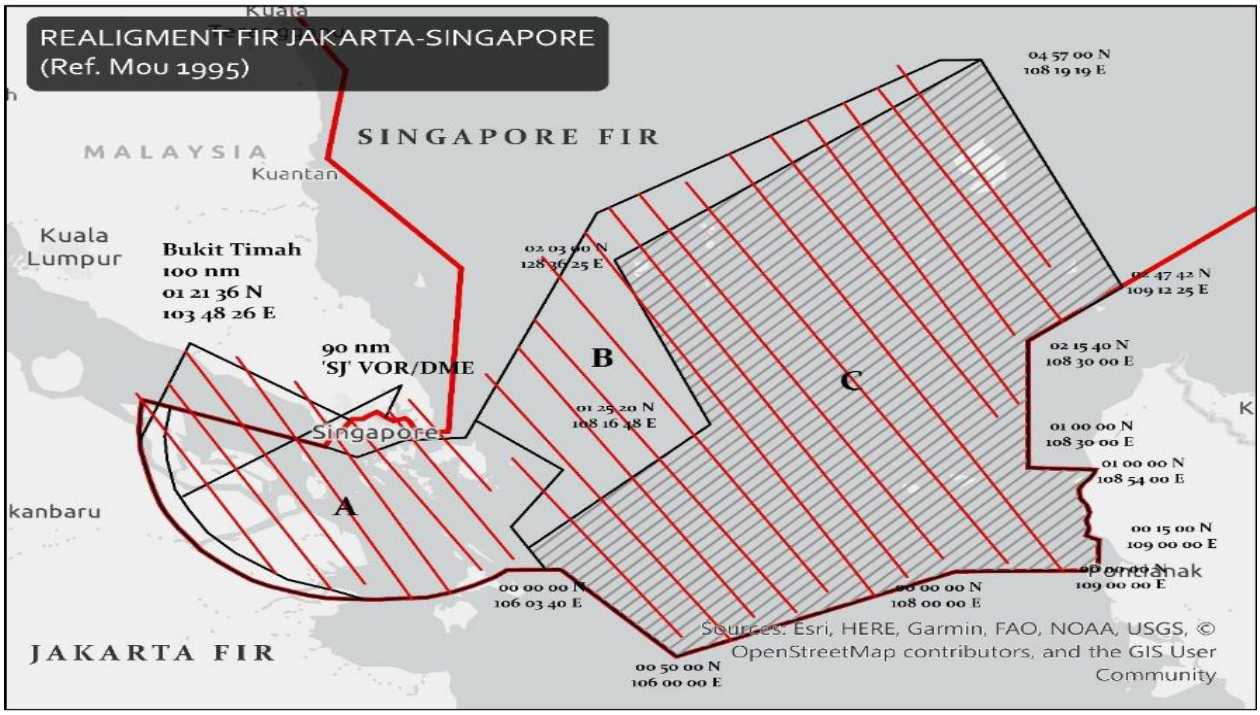
A. Indonesia versus Singapore

Indonesia and Singapore currently have a problem that concerns FIR delineation. Singapore's FIR covers a huge portion of Indonesia's airspace. This issue goes back to 1946, when Singapore was given an FIR (shown in Figure 7) that covered the airspace above the islands of Batam and Natuna during an ICAO Regional Air Navigation (RAN) Meeting held in Dublin.[588]

[585] D Wahyudin and others, 'Indonesian Diplomacy against Singapore in Acquisition of Flight Information Region (FIR)' (2022) 25 Journal of Legal, Ethical and Regulatory Issues 2.
[586] Abeyratne, Air Navigation Law (n 234) 29.
[587] Chicago Convention (n 42) art 1.
[588] AA Supriyadi and others, 'Strategy for the Alignment of Singapore Flight Information Region Over Indonesian Airspace' (2020) 14 The Open Transportation Journal 204.

Figure 7 Singapore FIR

At that time, Indonesia was not yet independent and therefore was not present at that meeting. The airspace over these islands was subsequently divided into three sectors: sector A, which is located in the northern part of Singapore; sector B, which is linked to the South China Sea; and section C, which is illustrated in Figure 8.[589]



[589] ibid.

Figure 8 Singapore FIR over the Indonesia Airspace area (Source: http://masyarakathukumudara.or.id/wp-content/uploads/2016/02/FIR.png).

This FIR became strategically important for Indonesia to control due to its strategic location between two continents and two oceans.[590] In 1993, the matter was raised by Indonesia at the RAN meeting held in Bangkok. A proposal was circulated regarding the alignment of the FIR that included these islands; however, no agreement was reached. This was due to the involvement of Malaysia in the discussion; Malaysia had an agreement with Natuna region that complicated the issue.[591] In 1996, delegations from Indonesia and Singapore reached an agreement for the management of the FIR that included Batam and Natuna. Indonesia aspires to take full control of the FIR over its territory and has set 2024 as the target year in which the realignment of its FIR will be achieved. However, this does not seem to be happening soon due to Indonesia's technical inabilities.[592]

The matter is perceived by the Indonesian government as a sovereignty issue and a threat to its national security and dignity. Moreover, it has created considerable operational difficulties for Indonesian civil aviation and 'law enforcement[,] which are carried out both by the National Air Defense Command and by the Indonesian Navy[,] which carries out Maritime Operations, because the control of air space is in Singapore's Air Traffic Control'.[593] These difficulties can be illustrated by many examples; for instance, the Indonesian Air Force and Navy face some sort of limitation when conducting military operations over the FIR, which is supposedly an Indonesian territory, and coordination and even approval are sometimes required from Singapore before such military operations.[594] The chief of Indonesia's armed forces once had to wait more than half an hour for approval from Singapore authorities before being able to land on Natuna Island in his county's territory.[595] Singapore has been accused of many violations, 18 times in 2008 to 38 times in 2018, all related to state sovereignty.[596]

[590] Lestari (n 300) 179.
[591] Supriyadi and others (n 588) 205.
[592] Lestari (n 300) 175.
[593] D Wahyudin and others (n 585) 2.
[594] Mendes & Buissing (n 582). See also Nugraha RA, 'Flight Information Region above Riau and Natuna Islands: The Indonesian Efforts to Regain Control from Singapore Air Law' (2018) 67 Zeitschrift fur Luft- und Weltraumrecht – German Journal of Air and Space Law 244.
[595] Mendes & Buissing (n 582).
[596] D Wahyudin and others (n 585) 2. See also M. Ya'kub Aiyub Kadir. PD, 'Whither Sovereignty?: The Failure of Indonesia in Taking over Flight Information Region from Singapore 2015–2019' (2021) 1 ETD Unsyiah 191 < file:///C:/Users/User/Downloads/72156-1453-227787-2-10-20210731%20(1).pdf > accessed 30 August 2023.

This happened when Singapore unilaterally set a danger area and prohibited zone for its military training over the territory of Indonesia, specifically the airspace of the Riau Islands and Natuna, all without Indonesia's approval, on the basis that these territories fall under Singapore's FIR.[597] Singapore has also prohibited the Indonesian Air Force from conducting any military training over the region of Riau Island, which is Indonesian territory, on the basis that it poses a threat to Singapore's territory.[598] Such conduct by Singapore can be seen as a violation of article 1 of the Chicago Convention, according to which state exclusive authority over its airspace must be respected.[599]

Although the scope of the Convention covers only commercial aircraft, not state aircraft, the meaning of the state sovereignty concept is much more often presented and illustrated for military and other state aircraft operations and applications; it is also an integral part of aviation.[600] Another striking issue is that article 9 of the convention gives a contracting state the right to designate any portion of its airspace as restricted or even prohibited for military reasons or other safety concerns, but the right is given for a state on its own territory, not another state's territory. This could convey an understanding that Singapore deems the FIR over the Indonesian island as its own territory.[601] Also, the legal status of the ADIZ is highly debatable in international law. Although such zones are designated by states beyond their territorial waters, generally over their EEZs, they have no legal foundation in international law.[602] That an ADIZ can be over international waters is legally disputable: What would international law say about what Singapore has done over another state's territory?

[597] Supriyadi and others (n 588).

[598] M. Ya'kub Aiyub Kadir (n 596) 192. See also MY Kadir, 'Revisiting Self-Determination Conflicts in Indonesia: An International Law Perspective' (2015) 5 Indonesia Law Review 123; Aiyub M Kadir, 'Application of the Law of Self-Determination in a Postcolonial Context: A Guideline' (2016) 9 Journal of East Asia and International Law 7; M Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 Asian Journal of International Law 61.

[599] Chicago Convention (n 42) art 1.

[600] D Cluxton, 'The Chicago Convention 1944 in an UNCLOS 1982 World: Maritime Zones, Continental Shelves, Artificial Islands, and Some Other Issues' (2019) 41 University of La Verne Law Review 159. See also de R Oliveira, 'The Distinction between Civil and State Aircraft: Does the Current Legal Framework Provide Sufficient Clarity of Law with Regard to Civil and State Aircraft in Relation to Aviation Practicalities?' (2016) 41 Air and Space Law 329; K De Silva, 'Struggle for Sovereignty in the Air Space: An Analysis of Regulatory Developments and Current Challenges in Establishing "Air Sovereignty"' (2023) 3 KDU Law Journal 86.

[601] Chicago Convention (n 42) art 9. See also A Wickramasinghe, 'Military Interference on Civil Aviation: Any Improvements Section I: Leading Articles: Part A: Air Law' (2016) 41 Annals of Air and Space Law 232; A Sipos, 'The Legal Status and Use of National Airspace' (2018) 57 Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Sectio Iuridica 153.

[602] An ADIZ is a zone beyond the territorial sea of a state declared unilaterally by such state obligating aircraft entering the zone to identify themselves for national security reasons. This topic was discussed extensively in previous chapter.

Furthermore, from a national security perspective, there have been cases where aircraft, civil and military, of foreign countries enter the airspace of Indonesia without its permission or coordination.[603] The Convention is clear on the issue of flying over another contracting state's territory: it is only permissible if authorised by that state for both state and commercial aircraft.[604] Singapore also collects charges and revenues for the use of its air navigation services, which has some economic impact on Indonesia.[605] This case could prove that there is a conflict between the delineation of FIRs and the principle of sovereignty, which could be a door to conflict between states.

B. Greece versus Turkey

The FIR issue between Greece and Turkey was related to a territorial dispute regarding the airspace over the region of the Aegean Sea.[606] Greece claimed that its airspace extends to 10 miles offshore, while Turkey claimed that it was only 6 miles.[607] In 1952, the ICAO assigned Greece the responsibility of providing air traffic control (ATC) over the Aegean and establishing a dividing line between it and the Istanbul FIR.[608] These arrangements went smoothly until Turkey invaded Cyprus in 1974, at which time Turkey issued NOTAM 714 demanding that all aircraft operating over the median line report their position to Turkish ATC.[609] Furthermore, Turkey questioned the FIR distribution over the Aegean Sea, claiming

[603] Handar Bakhtiar, SyamsuddinMuhammad Noor and AbdulMaasba Magassing, 'Violation of the Sovereignty of Indonesia Airspace by Foreign Aircraft' (2017) 5 International Journal of Advanced Research 2107.

[604] Chicago Convention (n 42) art 6. See also E Napolitano, 'The Chicago Convention as a Self-Contained Regime Part I: Leading Articles: Section A: Air Law' (2018) 43 Annals of Air and Space Law 87; A Taborda, 'The Exchange of Air Traffic Rights: A System Highly Flawed, Yet Seemingly Indestructible Section I: Leading Articles: Part A: Air Law' (2016) 41 Annals of Air and Space Law 46.

[605] Mendes & Buissing (n 582).

[606] C Migdalovitz, Foreign Affairs and National Defense Division, 'Greece and Turkey: Aegean Issues – Background and Recent Developments Note' [1997] Greece and Turkey: Aegean Issues – Background and Recent Developments [i]–17. See also J Velos, 'The Aegean Continental Shelf Dispute between Greece and Turkey and the International Law Principles Applicable in the Delimitation of the Aegean Continental Shelf' (1987) 40/41 Revue Hellenique de Droit International 101-140.

[607] N Grief, 'The Legal Principles Governing the Control of National Airspace and Flight Information Regions and Their Application to the Eastern Mediterranean' (EU Rim Policy and Investment Council Ltd 2009) 2 <https://erpic.org/wp-content/uploads/2017/02/the-legal-principles-governing-the-control-of-national-airspace-and-flight-information-regions-and-their-application-to-the-eastern-mediterranean-2009.pdf> accessed 17 January 2021. See also G Assonitis, 'The Greek Airspace: The Legality of a Paradox' (1997) 8 United States Air Force Academy Journal of Legal Studies 160; S Keefer, 'Solving the Greek Turkish Boundary Dispute' (2003) 11 Cardozo Journal of International and Comparative Law 63.

[608] JM Van Dyke, 'An Analysis of the Aegean Disputes under International Law' (2005) 36 Ocean Development and International Law 25.

[609] NM Poulantzas, 'New International Law of the Sea and the Legal Status of the Aegean Sea, The Premiere Partie – Articles et Etudes' (1991) 44 Revue Hellenique de Droit International 257. See also K Tryfon, 'The Competence of Hellas on Search and Rescue Items in the Aegean Area' (2012) 4 Review of European Studies 98;

that it should be under the Istanbul FIR, not the Athinai FIR.[610] In response, Greece issued a NOTAM stating that the Turkish NOTAM was invalid and described it as illegitimate and contradicting ICAO regulations.[611] Turkey responded with a disavowal of any responsibility for the safety of aircraft not adhering to its notice.[612] Consequently, Greece issued another NOTAM designating the airspace over the Aegean Sea as a 'danger zone', which led to a suspension of international air traffic between Greece and Turkey.[613] After a series of negotiations and mediations at different levels, both parties withdrew their NOTAMs in February 1980.[614] However, even today, the FIR issue still plagues relations between the two nations, as Greece claims that Turkey violates international law over the Aegean Sea while Turkey accuses Greece of the same.[615] This case illustrates the strong correlation between the concept of state sovereignty and the concept of FIR, where a state builds its right to full control of its FIR on the concept of sovereignty.

C. Qatar versus Bahrain[616]

This issue between Qatar and Bahrain is quite different from the issue between Indonesia and Singapore. The Indonesian issue concerns only a relatively small portion of its airspace, while the Qatari issue with Bahrain on the FIR is something else. The Bahrain FIR covers not only the total of Qatar's territory but also much of the high seas surrounding Qatar, which literally isolates Qatar, from the FIR perspective, from its neighbouring countries and the rest of the world.

The most severe aspect of this problem was seen during the 2017 Gulf crisis, when blockading states closed their airspace, banning all Qatari-registered aircraft from using the airspace over their territories and their FIRs.[617] Any third-party air carriers who wanted to fly to or from

L Gross, 'The Dispute between Greece and Turkey Concerning the Continental Shelf in the Aegean' (1977) 71 American Journal of International Law 31-59.

[610] S Soldatos, 'Turkish Air Force Violations of Greek National Airspace in the Aegean' (2016) 3.

[611] MN Schmitt, 'Aegean Angst: A Historical and Legal Analysis of the Greek–Turkish Dispute' (1996) 2 Roger Williams University Law Review 48.

[612] ibid.

[613] Ibid.

[614] ibid.

[615] 'Greece–Turkey Clash over the Aegean: Here's What We Know – AeroTime' (21 December 2022) <https://www.aerotime.aero/articles/turkey-greece-clash-over-the-aegean-sea-heres-what-we-know-so-far> accessed 29 August 2023.

[616] The issue of the FIR between Qatar and Bahrain is discussed comprehensively in a previous chapter so the matter will be mentioned only briefly here to demonstrate the correlation between state sovereignty and FIR.

[617] Counter-Memorial of the Government of the State of Qatar (n 17) at 14.

Qatar using the airspace or FIRs of the blockading countries had to obtain approval from the concerned authorities of those countries. To Such an extent, Qatar was restricted to the use of only two air traffic service (ATS) routes, both of which were over the high seas in the Bahrain FIR, resulting in great congestion and massive disruptions and cancellations of flights to and from Qatar. Prior to that, Qatar had had 13 ATS routes, so this was a huge restriction that led to a severe threat to the safety of civil aviation, not only for Qatar but for all air carriers flying over these areas.

After this crisis, Qatar immediately informed the ICAO Council, urging intervention that would at least allow Qatari-registered aircraft to overfly the international airspace over the high seas that lie within the FIRs of the blockading countries.[618] After the intervention of the ICAO Council during an extraordinary meeting on 31 July 2017, the ban on Qatari-registered aircraft was limited to the national airspace of the blockading states.[619] Afterward, contingency routes were opened, and some additional ATS routes and airways, mostly within Bahrain's FIR, were reopened. The consequential result of the crisis was seen as a violation of the sovereignty of Qatar, as it was deprived from using ATS routes over its territory, as well as routes over its EEZ and the high seas. Bahrain failed to meet its obligations and responsibilities as a service provider entrusted with the management of Qatar's FIR. Also, the financial burdens that Qatar bore due to the closure of the airspace and FIR were great, as flight times were longer and Qatar Airways was severely affected in terms of fuel costs, loss of business and more.

These three examples show that the FIR concept can neglect many aspects of the principle of state sovereignty.[620] One of the main characteristics of the sovereign state is that even with the modern meaning of sovereignty, a sovereign state has exclusive authority over its territory, and no other state should have a share in such a right; however, the concept of the FIR gives the state in control of the FIR effective control over another state's airspace, which results in that particular state being put at the mercy of the controlling state. The control is exercised through the ability of the controlling state to permit foreign aircraft to enter the

[618] ibid annex 21. Letter from Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, to Fang Liu, ICAO Secretary General (5 June 2017).
[619] ibid annex 25, ICAO Council, 211th Session, Tenth Meeting, Summary of Decision, ICAO Doc. C-DEC 211/10 (23 June 2017).
[620] There are many other examples of FIR disputes among states including, but not limited to, India and Pakistan (the Kashmir Conflict), Cyprus and Turkey, China and Taiwan, Russia and Japan (the Kuril Islands dispute) etc.

controlled state's territory and airway structures, manage the controlled airspace classes, monitor military aircraft movements, designate restricted and prohibited areas of airspace and many other ways of exercising control over another state's territory. Even annex 11, when mentioning the delegation of FIRs, assures that such delegation is not a derogation to the sovereignty of the delegating state; however, the mere fact the annex has to mention such an idea could be construed as implied recognition of the existence of the conflict between FIRs and state sovereignty. Delegation of an FIR undermines a state's sovereignty over its territory, which is why the annex has to assure states of the intention behind such delegation. Another fundamental issue between the two concepts is that FIRs can threaten the national security of states and undermine their ability to monitor their airspace properly. They may therefore affect states' ability to be ready to respond to any military or security threats; this ability is deemed a fundamental element of sovereignty.[621] This idea was illustrated in the case of Indonesia versus Singapore and Qatar versus Bahrain very clearly, for: delegation affected the national security of Indonesia and its military operation over its islands, and it made Qatar subject to an airspace restrictions by Bahrain, who was entrusted with Qatar's FIR and the surrounding high seas.

For these reasons, Priyatna Abdurrasyid suggested that Indonesia needs to take over the control and management of its airspace. He bases this suggestion on two doctrines: the doctrine of necessity and the right of self-preservation, both emphasizing the protection of Indonesia's national security and military interests. According to Abdurrasyid, these doctrines justify sovereign control over FIRs as they align with broader international law principles prioritizing a state's security and territorial integrity. He argues that the doctrine of necessity allows a state to adopt essential measures to safeguard against potential threats, even if it involves overriding existing FIR arrangements. Similarly, the right of self-preservation supports maintaining airspace control to ensure defense readiness, given that airspace management is a fundamental aspect of sovereignty.[622]

Finally, the ICAO Council very recently stated its position very clearly with regard to the relation between the concept of state sovereignty and FIRs when it agreed to Qatar's proposal to have its own FIR over its territorial airspace, although it was seen by many to be technically

[621] Lestari (n 300) 182.

[622] Adi Kusumaningrum, 'The Legal Analysis of Teori Kedaulatan Nusantara towards the New Conception of Indonesian Airspace Sovereignty' (2016) 14 Indonesian Journal of International Law 514.

unviable for civil aviation.[623] The Council backed up its decision on the principle of sovereignty in article 1 of the Chicago Convention, which signifies the prevalence of the principle of state sovereignty over any technical consideration.[624]

3.3.2 Conclusion

Although the intention behind the concept of the FIR is to prioritize safety considerations, the reality is something else. It is a valid idea and wish for the international community to achieve, but its application confers control to some states over other states' territories, which, whether we like it or not, degrades state sovereignty and represents a threat to the latter states' national security. The real or potential misconduct of the delegated state is enough evidence of the conflict between the concept of the FIR and that of state sovereignty. From a legal point of view, the concept of the FIR has no power to limit or undermine the concept of sovereignty, which resulted in the FIR delineation on technical consideration to be a mere recommendation of annex 11. Therefore, FIRs should not be delineated only on the basis of technicality; instead, the state's national boundaries and national security and dignity should be considered first. Also, the given examples of states' abuse of their FIRs' responsibilities may pressure the ICAO to revisit its position concerning the relationship between the concept of sovereignty and FIRs.

[623] This aspect is extensively discussed in previous chapter.

[624] ICAO, 'ICAO Council 223rd Session C-DEC 223/9, Proposal for Amendment of the Air Navigation Plan – Middle East Region, Concerning the Establishment of a Doha Flight Information Region (FIR)/Search and Rescue Region (SRR)' (2021) <https://www.icao.int/about-icao/Council/Council%20Documentation/223/C-DECs/C.223.DEC.09.EN.pdf> accessed 26 January 2023.

4 Chapter 4: The jurisdiction of the ICAO Council to decide the GCC dispute under the Chicago Convention and International Air Services Transit Agreement

4.1 Introduction

The state of Qatar, in response to the air restrictions that were imposed on it, filed two applications and memorials with the ICAO Council on 30 October 2017. The first application (hereinafter 'ICAO Application (A)') was against Bahrain, Egypt, Saudi Arabia and the United Arab Emirates (UAE),[625] pursuant to Article 84 of the Chicago Convention.[626] The second application (hereinafter 'ICAO Application (B)') was against Bahrain, Egypt and the UAE,[627] pursuant to Article II, Section 2 of the International Air Services Transit Agreement (IASTA).[628] One of the reasons for filing two distinct applications instead of one was that Saudi Arabia is not a party to IASTA. However, the arguments concerning both applications were generally similar. On its applications, Qatar gave detailed background to the actions of each of the blockading states, as well as providing a comprehensive statement of law, citing relevant international treaties, such as the United Nations Charter, the Vienna Convention, UNCLOS,

[625] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) , Annex 23, Application (A) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944), 30 October 2017, <https://www.icj-cij.org/sites/default/files/case-related/173/173-20181227-WRI-01-02-EN.pdf> accessed 26 February 2023.

[626] Which reads as follows:

> 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.

See Chicago Convention (n 42) Article 84.

[627] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), Annex 23, Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944), 30 October 2017 <https://www.icj-cij.org/sites/default/files/case-related/174/174-20181227-WRI-01-02-EN.pdf> accessed 26 February 2023.

[628] Which reads as follows:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Agreement cannot be settled by negotiation, the provisions of Chapter XVIII of the [Chicago] Convention shall be applicable in the same manner as provided therein with reference to any disagreement relating to the interpretation or application of the above-mentioned Convention. (International Air Services Transit Agreement, (1944) 84 U.N.T.S. 389 (7 Dec 1944) (entry into force: 30 Jan 1945), Article II)

the Chicago Convention and its Annexes and IASTA.[629] The ICAO Council was requested by these two applications to provide the following relief: first, to determine that the blockading states were in violation of their obligations under mainly the Chicago Convention and its Annexes, as well as other obligations under the abovementioned treaties;[630] second, to deplore their violations of the fundamental principles contained in the Chicago Convention and its Annexes;[631] third, to urge the blockading states to withdraw all of their imposed restriction on Qatari registered aircrafts and to comply with their obligations under the Chicago Convention; fourth, for the blockading states to negotiate in good faith what is best for the region that results in the development of international civil aviation;[632] fifth, to suspend the participation of the blockading states in the Council, as they are parties to the dispute.[633]

As a counter-measure, on 19 March 2018, the blockading states raised two preliminary objections before the ICAO Council.[634] In the first objection, they argued that the ICAO Council did not have jurisdiction under the Chicago Convention and IASTA because they claimed that the real issue between the disputing states was related to matters extending beyond the scope of the Chicago Convention.[635] They insinuated that the real issue behind the aviation restrictions was related to the lawfulness of countermeasures under international law which fall outside the scope of both the Chicago Convention and IASTA. The second objection, they

[629] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), Annex 23, Application (A) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation. Also, Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), Annex 23, Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation.

[630] Ibid, Application (A) 601.

[631] ibid.

[632] ibid.

[633] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73), Annex 23, Application (B) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation, 560. It is worth noting that Saudi Arabia, Egypt and the UAE are members of the ICAO Council.

[634] Ibid, Annex 24, Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates in Re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on 7 December 1944, 19 March 2018; Annex 24, Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain and the United Arab Emirates in Re Application (B) of the State of Qatar Relating to the Disagreement Arising under the International Air Services Transit Agreement done at Chicago on 7 December 1944, 19 March 2018.

[635] 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, ICJ Reports 2020, 94; 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, ICJ Reports 2020, 185.

argued that Qatar did not meet the precondition of negotiation set forth in Article 84 of the Chicago Convention, Article II, Section 2, of the IASTA and Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences.[636] For this reason, from the blockading states' perspective, the Council lacked the jurisdiction to resolve these claims by Qatar, and therefore its application should have been inadmissible.[637]

On 29 June 2018, after extensive oral hearings and briefs,[638] the ICAO Council reached a decision rejecting the preliminary objections of the blockading states.[639] The decision was made in the form of a secret ballot on the question of whether to accept the preliminary objections of the blockading states. The result was 4 votes in favour, 23 against and 6 abstentions.[640] The blockading states did not accept that decision and therefore exercised their right to appeal the decision of the ICAO Council, safeguarded by Article 84 of the Chicago Convention, and they submitted a joint application[641] to the ICJ on 4 July 2018. Their appeal was constructed on three grounds. The first was that the decision of the ICAO Council 'should be set aside on the grounds that the procedure adopted by the ICAO Council was manifestly flawed and in violation of fundamental principles of due process and the right to be heard'.[642]

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[636] This article states, 'Any Contracting State submitting a disagreement to the Council for settlement . . . shall file an application to which shall be attached a memorial containing: . . . (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful'. See ICAO, Rules for the Settlement of Differences, approved on 9 April 1957; amended on 10 November 1975.

[637] Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation, Judgment, ICJ Reports 2020, (n 635) 95.

[638] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) , Annex 25, Response of the State of Qatar to the Preliminary Objections of the Respondents in re Application (A) of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation, 30 April 2018; also, Annex 26, Rejoinder to the State of Qatar's Response to the Preliminary Objections of the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates in re Application (A) of the State of Qatar Relating to the Disagreement Arising under the Convention on International Civil Aviation, 12 June 2018; also, Annex 53, ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO document C-MIN 214/8, 23 July 2018, 6.

[639] Ibid, Annex 52; Decision of the ICAO Council on the Preliminary Objection in the Matter: the State of Qatar and the Arab Republic of Egypt, the Kingdom of Bahrain, the Kingdom of Saudi Arabia and the United Arab Emirates (2017) – Application (A), 29 June 2018, 2.

[640] ibid.

[641] This is the same as the preliminary objections in application (A) related to the Chicago Convention and application (B) related to IASTA. Since the arguments in both applications are mostly the same, I will consider both applications as one unless the need to distinguish between them arises.

[642] International Court of Justice, 'Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council Dated 29 June 2018 on Preliminary Objections (Application (A), *Kingdom of Bahrain, Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates v State of Qatar*), 4 July 2018' in International Court of Justice (United Nations 2022) 14 <https://www.icj-cij.org/sites/default/files/case-related/173/173-20180704-APP-01-00-EN.pdf> accessed 5 March 2023; International Court of Justice, 'Joint Application Instituting Proceedings, Appeal Against a Decision of the ICAO Council Dated 29 June 2018 on Preliminary

The second was that the ICAO Council 'erred in fact and in law in rejecting the first preliminary objection in respect of the competence of the ICAO Council'.[643] The implication here is that the dispute amongst the parties required the Council to address a question that falls outside its jurisdiction, namely, the lawfulness of the countermeasures taken against Qatar. Third, they claimed that the ICAO Council

> erred when it rejected their second preliminary objection. That objection was based on the assertion that Qatar had failed to satisfy the precondition of negotiation contained in Article 84 of the Chicago Convention, and thus that the ICAO Council lacked jurisdiction. As part of that objection, they also argued that the claims of Qatar were inadmissible because Qatar had not complied with the procedural requirement in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences.[644]

These claims raise a question concerning the ICAO Council's jurisdiction in this case or any other future cases. The significance is that the ICAO Council would be deprived of its function to decide cases that are related to civil aviation just because these cases involve bigger matters that fall outside of civil aviation. Consequently, the question is whether the ICAO Council will ever be able to exercise its dispute settlement functions safeguarded by the Chicago Convention. Accepting such arguments will be of severe consequence, rendering the Council helpless in solving matters within the civil aviation field.

Therefore, this chapter will address the question of the ICAO Council's jurisdiction in general to decide the dispute at hand and any other future disputes amongst its contracting parties. It will be divided into two parts. The first will be dedicated to the ICAO as a UN agency, its history, purposes, responsibilities and features. The role of the ICAO Council will be important, as will the role of the ICAO assembly and the historical role of the ICAO Council in dispute settlement among the members of the ICAO. The topic of its jurisdiction will be discussed in depth, especially in relation to Articles 84 and 54 and the ICAO Rules for the Settlement of Differences. The second part will address the grounds for the appeal of the blockading states in the following sequence. The first to be discussed will be the second ground of appeal by

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Objections (Application (B), *Kingdom of Bahrain, Arab Republic of Egypt, and the United Arab Emirates v State of Qatar*), 4 July 2018' in International Court of Justice (United Nations 2022) 14 <https://www.icj-cij.org/sites/default/files/case-related/174/174-20180704-APP-01-00-EN.pdf> accessed 5 March 2023.

[643] Ibid, 14.

[644] Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation, Judgment (n 635) 98.

the blockading states, which is related to the lack of the ICAO Council's jurisdiction to consider the case and the admissibility of Qatar's claims. The second discussion will be of the third ground of appeal relating to the failure of Qatar to meet the negotiation conditions contained in Article 84 of the Chicago Convention, as well as the procedural requirement in Article 2, subparagraph (g), of the ICAO Rules for the Settlement of Differences. The final discussion will be of the first ground of appeal[645] relating to the procedure adopted by the ICAO Council being flawed and in violation of the principle of due process.

4.2 The role and functions of the ICAO

4.2.1 Historical background

To begin with, the UN system, in addition to the UN itself, comprises many organisations that are specialised agencies in different fields. These agencies carry out operations whose nature is purely technical and professional in a very broad range of areas, such as agriculture, education, public health, labour and so on.[646] Amongst these agencies is the ICAO, which is an agency specialised and exclusively authorised to deal with international civil aviation.[647] The ICAO story started on 11 September 1944, when the United States of America took the initiative of inviting 52 states, as well as two dignitaries whose governments were in exile, to attend a conference in Chicago.[648] During the Chicago international conference, the United States made a proposal that such conference should consider, among other things, the establishment of a general agreement for the provisional arrangement of aviation routes 'which would form the basis for the prompt establishment of international air transport services by the appropriate countries'.[649] The result of this initiative was the creation of the

[645] The reason the first ground of appeal is discussed last is because addressing that issue entails discussing the second and third grounds of appeal first. Therefore, it is appropriate to follow this sequence.

[646] There are 15 specialised agencies: FAO: Food and Agriculture Organization of the United Nations; ICAO: International Civil Aviation Organization; IFAD: International Fund for Agricultural Development; ILO: International Labour Organization; IMF: International Monetary Fund; IMO: International Maritime Organization; ITU: International Telecommunication Union; UNESCO: United Nations Educational, Scientific and Cultural Organization; UNIDO: United Nations Industrial Development Organization; UNWTO: World Tourism Organization; UPU: Universal Postal Union; WHO: World Health Organization; WIPO: World Intellectual Property Organization; WMO: World Meteorological Organization; World Bank Group. See more Library DH, 'Research Guides: UN System Documentation: Specialized Agencies' <https://research.un.org/en/docs/unsystem/sa> accessed 8 March 2023.

[647] Van Fenema P, 'Suborbital Flights and ICAO Note' (2005) 30 Air and Space Law 401. R Abeyratne, 'Key Legal Issues in ICAO: A Commentary and Review' (2019) 44 Air and Space Law 53.

[648] 'History of ICAO and the Chicago Convention - ICAO75' <https://www4.icao.int/icao75/History/ICAOAndChicagoConvention> accessed 14 July 2023

[649] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 476.

Chicago Convention, which was signed by the 52 states on 7 December 1944. However, the Convention did not come into force until 4 April 1947 due to a delay in the ratification process.[650] Between these two dates, the Chicago Conference also resulted in the signing of an interim agreement that formed the Provisional International Civil Aviation Organization (PICAO),[651] which had the purpose of serving as an advisory and coordinating body until the Chicago Convention came into force.[652] The PICAO comprised an Interim Council and an Interim Assembly, which began with 21 member states meeting in June 1945 in Montreal.[653] The era of the PICAO did not last long, as it became the ICAO when the quorum of ratifications was met on 4 April 1947. As for the name ICAO, Article 43 of the Chicago Convention states that this organisation is to be named the International Civil Aviation Organization and made up of the Assembly, the ICAO Council, and 'such other bodies as may be necessary'.[654] The purpose of the ICAO is derived from the Preamble to the Chicago Convention, which states, among other things, that international civil aviation should 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'.[655] In achieving this, the Chicago Convention set out a list of objectives in Article 44, mainly to 'develop the principles and techniques of international air navigation and to foster the planning and development of international air transport'.[656] This primarily emphasises the technical nature of the

[650] J Wool, 'Next Generation of International Aviation Finance Law: An Overview of the Proposed Unidroit Convention on International Interests in Mobile Equipment as Applied to Aircraft Equipment, The International Interests in Mobile Equipment as Applied to Aircraft Equipment' (1998) 23 Air and Space Law 243.

[651] State D of Proceedings of the International Civil Aviation Conference, Chicago, Illinois, November 1 - December 7, 1944 (US Department of State 1944) 111.

[652] E Warner, 'PICAO and the Development of Air Law' (1947) 14 Journal of Air Law and Commerce 1. Also, D MacKenzie, *ICAO: A History of the International Civil Aviation Organization* (University of Toronto Press 2010) 60.

[653] History of ICAO and the Chicago Convention (n 648).

[654] Chicago Convention (n 42) Article 43. The third body is the secretariat of ICAO.

[655] Ibid, Preamble.

[656] Article 44 says:

> The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to: (a) Insure the safe and orderly growth of international civil aviation throughout the world; (b) Encourage the arts of aircraft design and operation for peaceful purposes; (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation; (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport; (e) Prevent economic waste caused by unreasonable competition; (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines; (g) Avoid discrimination between contracting States; (h) Promote safety of flight in international air navigation; (i) Promote generally the development of all aspects of international civil aeronautics.

organisation's mandate.[657] The major aspects of civil aviation mentioned here first are 'air navigation', which is a reference to the operational and technical aspects of aircraft movement, and 'air transport', which relates to the air transportation of passengers, cargo, mail and so on.[658] Also, these aims cover a wide range of fields within civil aviation, such as economic, environmental, technical, administrative, supervisory, law-making and juridical.[659]

The ICAO, as an organisation, has many characteristics, one of which is that it was created by states and therefore derives its legal power from these sovereign states. In addition, these states conferred legal powers on the ICAO through a treaty, the Chicago Convention.[660] Another feature of the ICAO is the universality of its application, which the drafters of the Chicago Convention made abundantly clear that such technical organisations must have. It is believed that the universality feature is more necessary for the ICAO than for, for instance, the International Monetary Fund or the Food and Agriculture Organization.[661] The reason behind this notion is that if a non-member of ICAO were to establish an air service without adherence to ICAO Rules, the safety of air service operations of the entire international community would be in jeopardy.[662] It even goes beyond safety concerns to economics: If non-member states close their air space, it would hinder the growth of the economic development of the air transport industry. For this reason, the founders of the ICAO deemed its universal application by all states to be of vital and paramount importance and crucial to the achievement of the ICAO's objectives outlined in Article 44.[663]

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[657] L Weber, International Civil Aviation Organization (ICAO) (Kluwer Law International BV 2021) 263.
[658] ibid.
[659] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 477. See also ICAO Strategic Objectives <https://www.icao.int/about-icao/Council/Pages/Strategic-Objectives.aspx> accessed 01 July 2023. BDK Henaku, 'ICAO: Fourth Air Transport Conference – An Examination of the Underlying Objectives / Die Vierte ICAO Lufttransportkonferenz: Eine Betrachtung Der Zugrundeliegenden Voraussetzungen / La Quatrieme Conference de l'OACI: Une Examination Des Objectives a La Base' (1994) 43 Zeitschrift fur Luft- und Weltraumrecht – German Journal of Air and Space Law 249.
[660] D Sarooshi, International Organizations and Their Exercise of Sovereign Powers (Oxford University Press 2005) 110.
[661] J Schenkman, *International Civil Aviation Organization* (Librairie E. Droz 1955) 125.
[662] ibid.
[663] R Abeyratne, 'Legal Legitimacy of ICAO and Direction to Be Taken' in Ruwantissa Abeyratne (ed), *Regulation of Commercial Space Transport: The Astrocizing of ICAO* (Springer International Publishing 2015) 118 <https://doi.org/10.1007/978-3-319-12925-9_6> accessed 23 February 2023. See also Resolution A1-9, ICAO Doc 7375-C/852, 1947.

4.2.2 ICAO structure

A. The Assembly

As previously mentioned, one of the main bodies of the ICAO is the Assembly, which is the sovereign body that consists of all ICAO contracting states.[664] Each of these states has a seat in the Assembly, with equal rights in representation and vote.[665] As per Article 48 of the Chicago Convention, the Assembly shall ordinarily meet not less than once in three years[666] and may have an extraordinary session 'at any time upon the call of the Council or at the request of not less than one-fifth of the total number of contracting States addressed to the Secretary General'.[667] The quorum of the Assembly is the majority of the contracting states, and any decision to be made requires a simple majority of votes cast.[668] The powers and duties of the Assembly are outlined in Article 49 of the Convention:

> The powers and duties of the Assembly shall be to: (a) Elect at each meeting its President and other officers; (b) Elect the contracting States to be represented on the Council, in accordance with the provisions of Chapter IX; (c) Examine and take appropriate action on the reports of the Council and decide on any matter referred to it by the Council; (d) Determine its own rules of procedure and establish such subsidiary commissions as it may consider to be necessary or desirable; (e) Vote annual budgets and determine the financial arrangements of the Organization, in accordance with the provisions of Chapter XII; (f) Review expenditures and approve the accounts of the Organization; (g) Refer, at its discretion, to the Council, to

[664] There are presently 193 member states. See 'Assembly 41st Session' <https://www.icao.int/Meetings/a41/Pages/default.aspx> accessed 14 July 2023. also, R Abeyratne, 'The Outcome of the 40th ICAO Assembly: A New Look at ICAO?' (2020) 45 Air and Space Law, 81–96 <https://kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals\AILA\AILA2020005.pdf> accessed 12 March 2023; E Agustini, Y Kareng and OA Victoria, 'The Role of ICAO (International Civil Aviation Organization) in Implementing International Flight Safety Standards' (2021) KnE Social Sciences 111.

[665] Chicago Convention (n 42) Article 48.

[666] In the original text of the Chicago convention, the word was 'shall meet annually'; however, this was replaced by amendment adopted by the Assembly in Resolution A8-1. See I-24 <https://www.icao.int/publications/documents/9902_en.pdf> accessed 14 May 2023.

[667] This wording is also in amendment adopted by the Assembly, at its 14th Session (Rome, 21 August–15 September 1962), Resolution A14-5 (Protocol relating to the Amendment of Article 48(a) of the Chicago Convention on International Civil Aviation). The original text read, 'Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of any ten contracting States addressed to the Secretary General'. See I-17 <https://www.icao.int/publications/Documents/9848_en.pdf> accessed 16 May 2023. See also The Assembly, 16th session (Buenos Aires, 3-26 September 1968) adopted Resolution A16-13 (Frequency and Site of Ordinary Sessions of the Assembly) <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a16> and 21st Session (Montreal, 24 September–15 October 1974) the Resolution A21-15 (Study of a System of Rotation of Sites for Assembly Sessions) <https://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a21>.

[668] Chicago Convention (n 42) Article 48(c). Generally, most decisions of the Assembly are taken by consensus in the form of resolution.

> subsidiary commissions, or to any other body any matter within its sphere of action; (h) Delegate to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time; (i) Carry out the appropriate provisions of Chapter XIII; (j) Consider proposals for the modification or amendment of the provisions of this Convention and, if it approves of the proposals, recommend them to the contracting States in accordance with the provisions of Chapter XXI; (k) Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.[669]

For a better illustration of the duties of the Assembly in practice, it is useful to see the accomplishments of the 37th Session (Montreal, September/October 2010). At this session, many important achievements were recorded, and the participation was remarkable: there were 176 member states and 40 international organisations involved in civil aviation.[670] These achievements were mainly in three areas: safety, security and environmental protection. As for the safety area during this session, the Assembly endorsed proactive safety strategies in reliance on critical information shared by governments and other players in the aviation industry. It also covered significant issues related to the safety of runways, where a significant portion of all accidents occur, by declaring that the ICAO shall establish a multidisciplinary approach in addressing runway safety and urging states to enhance their measures in this regard.[671] With regard to security, the Assembly during this session updated and strengthened the provisions of Annex 17 of the Chicago Convention in relation to Aviation Security.[672] The Assembly adopted a statement that condemned all acts of unlawful interference against civil aviation regardless of the reasons or circumstances in which they are perpetrated.[673] Moreover, the Assembly adopted a 'Declaration on Aviation Security' urging member states to the ICAO to fully comply with, strengthen and promote application of ICAO SARPs,

[669] Chicago Convention (n 42) Article 49. It is also useful for further reading to see Doc 7600/8, Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization <https://www.icao.int/publications/Documents/7600_cons_en.pdf> accessed 17 May 2023; CT Tourtellot CT, 'Membership Criteria for the ICAO Council: A Proposal for Reform' (1981) 11 Denver Journal of International Law and Policy 56.

[670] R Abeyratne, 'Outcome of the 37th Session of the ICAO Assembly' (2011) 36 Air and Space Law 7.

[671] ibid.

[672] International Civil Aviation Organization, Security: Annex 17 to the Convention on International Civil Aviation (Eighth Edition, April 2006) (Safeguarding International Civil Aviation Against Acts of Unlawful Interference). <https://skylibrarys.files.wordpress.com/2016/07/annex-17-security.pdf> accessed 16 May 2023.

[673] ibid.

especially those contained in Annex 17 of the Chicago Convention.[674] In addition, the Assembly urged all states to sign and ratify the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention of 2010) and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing Protocol of 2010), which resulted from the ICAO Diplomatic Conference on Aviation Security held in Beijing from 30 August to 10 September 2010.[675] Finally, concerning environmental protection, the Assembly adopted a comprehensive resolution[676] to contribute to the reduction of the impact of aviation emissions on climate change.[677] The ICAO, in adopting this resolution, was the first UN agency to 'lead a sector in the establishment of a globally harmonised agreement for addressing its CO2 emissions'.[678] The 37th session is an excellent illustration of the active role of the Assembly in discharging its duties and responsibilities outlined in the Chicago Convention.

[674] A Piera and M Gil, 'Will the New ICAO- Beijing Instruments Build a Chinese Wall for International Aviation Security' (2014) 47 Vanderbilt Journal of Transnational Law 217.

[675] ICAO, Assembly, 37 the Session, Legal Commission, Agenda Item 59: Acts or Offences of Concern to the International Aviation Community and Not Covered by Existing Air Law Instruments, A37-WP/290, LE/13, 27 September 2010 <https://www.icao.int/Meetings/AMC/Assembly37/Working%20Papers%20by%20Number/wp290_en.pdf> accessed 21 May 2023.

[676] It is worth mentioning that the binding legal effect of ICAO Assembly resolutions on the contracting state is highly controversial. The nature of these resolutions creates a custom but nonbinding instrument which is referred to as a 'soft law' that falls short of the enforceability element. And the fact that contracting states can opt out of these resolutions and express their reservations at the time of adoption supports the notion of a nonbinding effect of these resolutions. See Brownlie I (1990) *Principles of Public International Law* (4th edn, Clarendon Press) 691; A Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention' (2017) 16 Chinese Journal of International Law 212; DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955) 32 British Year Book of International Law 97; R Barber, 'Revisiting the Legal Effect of General Assembly Resolutions: Can an Authorising Competence for the Assembly Be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or Customary International Law?' (2021) 26 Journal of Conflict and Security Law 9.

[677] ICAO, Assembly, 37 the Session, Report of the Executive Committee on Agenda Item 17 (Section on Climate Change), A37-WP/402, P/66, 10 July 2010.

[678] Abeyratne, (n 670) 7. For further reading, see R Abeyratne, 'Carbon Offsetting as a Trade Related Market Based Measure for Aircraft Engine Emissions' (2017) 51 Journal of World Trade 437; S Truxal, 'The ICAO Assembly Resolutions on International Aviation and Climate Change: An Historic Agreement, a Breakthrough Deal, and the Cancun Effect' (2011) 36 Air and Space Law 217; J Liu, 'The Role of ICAO in Regulating the Greenhouse Gas Emissions of Aircraft' (2011) 2011 Carbon & Climate Law Review 417; M Adam, 'ICAO Assembly's Resolution on Climate Change: A Historic Agreement' (2011) 36 Air and Space Law 23; Sebastian Oberthr, 'The Climate Change Regime: Interactions of the Climate Change Regime with ICAO, IMO, and the [U Burden-Sharing Agreement', in Sebastian Oberthr and Thomas Gehring (eds), Institutional Interaction in Global Environmental Governance: Synergy and Conflict among International and EU Policies (MIT Press, 2006), 53.

B. The ICAO Council

The ICAO Council is the permanent governing body of the ICAO responsible to the Assembly.[679] Originally, the Council was composed of 21 contracting states to be elected for a term of three years.[680] However, the number of members has increased over the years, starting from 27 members at the 13th Session of the Assembly,[681] then to 30 seats at the Assembly's 17th Session,[682] then to 33 seats during the 21st Session in 1974,[683] until it reached 36 seats, the current membership number, during the 28th Session in 1990.[684] The members of the Council are elected from three categories: first, the category of states that have chief importance in air transport;[685] second, states that largely contribute to the provision of facilities for international civil air navigation;[686] and third, those states whose election ensures that the Council represents all major geographic areas of the world.[687]

The Council bears mandatory responsibilities and plays a pivotal role as outlined in the Chicago Convention. These responsibilities are outlined in Article 54:

> The Council shall: (a) Submit annual reports to the Assembly; (b) Carry out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention; (c) Determine its organization and rules of procedure; (d) Appoint and define the duties of an Air Transport Committee, which shall be chosen from among the representatives of the members of the Council, and which shall be responsible to it; (e) Establish an Air Navigation Commission, in accordance with the provisions of Chapter X; (f) Administer the finances of the Organization in accordance with the provisions of Chapters XII and XV; (g) Determine the

[679] Chicago Convention (n 42) Article 50.
[680] ibid.
[681] 13th Session, the Assembly, by Resolution A13-1: Amendment to Article 50(a) of the Convention increasing the membership of the Council to 27, I-15 <https://www.icao.int/Meetings/a41/Documents/Resolutions/10184_en.pdf> accessed 16 May 2023.
[682] Ibid, 17th Session, the Assembly, by Resolution A17A-1: Amendment to Article 50(a) of the Convention, increasing the membership of the Council to 30, I-16.
[683] Ibid, 21st Session, the Assembly, A21-2: Amendment to Article 50(a) of the Convention increasing the membership of the Council to 33, I-17.
[684] Ibid, 21st Session, the Assembly, A28-1: Amendment to Article 50(a) of the Convention on International Civil Aviation I-18.
[685] Chicago Convention (n 42) Article 50(b). Current member states in this category are as follows: Australia, Brazil, Canada, China, France, Germany, Italy, Japan, United Kingdom and the United States. See <https://www.icao.int/about-icao/Council/CouncilStates/Pages/default.aspx> accessed 23 May 2023.
[686] ibid. Current member states in this category are as follows: Argentina, Austria, Egypt, Iceland, India, Mexico, Nigeria, Saudi Arabia, Singapore, South Africa, Spain, and Venezuela.
[687] ibid. Current member states in this category are as follows: Bolivia, Chile, El Salvador, Equatorial Guinea, Ethiopia, Ghana, Jamaica, Malaysia, Mauritania, Qatar, Republic of Korea, Romania, United Arab Emirates, and Zimbabwe.

> emoluments of the President of the Council; (h) Appoint a chief executive officer who shall be called the Secretary General, and make provision for the appointment of such other personnel as may be necessary, in accordance with the provisions of Chapter XI; (i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds; (j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council; (k) Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction; (l) Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken; (m) Consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX; (n) Consider any matter relating to the Convention which any contracting State refers to it.[688]

As shown, these functions vary between executive,[689] administrative,[690] judicial and even legislative in the sense of quasi-legislative power to the extent allowed by the Chicago Convention.[691] The focus of this research will be on two aspects of the ICAO Council functions: law-making and judicial.

4.2.3 The Council's law-making power[692]

The law-making power of the ICAO Council lies in its ability to prescribe civil rules of conduct. This is reflected in Article 54(l), the adoption of international standards and recommended practices and then their designation as Annexes to the Convention. As discussed in the previous chapter, Article 37 of the Convention requires contracting states to achieve the highest practical degree of uniformity with the SARPs adopted by the Council in the discharging of its functions under Article 54(l). Article 38 of the Chicago Convention obligates

[688] Chicago Convention (n 42) Article 54.
[689] For instance, 54(b) falls under the executive role of the Council when it carries out the directions of the Assembly.
[690] With regard to the administrative functions of the Council, this role is reflected in the control of the financial aspects of the organisation, as well as arrangements of the Assembly meetings and extraordinary sessions if so needed. See Chicago Convention (n 42) Article 54(f).
[691] Edward Yemin, Legislative Powers in the United Nations and Specialized Agencies (A. W. Sijthoff 1969) 114-160.
[692] This aspect was discussed thoroughly in a previous chapter.

contracting states to immediately notify the Council in case of an inability to comply with these SARPs. Furthermore, states cannot deviate from Annex 2, and its application is compulsory, with no escape clause. This compulsion is stated in Article 12 of the Chicago Convention: over the high seas, the only applicable rules shall by those of Annex 2, established by the Council under the Chicago Convention.[693] Furthermore, another aspect that emphasises the ICAO Council's quasi-legislative power lies in the strict interpretation of the wording of Article 22 of the Convention. That article is conceived of as a rule of conduct falling under Article 54(l), as states agree to adopt all practical measures for the facilitation and expediting of aircraft navigation between the territories of member states.[694] Article 90 of the Convention is another declaration of the compulsory power of the Council to legislate rules of conduct in the field of international civil aviation: an Annex or amendment of that Annex shall become effective within three months after it is submitted by the ICAO Council to contracting states.[695] Also, the ICAO Council's law-making ability is in line with the objectives of the organisation, that is, to 'develop the principles and techniques of international air navigation and to foster the planning and development of international air transport'.[696] Thus, all of the abovementioned articles prove the quasi-legislative capacity of the ICAO Council.

4.2.4 The Council's judicial function

The Chicago Convention bestows upon the ICAO Council a considerable judicial function for the settlement of disputes among member states. This function is derived from Articles 84–88 of Chapter XVIII, which give the Council jurisdiction to decide any disputes between contracting states that cannot be solved by negotiation in relation to the interpretation or application of the Chicago Convention and its Annexes.[697] In addition, at its first session in 1947, the Assembly of the ICAO adopted Resolution A1-23, which authorised the Council to

[693] Action of the Council, 77th Session, (1972), ICAO Doc. 9078 (C/1012) (1974) 25.

[694] Chicago Convention (n 42) Article 22. Also, Abeyratne, 'Outsourcing and the Virtual Airline – Legal Implications' (1997) 22 Air and Space Law 188. See also, K Wilson, 'Gone with the Wind: The Inherent Conflict between API/PNR and Privacy Rights in an Increasingly Security-Conscious World' (2016) 41 Air and Space Law 236.

[695] Ibid, Article 90. Also, R Abeyratne, 'Law Making and Decision Making Powers of the ICAO Council – A Critical Analysis / Gesetzgebungs- Und Entscheidungskompetenzen Des ICAO-Rates - Eine Kritische Analyse / Les Competences Legislatives et Decisives Du Conseil de l'OACI - Une Analyse Critique' (1992) 41 Zeitschrift fur Luft- und Weltraumrecht – German Journal of Air and Space Law 387.

[696] Chicago Convention (n 42), Article 44. See also Michael Milde, 'The Chicago Convention – After Forty Years', IX Annals Air and Space L. 119, 126; Alexander Tobolewski, 'ICAO's Legal Syndrome...', IV Annals Air and Space L. 1979, 349 at 359. Also, Paul Stephen Dempsey, Law and Foreign Policy in International Aviation (Transnational 1987) 302.

[697] Chicago Convention (n 42) Article 84.

act as an arbitral body on any disagreement between contracting states pertaining to international civil aviation matters.[698] However, the jurisdiction of the Council to decide any disputes is subject to a fulfilment of preconditions.

The first precondition is the existence of disagreement between the members of the ICAO. The application of Article 84 of the Convention and the jurisdiction of the Council is limited to disputes, as opposed to advisory proceedings or functions.[699] It should be emphasised that the term 'disagreement' is not defined in the Chicago Convention; however, there is little doubt that the meaning is no different from what other international conventions refer to as a 'dispute'. As per the ICJ, for a dispute to exist, it must be shown that the claim of one party is 'positively opposed by the other'.[700] The court stated that the mere assertion of a party concerned in a dispute is not enough to prove the existence of dispute, nor is it sufficient to 'show that the interests of the two parties to such a case are in conflict'.[701] For this reason, the definition of the term 'disagreement' contained in Article 84 could mean that a dispute arises between two or more contracting states, where one side of the dispute claims a legal right against another party that holds clearly opposite views concerning the validity of such a claim.[702]

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[698] The Assembly, at its first session (Montreal, 6-27 May 1947), adopted Resolution A1-23 (authorisation to the council to act as an arbitral body) I-27 <https://www.icao.int/publications/documents/9902_en.pdf> accessed 16 May 2023.

[699] Buergenthal (n 274) 125-126; G. Hafner, 'The Physiognomy of Disputes and the Appropriate Means to Resolve Them', in United Nations (ed.), International Law as a Language for International Relations. Proceedings of the United Nations Congress on Public International Law (1995), 560 <https://legal.un.org/cod/books/IntlLawAsLanguageForIntlRelations.pdf> accessed 16 May 2023.

[700] South West Africa Cases *(Ethiopia v South Africa*; *Liberia v South Africa*), Preliminary Objections, Judgment of 21 December 1962: ICJ Report; 1962, 319-328; Mavrommatis Palestine Concessions,. Judgment No. 2, 1924, PCIJ, Series A, No. 2) 11; Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v Rwanda*), Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, 40, para 90; C Schreuer, *What Is a Legal Dispute?* (Brill Nijhoff 2008), 46 <https://brill.com/display/book/edcoll/9789047440338/Bej.9789004167278.v-1086_047.xml> accessed 29 March 2023.

[701] South West Africa Cases (n 700) 328.

[702] A Kanehara, 'Refining Japan's Integrative Position on the Territorial Sovereignty of the Senkaku Islands' (2021) 97 International Law Studies Series. US Naval War College 1603-1604. In this regard, it is relevant to see Interpretation of Peace Treaties, Advisory Opinion: ICJ Reports 1950, 74, where the court stated the following:

> Whether there exists an international dispute is a matter for objective determination …There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.

Also, the ICJ added in a recent case that existence of disagreement is not a matter of form but substance. See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*), Preliminary Objections, Judgment, ICJ Reports 2011, 84.

The second condition that allows the ICAO Council to decide a dispute is that the dispute must be related to the interpretation or application of the Chicago Convention and its Annexes.[703] This means that if the subject matter of the dispute is not related to the interpretation or application of the Chicago Convention and its Annexes, the Council will not have any jurisdiction to decide the disagreement. Therefore, this forms a basic ground of objection for any state that opposes the jurisdiction of the ICAO Council. In some cases, the Council would be forced to examine the merits of the case to decide whether the dispute or part of it falls within the Council's jurisdictional scope.[704] It should also be noted that the jurisdiction of the ICAO Council to decide disputes could extend beyond the Chicago Convention to other international civil aviation agreements, whether bilateral or multilateral, as these legal instruments give the Council such jurisdiction.[705] For instance, IASTA provides that if any disagreement arises in relation to the interpretation or application of this agreement, Article 84, which gives the ICAO Council jurisdiction to decide the matter, shall be applicable.[706] Also, many multilateral agreements have been concluded under the auspices of the ICAO, including the Agreement on the Joint Financing of Certain Air Navigation Services in Iceland and the Agreement on the Joint Financing of Certain Air Navigation Services in Greenland.[707] These agreements contain almost identical articles that confer upon the ICAO Council jurisdiction to decide a dispute that relates to the interpretation or application of these agreements.[708] As for bilateral agreements, these agreements come in the form of an air service agreement, which is an agreement typically signed between states to allow international commercial air transport services. In this legal instrument, a reference is given to the jurisdiction of the ICAO Council in the case of disagreement.[709]

[703] Chicago Convention (n 42) Article 84.
[704] Buergenthal (n 274) 126. Also, O'Kane A, 'Appeals Relating to the ICAO Council's Jurisdiction under Article II, Section 2, of the 1944 International Air Services Transit Agreement and Article 84 of the Convention on International Civil Aviation Case Notes' (2020) 27 Australian International Law Journal 222.
[705] Buergenthal (n 274) 126.
[706] IASTA (n 628) Article II, Section 2.
[707] Agreement on the Joint Financing of Certain Air Navigation Services in Iceland (1956) as amended in 1982 and 2008 (Doc 9586) <https://www.icao.int/sustainability/Joint-Financing/Documents/Iceland%20Agreement.pdf> accessed 24 May 2023; Agreement on the Joint Financing of Certain Air Navigation Services in Greenland (1956) as amended in 1982 and 2008 (Doc 9585-JS/681) <https://www.icao.int/sustainability/Joint-Financing/Documents/Danish%20Agreement.pdf>; ICAO Doc 7695-1956 Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe <https://www.caa.md/files/2013_02/249.pdf> accessed 24 May 2023.
[708] Ibid, Article XIV.
[709] Buergenthal (n 274) 174.

Third, only contracting states concerned with the disagreement can invoke Chapter XVIII and ask for the adjudication of the Council.[710] This means that any state that desires the adjudication of the Council will have to be a party to the dispute and will have to show that the action or inaction of the adversary state directly violates or affects its rights under the Chicago Convention or its Annexes.[711] The wording of Article 84 talks about a state 'concerned in the disagreement', not a party to it. This presupposes that for a state to be 'concerned' in a dispute, it must have been involved in some sort of negotiation or confrontation with the other party before submitting the matter to the ICAO Council. This could mean that a third-party state whose interests or rights could be profoundly affected by a dispute between other contracting states cannot submit a dispute to the Council unless it is involved in the negotiation between the disputing parties.[712] On this basis, the ICAO Council refused a complaint by Afghanistan against Pakistan, which was in a dispute with India in 1952, as Afghanistan had not been a party to the negotiation between India and Pakistan.[713]

The fourth condition is that this disagreement cannot be settled through negotiation, which means that before invoking dispute-settlement provisions of the Convention, contracting states must first attempt to settle their dispute by themselves through negotiation.[714] Therefore, prior negotiation between the disputing parties is an essential precondition for the jurisdiction of the ICAO Council. This requirement is not exclusive to the Chicago Convention; many international treaties contain similar clauses.[715] In the Application of the International Convention on the Elimination of All Forms of Racial Discrimination case, the ICJ stated, 'It is not unusual in compromissory clauses conferring jurisdiction on the Court and other international jurisdictions to refer to resort to negotiations.'[716]

The logic behind that requirement, as the ICJ stated, is to achieve three goals. First, it serves as a notification to the adversary state that a disagreement exists that 'delimits the scope of

[710] Chicago Convention (n 42) Article 84.
[711] Buergenthal (n 274) 127.
[712] ibid, 128.
[713] ICAO Doc. C-WP/1222 (1952); ICAO Council, 16th Sess., Doc. 7291 (C/845), 195 (1952).
[714] Chicago Convention (n 42) Article 84.
[715] See the Convention on the Elimination of All Forms of Discrimination against Women, signed at New York on 18 December 1979, entered into force on 3 September 1981,1249 UNTS 13 (CEDAW), Article 29; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed at New York on 10 December 1984, entered into force on 26 June 1987, 1465 UNTS 85 (CAT), Article 30(1).
[716] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v Russian Federation*) (n 702) 58.

the dispute and its subject-matter'.[717] Second, it aims to avoid adjudication by third parties by encouraging the concerned states to settle their dispute by themselves by mutual agreement.[718] Third, prior negotiation plays a functional role, indicating the limitation of consent given by states.[719] In addition, the prior negotiation requirement was present in the Advisory Opinion on the Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, when the Court stated that such disputes must satisfy the requirement of being unable to be settled by negotiation.[720] Thus, these direct references to the requirement of prior negotiation in treaties and law cases make clear that for the ICAO Council to exercise jurisdiction over a dispute, that dispute must be one that 'cannot be settled by negotiations' as stated in Article 84 of the Chicago Convention.

That said, questions arise as to what would happen if one of the concerned parties to the dispute were to refuse to negotiate. How can this condition be met for the ICAO Council to have jurisdiction over a dispute? What constitutes a negotiation required by Article 84 of the Chicago Convention? The ICJ gave criteria for what constitutes a negotiation in the Application of the International Convention on the Elimination of All Forms of Racial Discrimination case:

> In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counterclaims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires—at the very least—a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.[721]

The Court went on and emphasised that:

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[717] ibid.
[718] ibid.
[719] Ibid, 59.
[720] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, 27. See also Armed Activities on the Territory of the Congo (n 700) para 89, 40; Questions Relating to the Obligation to Extradite or Prosecute (Belgium v Senegal), Judgment, ICJ Reports 2012, 445, para 56; Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v Russian Federation*), Provisional Measures, Order of 19 April 2017, ICJ Reports 2017, 120, para 40; Immunities and Criminal Proceedings (*Equatorial Guinea v France*), Preliminary Objections, Judgment, ICJ Reports 2018, 317.
[721] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (n 702) 132, para 157.

> in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced . . . the precondition of negotiations is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked.[722]

The Court also clarified that:

> The requirement that the dispute 'cannot be settled through negotiation' could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that, as the Court noted with regard to a similarly worded provision, 'no reasonable probability exists that further negotiations would lead to a settlement' (South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 345).[723]

Moreover, another important element must be added: The requirement of a prior negotiation could be discharged if the disputing party is faced by the other party with an 'immediate and total refusal'[724] to negotiate. Such refusal closes every door to the possibility that this dispute can be settled amicably. This conclusion was reached by the ICJ in the case of the United States Diplomatic and Consular Staff in Tehran, when it deemed the Iranian refusal to 'enter into any discussion of the matter'[725] a deadlock, and therefore the United States was discharged from the negotiation requirement contained in Article XXI, paragraph 2 of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran.[726] This conclusion is logical, as otherwise, the opposing party to the disagreement would be allowed to block the other party from accessing the dispute settlement mechanism by simply refusing to engage in negotiation. This is also consistent with the Court's explanation in the North Sea

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[722] Ibid, 133 para 159; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v United States of America*), Preliminary Objections, Judgment, ICJ Reports 1998, 17, para 21.

[723] Questions Relating to the Obligation to Extradite or Prosecute (*Belgium v Senegal*), Judgment, ICJ Reports 2012, 446, para 57.

[724] Case Concerning United States Diplomatic and Consular Staff in Tehran, (n 96) 27, para 52.

[725] ibid, para 51.

[726] Treaty of Amity Economic Relations and Consular Rights between the United States and Iran, 15 August 1955, 284 UNTS 93 (entered into force 16 June 1957). Article XXI, paragraph 2 reads:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

See also NK Hevener, Diplomacy in a Dangerous World: Protection for Diplomats under International Law (Routledge 2019) 219.

Continental Shelf case of what is expected from states when they negotiate: they are obliged to negotiate with 'a view to arriving at an agreement' in a meaningful manner.[727] Therefore, a dispute cannot be settled with negotiation if its parties do not negotiate in a meaningful way, let alone if they totally refuse to negotiate in the first place.

Thus, as the ICJ explained in all of the above-mentioned cases, prior negotiation is required for the ICAO Council to have jurisdiction over a dispute. However, this requirement can be met with negotiation – or at the very least a 'genuine attempt' to negotiate – that would meet the requirement of prior negotiation if done 'with a view to resolving the dispute'.[728] If this attempt at negotiation has failed or has made no progress, or one of the disputing parties refuses to negotiate, or for any reason a deadlock is reached, then the negotiation requirement under Article 84 of the Chicago Convention is met, and therefore the ICAO Council can vest its jurisdiction over the dispute.

4.2.5 Rules for the Settlement of Differences

In performing its judicial duties concerning the settlement of disputes amongst contracting states, the ICAO Council must act in accordance with the provisions contained in Article 84 of the Chicago Convention, as well as the Rules for the Settlement of Differences (ICAO Rules).[729] The ICAO Rules were initially brought into existence on 10 September 1946 by the Interim Council of the Provisional International Civil Aviation Organization.[730] These rules then went through revision when the ICAO Council decided, at its 16th Session, to establish a working group to accomplish that mission on 21 May 1952.[731] After seven years of debate and back-and-forth discussion of amendments,[732] the ICAO Council entrusted the finalisation of the ICAO Rules to a group of legal experts appointed by the Chairman of the ICAO Legal Committee

[727] North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment, ICJ Reports 1969, 46-47, para 85 (a).

[728] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (n 702) 132, para, 157.

[729] Rules for the Settlement of Differences, approved by the ICAO Council on 9 April 1957, and amended on 10 November 1975, ICAO document 7782/2 <http://www.aviationchief.com/uploads/9/2/0/9/92098238/icao_doc_7782_-_rules_for_settlement_of_differences_-_2nd_edition_-_1976.pdf> accessed 24 May 2023.

[730] Rules Governing the Settlement of Differences between States, PICAO Doc. 2121 (C/228) (1946).

[731] Action of the Council, 16th Sess., ICAO Doc. 7314 (C/849), 26 (1952). The Rules prepared by the Secretariat can be found in ICAO Doc. C-WP/1171. Appendix A (1952). See also ICAO, Working Paper of the Secretariat submitted to the Legal Committee for consideration at its 37th Session, ICAO document LC/37-WP/3-2, 27 July 2018.

[732] See ICAO Council, 21st Sess., Doc. 7464 (C/871), 4-6 (1954); ICAO Council, 23rd Sess., Doc. 7525 (C/875), 204 (1955).

in consultation with the President of the ICAO Council.[733] In 1957, the ICAO Council finally approved the ICAO Rules presented by the legal experts at its 30th Session.[734] It should be mentioned that the drafters of the ICAO Rules tried to align them closely with the Rules of the ICJ 1946.[735]

The ICAO Rules are divided into three parts, Parts I, II and III, the importance of mentioning these parts linked to the scope of the ICAO Rules. If the settlement of disagreement between contracting states is referred to the ICAO Council related to or under Articles 84-88 of the Chicago Convention, or under Article II, Section 2 of the Air Services Transit Agreement, or under Article IV, Section 3 of the International Air Transport Agreement, then Parts I and III shall govern the settlement of that dispute.[736] Parts II and III shall govern the consideration of any complaint under Article II, Section 1 of the Air Services Transit Agreement and Article IV, Section 2 of the International Air Transport Agreement concerning actions deemed to be unjust taken by one state against another, provided both states are party to the same agreement.[737] The ICAO Rules start applying when a contracting state (the applicant) files an application along with a memorial containing specific requirements, such as the name of the applicant, as well as the name of the other contracting party with whom the dispute exists (the respondent).[738] In addition, the memorial of the applicant must contain the following:

> (c) A statement of relevant facts; (d) Supporting data related to the facts; (r) A statement of law; (f) The relief desired by action of Council on the specific points submitted; (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful.[739]

Once an application is received, the Secretary General shall verify it in terms of its conformity with the requirements of Article 2 mentioned above[740] and could even point out deficiencies in the application and request that the applicant amend it.[741] In addition, the Secretary General shall notify the respondent and send the application and its memorial to the

[733] Action of the Council, 23rd Sess., ICAO Doc. 7556 (C/877), 36 (1955).
[734] Action of the Council, 30th Session., ICAO Doc. 7818 (C/901), 33 (1957).
[735] ICAO document LC/37-WP/3-2 (n 731).
[736] ICAO Rules (n 729) art 1(1)(a)(b).
[737] Ibid, Article 1(2).
[738] Ibid, Article 2(a).
[739] ibid.
[740] Ibid, Article 3(1).
[741] ibid, Article 3(2).

respondent with an invitation to file a counter-memorial with a fixed time limit.[742] It should be noted that the ICAO Rules do not provide any time limits for the pleadings; that issue is left for the discretion of the ICAO Council – or to its president on behalf of the Council if the Council is not in session[743] – to determine with the objective of ensuring smooth and fair conduct and avoiding any delays.[744] Upon receipt of the notification from the Secretary General, the respondent has two options: either to file a counter-memorial as per Article 4 of the ICAO Rules or to file a preliminary objection challenging the ICAO Council's jurisdictional capacity to decide the case and set out its basis for such objection.[745] In the latter case, the proceedings on the merits and the time limits for the counter-memorial are suspended until the Council decides on the preliminary objection.[746] Article 5(4) obligates the ICAO Council, prior to any further steps that can be taken under the ICAO Rules, to decide on the preliminary objection. This generally takes the form of hearings in which both parties are given a platform to present their cases.[747] It must be noted that the ICAO Council decides cases referred to it by a majority vote of all of its members, which is 19 votes.[748] However, no member of the Council shall participate in the voting if it is party to the dispute.[749] The Council can decide either to accept the preliminary objections of the respondent and agree that it has no jurisdiction to decide the case or to reject the objections and rule that it has jurisdiction over the case. Regardless of the outcome of the ICAO Council's decision, both the applicant and the respondent have the right to appeal either to an ad hoc arbitral tribunal agreed to by the disputing parties or to the ICJ according to Article 84 of the Chicago Convention and Article 18 of the ICAO Rules. However, the Council shall be notified of such an appeal within 60 days from the receipt of the Council decision.[750] The proceedings before the ICAO Council will then be suspended until the appeal is decided by either the ICJ or the ad hoc arbitral tribunal, whose decision shall be final and binding.[751] On the other hand, if no appeal is made by the applicant, then the decision of the Council accepting the preliminary objection will result in

[742] ibid.
[743] ibid, Article 28(3).
[744] ibid, Article 28(1).
[745] Ibid, Article 5(1).
[746] Ibid, Article 5(3).
[747] Ibid, Article 5(4).
[748] Chicago Convention (n 42) Articles. 84, 52, 53 and ICAO Rules (n 729) Article 15.
[749] ibid.
[750] Chicago Convention (n 42) Article 84 and ICAO Rules (n 729) Article 18(2).
[751] Chicago Convention (n 42) Article 86.

the case being closed. In addition, if no appeal is made by the respondent, then the decision of the Council rejecting the preliminary objection will result in the respondent being required to file a counter-memorial as per Article 4 mentioned above.

Once the respondent submits its counter-memorial, the Council will allocate the consideration of the case to a committee[752] consisting of five individuals[753] who are members of the ICAO Council but are not involved in the disagreement.[754] This committee is assigned a set of functions to carry out on behalf of the ICAO Council.[755] For instance, the committee is assigned to examine all submitted documents, conduct the hearings of the arguments presented from both parties and present to the Council a report of the proceedings and proposed actions to be taken (the decision) by the Council.[756] After the Council considers the report of the committee, the Council shall render its decision on the case. This decision must be made in writing, containing a list of the participating members with a statement that illustrates whether the decision is reached unanimously or by majority vote, and if by majority vote, it shall identify who voted in favour or against or abstained.[757]

4.2.6 Previous cases referred to the ICAO Council under Article 84

Throughout its history, the ICAO Council has been asked to decide disputes in seven cases, including Qatar's application against the blockading states, none of which ended with a decision by the ICAO Council on the merits of the case. The first case brought before the Council was between India and Pakistan in April 1952.[758] It started when India submitted to the ICAO Council a complaint accusing Pakistan of violating Articles 5, 6 and 9 of the Chicago Convention, as well as violating its obligations under the International Air Transit Agreement.[759] This was due to Pakistan's refusal to allow Indian aircraft engaged in

[752] The Council might conduct the proceedings by itself, although such instance is not likely. See Buergenthal (n 274) 185.
[753] That does not preclude the Council or the committee itself from seeking expert opinion from outside the Committee, whether 'individual, body, bureau, commission, or other organization', as stated in Article 8(1) of the ICAO Rules. This to some extent is deemed to overcome the restriction that stipulates that the members of the Committee must only be those who are members of the ICAO Council, which would enable the Council to benefit from those skilled and qualified individuals outside the Council. It even permits the Council to apply for an advisory opinion from the ICJ.
[754] ICAO Rules (n 729) art 6 (2).
[755] Ibid, Article 13.
[756] ibid.
[757] Ibid, Article 15.
[758] PS Dempsey, *Public International Air Law* (William S Hein 2017) 700.
[759] R Gariepy and D Botsford, 'The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery' (1976) 42 Journal of Air Law and Commerce 357.

commercial air services between India and Afghanistan to fly over its western territorial air space.[760] Pakistan based its actions on the grounds that these flights were operating over an air space that Pakistan had declared to be a prohibited area under Article 9 of the Convention.[761] India requested that the Council assert that Indian aircraft were entitled to operate scheduled air services between India and Afghanistan above West Punjab and ask Pakistan to refrain from impeding the operation of air services of Indian aircraft 'between Delhi and Kabul over the Delhi-Peshawar-Kabul route, on the route between Bombay and Ahmedabad and Kabul via Karachi-Zahidan and Kandahar, and by any other commercially feasible route'.[762] It should be noted that this dispute arose before the enactment of the ICAO Rules, so the Council established a working group to consider what steps should be taken and procedures followed.[763] After a series of consultations between the parties concerned and the group, a conclusion was reached that both parties were willing to negotiate with the intention of settling the dispute.[764] And this was exactly what happened. Both parties informed the ICAO Council that they had reached an amicable settlement, and the case was ended with both countries exchanging notes constituting an agreement between them.[765] The role of the ICAO Council during this dispute was more like that of a mediator than an adjudicator, as the merits of the matter were not formally touched upon at all.[766]

The second case brought before the ICAO Council was a dispute between the United Kingdom and Spain in 1967. In this case, the United Kingdom contested the legality of Spain's establishment of a prohibited area in the vicinity of Gibraltar.[767] No decision was made in this

[760] Mainly the first and second traffic rights safeguard by the International Air Services Transit Agreement and the Chicago Convention, see five freedoms of traffic rights (n 64).
[761] The 7th Session of the Assembly, Report of the Council, ICAO Doc. 7367 (A7-P/1), 74-76 < https://www.icao.int/assembly-archive/Session7/A.7.REP.3.P.EN.pdf> accessed 30 May 2023.
[762] Ibid, 74.
[763] ICAO Council, 16th Sess., Doc. 7291 (C/845), 11 (1952). ICAO Doc. C-WP/1192 (1952). See also P Dempsey, 'The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Resolution' (1987) 52 Journal of Air Law and Commerce 562.
[764] ICAO Council, 16th Sess., Doc. 7291 (C/845) 164.
[765] Exchange of Notes Constituting an Agreement Between the Government of India and the Government of Pakistan Regarding the Operation of Air Services to Afghanistan by Indian Aircraft (1953) INTSer 2 available at <http://www.commonlii.org/in/other/treaties/INTSer/1953/2.html> accessed 30 May 2023. See also ICAO Council, 18th Sess., Doc. 7361 (C/858) 15-26 (1953).
[766] Buergenthal (n 274) 139.
[767] The UK based its position on Article 9 of the Chicago Convention.

case either, as both parties requested that the ICAO Council defer the consideration of the matter *sine die*.[768]

The third case occurred again between India and Pakistan in 1971, when India suspended all flights over its territory by Pakistan civil aircraft due to an alleged hijacking incident.[769] Pakistan subsequently initiated an application alleging that India had breached its obligation under Article 84 of the Chicago Convention and under Section 2 of Article II of the Transit Agreement and in accordance with Article 2 ICAO Rules. It also made a complaint under Section 1 of Article II of the Transit Agreement and in accordance with Article 21 of the ICAO Rules.[770] India submitted preliminary objections, asserting that the ICAO Council did not have the jurisdiction to decide the dispute, as the matter was not related to a dispute over the interpretation of the Convention but to the suspension of the treaties.[771] However, the Council rejected India's preliminary objections, which led India to appeal to the ICJ.[772] The ICJ upheld the decision of the Council and reaffirmed the jurisdiction of the Council to determine the dispute.[773] However, the case ended through settlement between the parties in 1976, and they both informed the Council of their discontinuation of the proceedings.[774]

The fourth case occurred in 1996, when the United States closed its airspace to Cuban aircraft, preventing them from overflight to and from Canada.[775] Cuba submitted its application in accordance with Article 84, asking for the intervention of the ICAO Council to examine the US measures, which caused the Cuban air carrier operational and financial hardship, and to ask the United States to refrain from its actions.[776] After hearings and going through the process

[768] See Annual Report of the Council to the Assembly for 1969, ICAO Doc. 8869 (A18-P/2), 133 (1970) available at <https://www.icao.int/assembly-archive/Session18/A.18.REP.2.P.EN.pdf> accessed 30 May 2023.
[769] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, ICJ Reports 1972, 51, para, 10. See also GF Fitzgerald, 'The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council' (1975) 12 Canadian Yearbook of International Law/Annuaire canadien de droit international 153.
[770] Appeal Relating to the Jurisdiction of the ICAO Council (*India v Pakistan*), Judgment (n 769) 50, para 9. See also ICAO Council, 74th Session, Minutes of the Second Meeting, ICAO Doc. 8956-C/1001 (27 July 1971).
[771] Appeal Relating to the Jurisdiction of the ICAO Council (*India v Pakistan*): Memorial of the Government of India International Court of Justice (1971) 26. See also Gariepy (n 759) 357.
[772] ICAO Council – 74th Session, Minutes of the Fifth Meeting, ICAO document 8987-C/1004, 28 July 1971.
[773] Appeal Relating to the Jurisdiction of the ICAO Council (*India v Pakistan*), Judgment (n 769) 46.
[774] AS Bhasin, *India-Pakistan Relations 1947-2007: A Documentary Study* (Geetika Publishers 2012) CXLV 153. See also Gariepy (n 759) 357.
[775] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 11, ICAO Council, *Cuba v United States*, Memorial of Cuba <https://www.icj-cij.org/public/files/case-related/173/173-20190225-WRI-01-00-EN.pdf> accessed 6 October 2021.
[776] ibid.

of ICAO Rules, an agreement was reached through the president of the ICAO Council, who acted as a mediator between the concerned parties.[777]

The fifth case brought before the ICAO Council acting in its judicial capacity under Article 84 was between the United States and 15 EU member states in 2000. The issue was in relation to the adoption of the European Union of a new regulation, known as 'hushkit' regulation, aimed at reducing the noise of aircraft engines.[778] This regulation had a considerable effect on almost all US air carriers, preventing them from operating any of their old aircraft in EU air space.[779] The 15 EU states, being the respondents, submitted their preliminary objections to the Council's jurisdiction to decide the dispute. Nevertheless, the Council rejected these preliminary objections, affirming its jurisdiction over the dispute, which led to the hearings and the continuation of the application of the ICAO Rules.[780] Eventually, the Council appointed its president to act as mediator, which resulted in the settlement being reached: the EU replaced its regulation, and consequently the United States withdrew its complaint.[781]

The sixth case occurred in 2016 between the United States and Brazil in the aftermath of a 2006 collision over Brazil between a Brazilian aircraft and a US aircraft; Brazil alleged that US actions were not consistent with Article 12.[782] As the respondent, the United States filed a preliminary objection urging the Council to dismiss the application as time barred as the incident had happened ten years previously.[783] However, the Council rejected the preliminary

[777] Dempsey (n 758) 709-710.
[778] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 13, ICAO Council, 161st Session, Summary Minutes of the Fourth Meeting, ICAO Doc. C-MIN 161/4 (15 Nov 2000).
[779] K Bown, 'The International Civil Aviation Organization Is the Appropriate Jurisdiction to Settle Hushkit Dispute between the United States and the European Union' (2002) 20 Penn State International Law Review 465. See also Dempsey (n 758) 711.
[780] ICAO Council, 161st Session, Decision of the Council on the Preliminary Objection in the Matter "United States and 15 European States", Doc. C161/6 November 2000.
[781] Department Of State. The Office of Electronic Information B of PA, 'US Withdrawal of Complaint at the ICAO' <https://2001-2009.state.gov/r/pa/prs/ps/2002/11096.htm> accessed 3 May 2023.
[782] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 30, Comments by the Federative Republic of Brazil In Re the Preliminary Objection of the United States of America relating to the Disagreement arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944, 19 May 2017
[783] Ibid, Annex 29, Preliminary Objection of the United States In Re the Application of the Federative Republic of Brazil Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944, 24 March 2017.

objection by the United States in 2017,[784] and until today, the parties are still in ongoing negotiation under the mediation of the Council.[785]

As indicated above, of the cases brought by the ICAO Council under Article 84 of the Chicago Convention, none ended up with the Council touching or rendering a decision on the merits of the disputes.[786] Even today, the Council plays the role of mediation rather than a judicial role, which has led many authors to question the Council's judicial functions and even to perceive it as a failure.[787] One of these is Professor Michael Milde, the former director of ICAO's Legal Bureau, who stated that the ICAO Council:

> cannot be considered a suitable body for adjudication in the proper sense of the word—i.e. settlement of disputes by judges and solely on the basis of respect for law. The Council is composed of States (not independent individuals) and its decisions would always be based on policy and equity considerations rather than on pure legal grounds...truly legal disputes...can be settled only by a true judicial body which can bring into the procedure full judicial detachment, independence and expertise. The under-employed ICJ is the most suitable body for such types of disputes.[788]

Others argue that even though the Council has never adjudicated a dispute and rendered a decision on its merits, this does not necessarily mean that the ICAO Council is unable and insufficient to perform judicial functions.[789] Furthermore, though the composition of the

[784] ICAO Council – 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO Document C-MIN 211/10, 11 July 2017, 1-3, 15-16.
[785] See Annual Report of the Council to the Assembly for 2021 available at 25 < https://www.icao.int/annual-report-2021/Documents/Supplement_en.pdf> accessed 04 June 2023.
[786] Dempsey (n 758) 736-737.
[787] GS Sanchez, 'The Impotence of the Chicago Convention's Dispute Settlement Provisions' (2010) 10 Issues in Aviation Law and Policy 35; J Bae, 'Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication' (2013) 4 Journal of International Dispute Settlement 81.
[788] Michael Milde, 'Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)', in *Settlement of Space Law Disputes: The Present State of the Law and Perspectives of further Development: Proceedings of an International Colloquium, Munich, 13 & 14 September 1979* (Karl-Heinz Böckstiegel ed, Heymann 1980) 87-89. See also PS Dempsey, 'Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation' (2004) 32 Georgia Journal of International & Comparative Law 302; L Zhang, 'Introduction to the Forums in Resolving International Aviation Disputes Special Volume: Selected Papers Presented at the ILA 78th Biennial Conference Sydney, 19-24 August 2018' (2018) 25 Australian International Law Journal 201.
[789] Gariepy (n 759) 357-358. JCS de Lacerda, 'A Study about the Decision of the I.C.A.O. Council and the Admissible Appeals and Their Effects Air Law' (1978) 3 Annals of Air and Space Law 219.

Council is political, the difficulty can be resolved because the Council only addresses issues with purely technical aspects relating to the dispute while avoiding political pitfalls.[790]

However, it is clear that the Council prefers the mediation and the use of good office roles over being a judicial panel for the following reasons: First, the council members represent states who prefer to use diplomatic channels rather than adjudication to settle their differences.[791] Second, if the council relies on the adjudication of this dispute rather than on mediation, it will take considerable time to settle disputes, so it is a time-consuming and impractical solution, not just for the applicant but also for the respondent and the entire organisation. In addition, mediation is more advantageous to states, as it works faster and is beneficial to all parties.[792] Moreover, assuming that the council uses the adjudication process, touches the merits of the matter and renders a decision accordingly, what would happen? Most likely the states disadvantaged by the decision will appeal to either an ad hoc tribunal or to the ICJ, whose decision will be binding and final. In addition, the Council is already fully equipped to deal with many tasks and issues, and choosing the adjudication path would lead to lengthy proceedings. So, to the Council, it is more reasonable and practicable and wiser to rely on mediation and negotiation other than acting as a judicial tribunal. Therefore, the ICAO Council judicial functions are incontrovertible, as the Convention itself bestows upon it such ability, and whether the Council uses its discretion and chooses not to use it is a separate issue that does change this fact.

4.2.7 Article 54(n) versus Article 84 of the Chicago Convention

As stated above, one of the mandatory functions of the ICAO Council outlined in Article 54 is Section (n), which states that the Council shall 'consider any matter relating to the Convention which any contracting State refers to it'.[793] On strict interpretation, this function seems to be

[790] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 665. Although the ICAO always says that it does not get involved in political issues, its history of conduct contradicts that stand. This was clearly observed at the 15th Session of the ICAO Assembly in 1965, at which it adopted Resolution A15-7, Condemnation of the Policies of Apartheid and Racial Discrimination of South Africa. South Africa was not allowed to attend any meetings held by ICAO because of its discriminatory policies; however, no matter how horrible these policies were, they were internal political issues of a state and had nothing to do with the technicality that ICAO boasts about. See also A18-4: Measures to Be Taken in Pursuance of Resolutions 2555 and 2704 of the United Nations General Assembly in relation to South Africa at 1-25 1-26 <https://www.icao.int/assembly-archive/Session29/A.29.RESOL.9602.EN.pdf> accessed 07 June 2023.

[791] Ibid.

[792] Sanchez (n 787) 31.

[793] Chicago Convention (n 42) Article 54(n).

broad enough to cover any issues related to the Convention, whether technical or not, encompassing even matters that fall under Article 84.[794] On the face of it, this seems to be a conflict of provisions to both states and the Council. Article 84 stipulates that it can be invoked only for disputes that cannot be settled through negotiation, while Article 54(n) states no such condition. So, can this be regarded as an escape clause for states that do not want negotiation?

The Secretary General of the Council gave an answer to this dilemma, stating that there are differences between Articles 54(n) and 84 of the Chicago Convention. For instance, Article 54(n) could be related to a dispute; however, this dispute is not 'part of the process for the settlement of disputes provided in Article 84'.[795] The distinction lies in the procedures applied to each article. The process for invoking Article 54(n) is governed by the Rules of Procedure for the Council, which manage the Council's general operations and decision-making. These rules facilitate urgent decision-making, allowing the Council to address immediate concerns related to the Convention.[796] On the other hand, Article 84 triggers the Rules for the Settlement of Differences, which are designed to handle formal disputes between states concerning the interpretation or application of the Convention. This process is more formal and involves detailed legal proceedings, including negotiations, hearings, and binding determinations.[797] Also, Article 54(n) deals with matters that are considered top-urgent items that need the intervention of the ICAO Council to determine the appropriate actions to be taken, while Article 84 deals with nonurgent matters; therefore, the requirements for the provisions are different.[798] Although this explanation is persuasive, it does not entirely resolve the ambiguity in terminology within the Convention, as Article 54(n) still appears broad in

[794] Abeyratne, Convention on International Civil Aviation: A Commentary (n 47) 666.
[795] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 34, item under Article 54(n) of the Convention on International Civil Aviation – Request of the State of Qatar, ICAO Council – 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO Document C-MIN 211/10, 11 July 2017.
[796] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 15, ICAO Council, Rules of Procedure for the Council, ICAO Doc. 7559/10 (2014). These rules govern the day-to-day functions of the Council and are specifically designed for dispute settlement.
[797] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 34, item under Article 54(n) of the Convention on International Civil Aviation – Request of the State of Qatar, ICAO Council – 211th Session, Summary Minutes of the Tenth Meeting of 23 June 2017, ICAO Document C-MIN 211/10, 11 July 2017, 1547.
[798] This includes memorial and counter-memorial requirement and preliminary objections, etc.

scope. If the Secretary General's interpretation is accepted by consensus among ICAO members, an amendment to clarify these provisions may be necessary.

4.2.8 Conclusion

The ICAO is a specialised UN agency exclusively authorised to carry out purely technical and professional operations in international civil aviation. The ICAO consists of two main bodies: the Assembly, which involves all of the ICAO contracting states, and the Council, which is composed of 36 members. The main objectives of the ICAO are derived from the Preamble to the Chicago Convention, which states, among other things, that international civil aviation should 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'.[799] In achieving this, the Chicago Convention set out a list of objectives in Article 44, as well as sets of functions in Article 54, empowering the ICAO Council with economic, environmental, technical, administrative, supervisory, law-making and juridical functions covering a wide range of fields within civil aviation. Two of these functions are of great relevance to this research: the Council's law-making power and judicial function. The law-making power of the ICAO Council lies in its ability to prescribe civil rules of conduct. This is reflected in Article 54(l), the adoption of international standards and recommended practices and their designation as Annexes to the Convention. The judicial function of the Council lies in its ability to decide disputes among the member states of the ICAO. This function is derived from Chapter XVIII, Articles 84-88, upon the fulfilment of four conditions for the Council to exercise jurisdiction over a dispute. First, the existence of disagreement between the members of the ICAO. Second, the disagreement must be related to the interpretation or application of the Chicago Convention and its Annexes. Third, only contracting states concerned in the disagreement can invoke Chapter XVIII and request the adjudication of the Council. Finally, before invoking the dispute-settlement provisions of the Convention, the contracting states must first have attempted to settle the dispute by themselves through negotiation. The ICAO Council, in performing its judicial duties, must act in accordance with the provisions contained in Article 84 of the Chicago Convention, as well as the ICAO Rules. Throughout its history, the ICAO Council has been asked to decide disputes in seven cases, none of which ended with a decision by the ICAO Council on the merits of the case. It seems

[799] Chicago Convention (n 42) Preamble.

obvious that the Council prefers mediation and the use of good office roles over being a judicial panel. However, the fact that the Council has never decided a dispute and rendered a decision on the merits does not necessarily mean the inability and insufficiency of the ICAO Council judicial functions, as the Convention itself bestows upon it such ability. Whether the Council has chosen in its discretion not to use that ability is a separate issue that does not change such fact. Finally, the Council should exercise its functions and propose an amendment to Article 54(n) to solve the dichotomy in its terminology, as the current wording seems to be contradictory and confusing.

4.3 Blockading states' grounds of appeal before the ICJ

As stated earlier, the blockading states did not accept the decision rendered by the ICAO Council when it rejected their preliminary objections, instead using their right of appeal safeguarded by Article 84 of the Chicago Convention and submitting a joint application to the ICJ on 4 July 2018. Their application was constructed on three grounds of appeal. First, they asserted that the Council had committed procedural irregularities during its decision-making process. Second, they asserted that the Council had failed to accept their first preliminary objection concerning its jurisdiction. Third, they asserted that Qatar failed to comply with the precondition negotiation set out in Article 84 of the Chicago Convention, as well as the requirements of Article 2(g) of the ICAO Rules. This section will address each of these grounds in depth so that a conclusion can be drawn as to whether the ICAO Council decision should be upheld or rejected.

4.3.1 Second ground of appeal[800]

In their second ground of appeal, the blockading states asserted that the ICAO Council 'erred in fact and in law in rejecting the first preliminary objection made [by them] in respect of the competence of the ICAO Council'.[801] The insinuation here is that the dispute amongst the parties required the Council to address a question that falls outside its jurisdiction, namely the lawfulness of the countermeasures taken against Qatar. The gist of their arguments can be summarised in two main points: First, the jurisdiction of the ICAO Council is limited to matters relating to the interpretation or application of the Chicago Convention, while the real issue between the disputing parties is related to a larger dispute that is beyond ICAO Council

[800] The reason the first ground of appeal is discussed at last because addressing such issue entails discussing second and third of grounds of appeal first.
[801] Joint Application Instituting Proceedings, (n 642) 14, para 30.

jurisdiction.[802] Second, even if the Court were to reject the blockading states' first preliminary objection and assert the jurisdiction of the ICAO Council over the matter, the ICAO Council should have regarded Qatar's claim as inadmissible on the basis of its incompatibility with 'judicial propriety'.[803] Concerning the first point, the blockading states argued that the scope and mandate of the Council are clear in matters relating to the interpretation or application of the Chicago Convention and its Annexes. This reflects the party's consent, which sets the limitation to the jurisdiction of the Council. In other words, the jurisdiction of a court or tribunal is based on the principle of the consent of the parties and is limited to the extent it is accepted by them.[804] If Article 84 of the Convention contains a limitation, this limitation constitutes the consent of the parties of the Convention, and acting beyond it would be considered *ultra vires*.[805] Moreover, the ICAO is a UN agency specialising in international civil aviation, and per the principle of speciality,[806] the jurisdiction of the Council is confined within this particular field of specialisation, as articulated in Article 84. As such, the ICAO Council cannot exceed this limitation and decide matters not related to its specialisation.[807] The ICJ stated that international organisations do not have general competence like states, and they are governed by the principle of speciality, which means that 'they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'.[808] For this reason, the blockading states claimed that the role of the ICAO is limited to the civil aviation sector and, more specifically, to the aims and objectives set out in Article 44, which focuses on air navigation, the safety of civil aviation, and the promotion of international civil aeronautics.[809] They concluded that the jurisdiction and mandate given to the ICAO Council under Article 84 of the Chicago Convention:

[802] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 120.
[803] Ibid, 156.
[804] Armed Activities on the Territory of the Congo (n 700) para 88, 39.
[805] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 120.
[806] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, 79-para 26, 80.
[807] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 123-127.
[808] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (n 806)78, para 25.
[809] This is just four of the nine objectives of Article 44.

> must, in accordance with its express terms, and in light of the specialized functions of ICAO, be interpreted as being strictly restricted to matters relating to the interpretation and application of the Chicago Convention. Conversely, the jurisdiction of the ICAO Council under Article 84 of the Chicago Convention self-evidently does not extend to matters falling outside that narrow compass.[810]

However, the blockading states omitted an important meaning of the principle of speciality, which the ICJ stressed in its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*. That is, such an organisation exists with a:

> special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.[811]

This means that the principle of speciality does not limit the functions of the ICAO Council, nor does it deprive the Council of its judicial function under Article 84.The interaction between the principle of specificity and *compétence de la compétence* is crucial in understanding the ICAO Council's authority in this case. While the principle of specificity restricts the Council's functions to civil aviation matters defined by the Chicago Convention, the principle of *compétence de la compétence* allows the Council to determine the extent of its own jurisdiction. This principle, acknowledged in international law and reinforced by the ICJ in cases like *Nottebohm*, establishes that international tribunals have the inherent authority to assess the boundaries of their jurisdiction, even when broader issues like countermeasures are involved.[812] As such, the ICAO Council can evaluate whether disputes relate to the interpretation or application of the Convention, ensuring it does not exceed its specialized mandate under Article 84. This dual approach balances adherence to the principle of specificity with the Council's ability to exercise its judicial capacity fully, thereby preserving its authority within the specialized domain of international civil aviation law. The ICAO specialises in international civil aviation, and in this field the Council is empowered to exercise its

[810] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 127.
[811] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (n 806) 78, para 25. See also Jurisdiction of the European Commission of the Danube, Advisory Opinion, PCIJ, Series B, No. 14, 64.)
[812] Nottebohm case (Preliminary Objectio~z) , Judgînent of November 18th, 1953: I.C.J. Reports 1953, 119-120. See also, Heiskanen V, 'Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction' (1994) 5 Finnish Yearbook of International Law 18-22.

functions, including the judicial function, to the full extent, as long as these functions relate to the interpretation or application of the Chicago Convention and its Annexes (which is the area of the speciality of the ICAO). Also, the argument limiting the Council's functions to only four aims and the objectives of Article 44 seems very strange, as they omitted the rest of the aims set out in Article 44, namely, '(f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines; (g) Avoid discrimination between contracting States'.[813] Therefore, the Council's jurisdiction over the air restrictions imposed by the blockading states serves these aims; this is also in line with the Preamble to the Chicago Convention.[814] Moreover, the ICJ made it clear in the 1972 ICAO Council Appeal case that the ICAO Council is empowered to exercise its judicial functions under Article 84 to the full extent of its scope of jurisdiction.[815] Therefore, neither Article 84 nor the principle of speciality nor the aims and objectives of the Chicago Convention limit the Council jurisdiction to deciding disputes relating to the interpretation or application of the Chicago Convention and its Annexes. This understanding is a common platform for the ICJ, the Council, Qatar and even the blockading states. However, the blockading states were trying to argue that Qatar's claims were related not to the area of speciality of the ICAO but to the wider picture of countermeasures. Can this defence, therefore, have any significance in depriving the Council of jurisdiction over this dispute?

It is worth noting that the ICJ rejected a similar argument in the 1972 ICAO Council Appeal case, when India claimed that its disagreement with Pakistan was related not to the interpretation or application of the Chicago Convention but to a wider matter outside the scope of the ICAO Council jurisdiction.[816] The ICJ noted the danger of accepting such a notion, which would result in the respondent being allowed to have control over the competence of

[813] Chicago Convention (n 42) Article 44.

[814] The Preamble stated the main purpose of the Convention:

> . . . 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.

[815] Appeal Relating to the Jurisdiction of the ICAO Council (*India v Pakistan*), Judgment (n 769) 60-61, para 26.

[816] Memorial of the Government of India International (n 771), paras. 68-85. The matter in India's view concerned whether the Chicago Convention was validly suspended or terminated between Pakistan and India.

the Council or the tribunal by simply relying on the defence of the merits.[817] The Court affirmed that the jurisdiction of the Council must rely on the character of the disagreement raised before it, not on those defences on the merits or any other issues that might be relevant only after the settlement of the jurisdictional issues.[818] In other words, in the case of *India v Pakistan*, the competence of the Council depends on the submission of Pakistan; if it were disclosed that the disagreement related to the interpretation or application of the Chicago Convention, then, the Council is prima facie competent. Also, the Council cannot be deprived of jurisdiction simply because of considerations alleged to fall outside the scope of the Chicago Convention.[819] This conclusion of the Court was very logical, as accepting such an argument would lead to the whole of the international dispute settlement system being undermined by just casting countermeasures defence or any other type of self-help defence which can somehow be abused. Furthermore, the Court has many criteria for the identification of the subject matter of a disagreement, one of which is that the identification of the subject matter of a disagreement depends on the 'facts the applicant identifies as the basis of its claim'.[820] Therefore, if the facts identified by the applicant relate to the interpretation or application of the Convention, then the dispute falls squarely within the Council's jurisdiction.

Another point that the Court relies on when identifying the subject matter of the dispute is the object of the claim stated by the applicant, which determines the competence of the Council, the Courts, and other international tribunals.[821] So, when assessing Qatar's application and memorial before the Council, it seemed that Qatar did affirm in both law and

[817] Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan), Judgment (n 769) 60-61, para 27. See also Rose C, 'Appeal Relating to the Jurisdiction of the ICAO Council' (2021) 115 The American Journal of International Law 303.

[818] Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan), Judgment (n 769) 60-61, para 27.

[819] ibid. This was the position of the Council when it rejected India's preliminary objection. See Counter-Memorial of the Government of the State of Qatar (n 17) Annex 3, ICAO Council, Action of the Council: 74th Session, ICAO Doc. 8987-C/1004 (8 July 1971, 27-29 July 1971, 28 September–17 December 1971) 43.

[820] Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v Chile*), Preliminary Objections, Judgment, ICJ Reports 2015, para 26. See also Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021, para 53.

[821] Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan), Judgment (n 769) para 28; Aegean Sea Continental Shelf (*Greece v Turkey*), Judgment, ICJ Reports 1978, para, 83. Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v Chile*) (n 820) para 33. In the matter of an arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea (*Republic of the Philippines v People's Republic of China*), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (29 Oct 2015), para,152-153. In the matter of the Chagos Marine Protected Area Arbitration (*Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland*), PCA Case No. 2011-03, Award (18 Mar 2015), para 158.

fact that the disagreement related to the interpretation or application of the Chicago Convention and its Annexes. As for the facts, Qatar stated in its application what restrictive air space measures the blockading states took, such as the denial of all Qatar-registered aircraft from flying to or from their airports, national territorial airspace and FIRs that fall under their control, even on the high seas.[822] With regard to law, Qatar stated that these facts 'violated the leading spirit of the Chicago Convention proclaimed in the Convention's Preamble, as well as Articles 2, 3bis, 4, 5, 6, 9, 12, 37 and 89 of the Convention'.[823] Therefore, a disagreement related to measures taken by members of a treaty that were alleged to violate this treaty is clearly a disagreement relating to the interpretation or application of this treaty. This means that the pleadings of Qatar and the stated object of its application before the Council[824] made it clear that the disagreement was within the jurisdiction of the Council, as it was relating to the interpretation or application of the Convention.

The other part of the second ground of appeal was that, even if the Court were to reject their first preliminary objection and assert the jurisdiction of the ICAO Council over the matter, the ICAO Council should have regarded Qatar's claim as inadmissible on the basis of its incompatibility with 'judicial propriety'.[825] The blockading states meant here that there are occasions when the Court, in principle, may have jurisdiction over a disagreement; however, the existence of some factors or 'compelling reasons'[826] may prevent the Court from proceeding to decide a case due to judicial impropriety.[827] These reasons can include broader political sensitivities, potential conflicts with ongoing diplomatic negotiations, and the risk of

[822] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 23, Application (A) and Memorial of the State of Qatar Relating to the Disagreement on the Interpretation and Application of the Convention on International Civil Aviation (Chicago, 1944), 30 October 2017.
[823] Counter-Memorial of the Government of the State of Qatar (n 17) 63.
[824] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 23, Application (A) 2-3.
[825] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 156.
[826] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 200, Dissenting Opinion of Judge Bennouna, 501, para 5.
[827] K Polonskaya, 'International Court of Justice: The Role of Consent in the Context of Judicial Propriety Deconstructed in Light of Chagos Archipelago' (2019) 18 The Law & Practice of International Courts and Tribunals 189. See also GI Hernández, The International Court of Justice and the Judicial Function (Oxford University Press 2014) 78.

undermining the neutrality or legitimacy of the adjudicating body.[828] For instance, in cases like the *Kosovo Advisory Opinion*, certain ICJ judges highlighted that judicial propriety could necessitate restraint when a decision risks exacerbating geopolitical tensions or interfering with peaceful dispute resolution efforts.[829]The blockading states argued that the ICAO Council's involvement in the broader context of the GCC crisis and countermeasures presented such compelling reasons. They claimed that addressing Qatar's claims within the aviation-focused mandate of the ICAO Council would improperly entangle the Council in non-aviation matters, potentially compromising its judicial neutrality. In their memorial, the blockading states succeeded in citing many cases where the doctrine of judicial propriety was established;[830] however, they could not establish the connection between this principle, these cases and the dispute at hand. As clearly established in the previous section, the current disagreement was within the jurisdiction of the Council as it related to the interpretation or application of the Convention. For this reason, the adjudication of the Council is in line with judicial propriety, not the other way around.

Therefore, on 4 July 2020, the ICJ rejected the second ground of appeal and reaffirmed that the dispute between the parties before the Council related to the interpretation or application of the Chicago Convention.[831] It also stated that the fact that the dispute arose in a wider context did not affect the jurisdiction of the Council under Article 84 of the Convention. Finally, concerning judicial propriety, the Court affirmed its non-applicability in this dispute, as the jurisdiction of the Council is not affected by the fact that the dispute concerns matters outside civil aviation. Therefore, the Council did not err when it rejected the first preliminary objection from the standpoints of both jurisdiction and admissibility.

4.3.2 Third ground of appeal

The third ground of appeal challenged the jurisdiction of the ICAO Council on the basis of Qatar's alleged failure to comply with the precondition negotiations set out in Article 84 of

[828] Nicolaos Strapatsas, 'Case Note on the ICJ Advisory Opinion on the Legal Consequences of the Construction of the Wall in Occupied Palestinian Territory Section II: The Separation Fence' (2005) 35 Israel Yearbook on Human Rights 258.

[829] Dissenting Opinion of Judge Bennouna (n 826) para 1-6, and 15-24.

[830] Such as Northern Cameroons (*Cameroon v United Kingdom*), Preliminary Objections, Judgment, ICJ Reports 1963, 29. Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, PCIJ, 1929, Series A, No. 22, 15. Haya de la Torre (*Colombia v Peru*), Judgment, ICJ Reports 1951, 79.

[831] 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, ICJ Reports 2020, 82.

the Chicago Convention, as well as the requirements of Article 2(g) of the ICAO Rules. For that reason, the Council erred when it rejected the second preliminary objection. As previously discussed, for the ICAO Council to exercise jurisdiction over a dispute, a set of preconditions must be met, one of which is that the dispute is irresolvable through negotiations.[832] On this ground, the blockading states claimed that Qatar failed to demonstrate that it had made a genuine attempt to negotiate air space restrictions before its submission to the ICAO Council.[833] The topic of the requirements of negotiations and what constitutes a negotiation that satisfies the requirements of both Article 84 and Article 2(g) of the ICAO Rules has been thoroughly discussed. However, briefly, for the sake of coherence, Article 84 requires at least a genuine attempt to negotiate, even if the negotiation has not actually taken place. Also, this attempt may not even be required if the disputing party is faced with 'immediate and total refusal' to negotiate with the other party.[834] For this reason, this section will address whether Qatar met such a requirement before its submission, which will determine the fate of the third ground of appeal.

To start with, Qatar submitted to the ICAO Council a record in which it detailed its claimed attempt to negotiate with the blockading states on numerous occasions in different fora, such as direct means, at the ICAO, at the World Trade Organization[835] and through the facilitation of third-party states. As for the direct means, Qatar claimed that the closure of the blockading states' embassies in Qatar, the severing of all diplomatic relations and the expelling of all Qatari diplomats from their territories constituted a huge obstacle for it to overcome in initiating negotiations.[836] These measures coincided with statements from the blockading

[832] See section 2.2.2.b.

[833] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 172. See R Abeyratne, 'Decision of the International Court of Justice on the Qatar Issue and the ICAO Council' (2020) 20 Issues in Aviation Law and Policy 20.

[834] Case Concerning United States Diplomatic and Consular Staff in Tehran, (n 94). 27, para 52.

[835] This could be seen when Qatar asked the blockading states to engage in a consultation regarding the dispute. See Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 25, ICAO Response to the Preliminary Objections (A), Exhibit 11, World Trade Organization, Saudi Arabia — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS528/1 (4 Aug 2017), para 8(i); Exhibit 12, World Trade Organization, Bahrain — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS527/1 (4 Aug 2017), para 8(i); Exhibit 13, World Trade Organization, United Arab Emirates — Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights, WT/DS526/1 (4 Aug 2017), para 8(i); Exhibit 14, Letter from UAE, Bahrain, and Saudi Arabia to Junichi Ihara, Chairman of the WTO Dispute Settlement Body (10 Aug 2017), 2.

[836] Counter-Memorial of the Government of the State of Qatar (n 17) 96.

states that they refused to negotiate.[837] To top it off, they issued 13 demands, which they characterised as non-negotiable, and they made acceptance of those demands the condition for any negotiation.[838] The blockading states' position was seen as a refusal to negotiate unless Qatar complied with these non-negotiable conditions. Such a stand could be translated as an 'immediate and total refusal' to negotiate, which may discharge Qatar from the negotiation requirement. On the other hand, Qatar repeatedly claimed that it called publicly for a dialogue and negotiation of the disagreement with openness and unconditionality. This came from the top level, the Amir of Qatar, at the UN General Assembly, where he called for open, unconditional negotiations with the attitude to solve the dispute by compromise by all parties on a common platform.[839]

As for Qatar's attempt to negotiate at the ICAO level, Qatar claimed that it tried to engage with the blockading states with the help of the ICAO Council,[840] but it was faced with a refusal. This can be seen in the 211th Session, when the Council tried to discuss the request of Qatar under Article 54(n) of the Convention, but the blockading states refused to even discuss the matter on the basis that this was a political dispute in which the ICAO had no role.[841] Also, during the Council's extraordinary session, the blockading states asked the Council to defer the discussion regarding the dispute with Qatar as a nonurgent matter and limit any discussion to safety-related issues.[842] This exchange of views in the form of parliamentary diplomacy at

[837] Jon Gambrell, 'Emirati Diplomat to AP: "Nothing to Negotiate" with Qatar' <https://apnews.com/article/terrorism-ap-top-news-qatar-al-qaida-international-news-3a69bad153e24102a4dd23a6111613ab> accessed 30 May 2023.

[838] Counter-Memorial of the Government of the State of Qatar (n 17) 98.

[839] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 55, UN General Assembly, 72nd Session, General Debate, Address by His Highness Sheikh Tamim bin Hamad Al-Thani, Amir of the State of Qatar (19 Sept 2017) 4. See also the statement of the deputy prime minister at the UN Human Rights Council regarding Qatar's readiness for negotiation at Permanent Mission of the State of Qatar to the United Nations Office in Geneva, Switzerland, HE the Foreign Minister delivers a statement before the 36th Session of the Human Rights Council (11 Sept 2017) <http://geneva.mission.qa/en/news/detail/2017/09/17/he-the-foreign-minister-delivers-a-statement-in-front-of-the-36thsession-of-the-human-rights-council> accessed 09 July 2023.

[840] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 22, Letter from Fang Liu, ICAO Secretary General, to Abdulla Nasser Turki Al-Subaey, Chairman of Qatar Civil Aviation Authority, Reference No. AN 13/4/3/Open-AMO66892 (7 June 2017).

[841] ICAO Council, 211th Session, Summary Minutes of the Tenth Meeting, ICAO Doc. C-MIN 211/10 (23 June 2017). ICAO Council, 211th Session, Summary Minutes of the Tenth Meeting, ICAO Doc. C-MIN 211/10 (23 June 2017), para 15.

[842] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 25, ICAO Response to the Preliminary Objections (A), Exhibit 8, Response to Qatar's Submission Under Article 54(n) Presented by Bahrain, Egypt, Saudi Arabia, and the United Arab Emirates, ICAO Doc. C-WP/14640 (19 July 2017), para 5.1(b). Also, ICAO Response to the Preliminary Objections (A), Exhibit 10, ICAO Council, Extraordinary Session, Summary Minutes, ICAO Doc. C-MIN Extraordinary Session (31 July 2017), para. 5, 33 and 75.

the ICAO level could be regarded as a direct negotiation satisfying the negotiation requirement under Article 84 of the Convention.[843] Finally, Qatar represented its claimed genuine attempt to negotiate to the ICAO Council and to the ICJ through its efforts to settle the dispute with mediation by third-party states. The mediation was led by two main players: the United States and Kuwait.[844] Throughout this mediation, Qatar, through its leadership, maintained a clear position, as they are open to unconditional constructive negotiation with the blockading states.[845] However, the blockading states were unwilling to negotiate, which resulted in the failure of the mediation of the United States and Kuwait.[846] The US Secretary of State stated in an interview, 'It's up to the leadership of the quartet when they want to engage with Qatar because Qatar has been very clear – they are ready to engage.'[847] These endeavours made by Qatar suggested that it made a genuine attempt to negotiate and met the requirements of negotiation under Article 84 of the Convention.

Also, this issue raises the application of the principle of good faith. Good faith is a fundamental principle in international law that governs the conduct of states, especially in the context of negotiations.[848] It requires that parties engage sincerely, with a genuine intent to resolve disputes, rather than merely fulfilling a procedural obligation. Under Article 84 of the Chicago Convention, good faith mandates that the disputing party not only attempts to negotiate but does so constructively, demonstrating a willingness to find common ground.

In this case, Qatar's consistent calls for open, unconditional negotiations demonstrate a clear commitment to good faith. Repeated public statements by high-level officials, including the Amir's address at the UN General Assembly calling for dialogue without preconditions, reflect genuine efforts to engage with the blockading states. This aligns with the ICJ's interpretation of good faith in negotiations, as seen in cases such as Gabčíkovo-Nagymaros Project case[849]

[843] Buergenthal (n 274) 131.
[844] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 25, ICAO Response to the Preliminary Objections (A), Exhibit 19, HH the Emir Meets HH the Emir of Kuwait (7 June 2017); Exhibit 27, State Dept. Lashes Out at Gulf Countries Over Qatar Embargo (20 June 2017), 3; Exhibit 47, Tillerson Tries Shuttle Diplomacy in Qatar Dispute (11 July 2017); Exhibit 54, Qatar's Foreign Minister Says Visit to Washington Aims to Inform US Politicians about Negative Impacts of Gulf Crisis (25 July 2017) 1.
[845] Ibid, Exhibit 23, Foreign Minister: Qatar Focuses on Solving Humanitarian Problems of Illegal Siege (12 June 2017).
[846] Ibid, Exhibit 34, Qatar condemns Saudi refusal to negotiate over demands (28 June 2017).
[847] ibid, Exhibit 71, Tillerson Faults Saudi-Led Bloc for Failing to End Qatar Crisis (19 Oct 2017).
[848] See (n 32).
[849] Gabčíkovo-Nagymaros Project case (n 79) para. 142.

and others[850], where good faith is assessed based on meaningful dialogue aimed at resolution, rather than mere procedural compliance. Conversely, the blockading states' insistence on non-negotiable demands and refusal to engage unless these demands were met indicate a lack of good faith. This behaviour characterized by immediate rejection of negotiation attempts suggests an intent to obstruct rather than facilitate dispute resolution. The ICJ has increasingly relied on the principle of good faith to prevent states from frustrating negotiations, emphasizing that persistent refusal to engage can fulfil the precondition for prior negotiations, effectively closing off any genuine attempt at settlement. On the other side of the third ground of appeal, the blockading states claimed that Qatar's application should be regarded as inadmissible on the basis that it did not comply with the requirement of Article 2, subparagraph (g) of the ICAO Rules. This Article obligates the applicant when submitting its application to include in its memorial a 'statement that negotiations to settle the disagreement had taken place between the parties but were not successful'.[851] From the wording of the article it can be said, quite clearly, that what is required from the applicant is a mere statement, which is a form requirement, that negotiations took place but were not successful. To the Council, the allegation of fact satisfies the requirement of the article, as asserted by the Council in the *Cuba v United States*[852] and *US v 15 EU Member States* cases.[853] On this point, Qatar in its memorial did include a section under the heading of 'A statement of attempted negotiations'[854] which satisfied the requirement of Article 2 subparagraph (g) of the ICAO Rules.

In conclusion, these efforts made by Qatar suggested that it made a genuine attempt to negotiate and met the requirements of negotiation under Article 84 of the Convention, and the refusal of the blockading states could be interpreted as an 'immediate and total refusal' to negotiate, which discharges Qatar from the negotiation requirement. This conclusion was

[850] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (n 702) 132, para 157. Nuclear Tests (Australia v. France), Judgrnent, I.C.J. Reports 1974, para.46. See also, Steven Reinhold, 'Good Faith in International Law' (Social Science Research Network, 24 May 2013) 40.

[851] ICAO Rules (n 729), Article 2(g).

[852] *Cuba v United States* (n 775), para 9.

[853] Counter-Memorial of the Government of the State of Qatar (n 17) Annex 12, ICAO Council, *US v 15 EU Member States*, Memorial of the United States (14 March 2000).

[854] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 23, Application (A) Section (g).

also reached by the ICJ, as it held that Qatar did satisfy the negotiation requirement and made a genuine attempt to negotiate under Article 84 of the Convention.[855] Furthermore, the Court affirmed the compliance of Qatar with Article 2, subparagraph (g) of the ICAO Rules, stating that the application and the memorial of Qatar satisfied that article. Therefore, the Court rejected the third ground of appeal and upheld the Council decision when it rejected the second preliminary objection from both jurisdiction and admissibility.[856]

4.3.3 First ground of appeal[857]

The first ground of appeal challenging the ICAO Council's jurisdiction concerned the procedure followed by the Council when it rendered its decision on the preliminary objections of the blockading states. On this appeal, the blockading states claimed that the Council failed to uphold fundamental principles of due process in a way that was 'so grave and so widespread as to denude the proceedings and the Decision of any judicial character'.[858] These claimed procedural irregularities can be summed up in the following points.

First, the allocation of time amongst disputing parties to present their case was neither sufficient nor fair.[859] According to the blockading states, the hearing of their preliminary objections was given one half-day session, which they deemed insufficient for proper presentation and co-ordination between them. In contrast, the Council held five meetings of hearings in the case of *India v Pakistan* to decide only one of India's preliminary objections.[860] Also, the blockading states were treated as one party and given the same amount of time as Qatar; this was not fair, as there were four states against one.[861] The Council failed to give them additional time that suited their situation as a collective case with different respondents.[862] However, the records of the Council tell a different story. First, the Council on

[855] 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, (n 831) 83.
[856] ibid.
[857] The discussion of the first ground of appeal comes last because it hinges on a thorough exploration of the second and third grounds. This sequence ensures a comprehensive and interconnected analysis.
[858] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) 62, para 3.1.
[859] Ibid, para 3.2.
[860] Ibid, para 3.28.
[861] ibid.
[862] ibid.

17 November 2017 set a time limit[863] for the blockading states to file a counter-memorial in accordance with the ICAO Rules,[864] yet Egypt, on behalf of the blockading states, requested an additional six weeks, which the Council granted on 16 January 2018.[865] Second, the Council made an unusual allocation by giving the blockading state the opportunity to submit a rejoinder in response to Qatar's comment on their preliminary objections.[866] Moreover, it gave the blockading states the opportunity for oral presentations after they had submitted their rejoinder. The President of the Council notified the parties that the presentation would last for a half-day session to be held on 26 June 2018,[867] as well as an informal briefing on the settlement of dispute process on 19 June 2018.[868] As stated before, the blockading states claimed that the half-day session was not sufficient to allow them to present their arguments. However, the ICAO Rules state that final arguments shall be in writing, while oral arguments can be allowed subject to the discretion of the Council. This means that if the Council does not see the need to have an oral argument at all, it can disallow it or limit its duration to a half day, a day or a week.[869] In comparison, in *Brazil v United States,* less time was allocated for the disputing parties to present their cases;[870] this shows that the duration of the oral argument is discretionary and varies from case to case, as the *India* case needed more time and the *Brazil* case needed less. Concerning their objection to being treated as one party, which was not fair according to them, it should be noted that the president of the Council

[863] The limit was 12 weeks. Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 43, Letter of 17 November 2017 from the Secretary-General of ICAO to the Appellants.
[864] Article 3(1)(c).
[865] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 45, Letter of 9 February 2018 from the Secretary-General of ICAO to the Appellants.
[866] The usual process is that an applicant files an application, a respondent files a preliminary objection, then the applicant is asked to give a comment regarding the respondent's preliminary objection. See Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 49, Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants. Qatar objected to the blockading states being allowed a rejoinder. See Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 48 Letter of 28 May 2018 from the Secretary-General of ICAO to the Appellants, attaching email of 25 May 2018 from the Delegation of the State of Qatar to the Secretary-General of ICAO.
[867] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 50, Letter of 13 June 2018 from the President of the ICAO Council to the Appellants, attaching Working Paper in respect of Application (A), ICAO document C-WP/14778, 23 May 2018.
[868] Ibid, 76.
[869] ICAO Rules (n 729) art 12 (2).
[870] ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO document C-MIN 211/9, 5 July 2017, para 9.

informed them in advance that this would be the case, and they stated no objection.[871] More importantly, they themselves acted as one party on numerous occasions, starting from filing a collective preliminary objection to filing a collective appeal to the ICJ.[872] Furthermore, in the *US v 15 EU States* case, the ICAO Council treated the 15 EU states as a single party,[873] which was logical, as their argument was the same, and treating them as such was in line with the ICAO Rules to avoid delays.[874] Therefore, the conduct of the Council was fair and logical in terms of both allocation of time and fairness of conduct, as opposed to the claims raised by the blockading states.

Second, the blockading states accused the ICAO of the procedural irregularity of failing to have a deliberation before proceeding to vote with a secret ballot. This resulted in the absence of a statement of reasons for the rendered decision of the Council, which contradicted Article 15 of the ICAO Rules.[875] The blockading states claimed that the absence of deliberation violated the fundamental requirement of due process and could indicate that the decision may have been determined before the voting even took place.[876] Also, they raised an objection against voting with a secret ballot and instead requested 'a roll call vote with open voting'.[877] The actual issue here lies in the last claim, which is that voting by secret ballot generally results in an absence of reasons for decisions and deliberation before voting. It must be mentioned that Article 50 of the ICAO Council Rules of Procedure states that the Council shall vote with a secret ballot unless opposed by the majority of members of the Council.[878] Therefore, the request of the blockading states for a roll call vote with open voting must be supported by the majority of the members of the Council; otherwise, the request cannot be accommodated as

[871] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) para 3.27.
[872] For instance, Egypt, on behalf of all the blockading states, requested an extension of time to file the counter-memorial, the right to file a rejoinder and so on. See Counter-Memorial of the Government of the State of Qatar (n 17) Annex 29, Letter from President of the ICAO Council to Representatives of the ICAO Council, ICAO Doc. PRES OBA/273 (9 Feb 2018).
[873] ICAO Council, 161st Session, Summary of the Fourth Meeting, ICAO Doc. C-MIN 161/4 (15 Nov 2000).
[874] ICAO Rules (n 729) art 28 (1).
[875] Article 15 states that the rendered decision of the Council shall contain among other things the conclusions of the Council alongside the reasons for reaching them.
[876] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) para 3.44.
[877] Ibid, para 3.1. This proposal was rejected by the Council.
[878] Rules of Procedure for the Council (n 796). The Dean of the Council, who is the representative of Mexico, proposed the vote with the secret ballot; this was supported by the First Vice-President of the Council, the representative of Singapore, which satisfied the requirement of Article 50 of the ICAO Council Rules of Procedure.

per the Council Rules of Procedure. Also, in the most recent case before the Council, *Brazil v United States*, the Council followed the same procedures with no open deliberation and with secret ballot, and neither of the disputing parties raised an objection.[879] Ironically, in *Brazil v United States*, it was the UAE – one of the blockading states – that proposed a vote by secret ballot without deliberation, and none of the members of the Council, including the blockading states, objected.[880] Therefore, the ICAO Council Rules of Procedure and the ICAO practice in its recent decision show that when the Council decides on substantive issues in dispute, there are no deliberations or reasons given if such decision is taken through secret ballot.

The third of the Council's alleged procedural irregularities was its requirement of 19 of 36 votes as the majority instead of 17 of 33 to uphold the preliminary objections, as stipulated by Article 52 of the Chicago Convention. The issue here is linked to the understanding of the wording of Article 53, which states that no member of the Council shall vote if it is a party to the dispute. Accordingly, the blockading states asserted that the disputing parties cannot vote or even be deemed members for the purpose of counting votes required to reach a majority under Article 52.[881] This understanding seems to contradict the wording of Articles 52 and 53, which require the approval of the majority of all members of the Council, while suspending the voting rights of only those parties concerned in the disagreement.[882] Therefore, there is a big difference between suspending the voting rights of states involved in a dispute and suspending the membership of a state. In the same way, if a state is deprived of voting in the Assembly under Articles 62 or 88, its capacity as a contracting state is not affected. This was actually the practice of the Council in *India v Pakistan*[883] and *Brazil v US*,[884] on which the disputing parties, who were members of the Council, were deemed members for the purpose of counting the votes required to reach a majority under Article 52. This understanding has been the unanimous practice of the Council throughout its history in all disputes submitted

[879] Memorial of the Kingdom of Bahrain, the Arab Republic of Egypt, the Kingdom of Saudi Arabia and the United Arab Emirates (n 73) Annex 32, Decision of the ICAO Council on the Preliminary Objection of the United States in the Matter "Brazil v United States", 23 June 2017.
[880] Ibid, Annex 24, ICAO Preliminary Objections (A), Exhibit 2, ICAO Council – 211th Session, Summary Minutes of the Ninth Meeting of 21 June 2017, ICAO Document C-MIN 211/9, 5 July 2017, para 97.
[881] That is, the total of 36, minus the concerned states, which at that time were Saudi Arabia, the UAE and Egypt, leaves 33 members, and therefore the majority should be 17, not 19.
[882] ICAO Council, 74th Session, Working Paper: Voting in the Council on Disagreements and Complaints brought under the Rules on Settlement, ICAO Doc. C-WP/5465 (21 Oct 1971), 2-3.
[883] ICAO Council, 74th Session, Minutes of the Sixth Meeting, ICAO Doc. 8956-C/1001 (29 July 1979), para 60.
[884] ICAO Council – 211th Session (n 880) paras 97-98.

before it.[885] On the other hand, even if the blockading states were right and the majority should have been 17 votes, it would not have had any practical effect on the Council's decision, as it was adopted 23 to 4 with 6 abstentions.[886] This means that the failure of the Council to interpret Articles 52 and 53 had no practical significance in the decision.

That said, in the 1972 ICAO Council Appeal case, the ICJ affirmed two important aspects when India raised a similar appeal based on procedural irregularities to those raised by the blockading states. First, the procedural irregularities have to be of those that fundamentally prejudice 'the requirements of a just procedure'.[887] Although the Court did not define the requirements of 'just procedure', it can be imagined that such requirements shall include at least fairness, reasonable allocation of time and a public hearing conducted with impartiality by an independent tribunal.[888] Second, the Court stated that if the Council had answered the 'objective question of law' regarding its jurisdiction correctly, then the issue of procedural irregularities would become irrelevant.[889] This means that even if there were genuine procedural irregularities, 'the position would be that the Council would have reached the right conclusion in the wrong way'.[890] For this reason, applying these two important aspects to the current appeal of the blockading states would result in rejection, as there was no fundamental prejudice to the requirement of just procedures. Also, even if there were any, the Council, as determined in a previous section, did answer the jurisdictional question correctly, therefore rendering these alleged procedural irregularities irrelevant. Thus, the ICJ, following its judgment in the 1972 ICAO Council Appeal case, rejected the blockading states' first ground of appeal and affirmed that the 'Council's procedures did not prejudice in any fundamental way the requirements of a just procedure'.[891]

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[885] ICAO Council – 214th Session, Summary Minutes of the Eighth Meeting of 26 June 2018, ICAO Document C-MIN 214/8, 23 July 2018, para 112.
[886] Decision of the ICAO Council (n 639).
[887] Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan), Judgment (n 769) para 45, 60-61.
[888] AAS Zuckerman, 'Quality and Economy in Civil Procedure – The Case for Commuting Correct Judgments for Timely Judgments' (1994) 14 Oxford Journal of Legal Studies 357. Also, CT Kotuby and LA Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 157.
[889] Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan), Judgment (n 769) para 45, 60-61.
[890] ibid.
[891] 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, (n 831) 83.

4.3.4 Conclusion

The disagreement between Qatar and the blockading states was related to the Chicago Convention and its Annexes. Therefore, the ICAO Council had jurisdiction over the dispute, and the fact that the dispute arose in a wider context did not affect the jurisdiction of the Council under Article 84 of the Convention. For this reason, the adjudication of the Council was in line with the judicial propriety, not the other way around. Furthermore, the efforts made by Qatar suggested that it made a genuine attempt to negotiate and met the requirements of negotiation under Article 84 of the Convention, and the refusal of the blockading states could be interpreted as an 'immediate and total refusal' to negotiate, which discharges Qatar from the negotiation requirement under Article 84 of the Convention. Likewise, Qatar complied with Article 2, subparagraph (g) of the ICAO Rules, as its application and memorial satisfied that article. Finally, the ICAO Council's procedures did not prejudice in any fundamental way the requirements of a just procedure, as illustrated above, and even if there were irregularities, they were not fundamental. More importantly, even if these procedural irregularities had been fundamental, the Council, as determined above, did answer the jurisdictional question correctly, rendering any procedural irregularities that might exist irrelevant. Therefore, the Council and the ICJ were right in rejecting the preliminary objections and the appeal for all the reasons set forth above. The outcome of this rejected preliminary objections and appeal forces the blockading states to file a counter-memorial as per Article 4 of the ICAO Rules. Once they submit their counter-memorial, the Council will allocate the consideration of the case to a committee consisting of five individuals who are members of the ICAO Council not concerned with the disagreement, as explained earlier.[892]

[892] However, the parties reached a settlement and signed Al-Ula Declaration, and consequently Qatar withdrew its claims, and the case ended on that point.

5 Conclusion

Throughout its history, the GCC has been able to maintain cohesion and overcome serious political and security challenges. However, the crisis of 2017 marked the deepest conflict in its history, and although that conflict ended on 5 January 2021, relations have still not entirely recovered to what they were before, despite all the positive and lofty objectives stated in the GCC charter – namely, the ultimate goal, stated in article 4 of its charter, is, to achieve unity among member states through effective coordination, integration and interconnection. This conflict gave rise to a great many questions for international lawyers: the legality of the air restrictive measures taken against Qatar; the use of countermeasures to preclude the wrongfulness of the blockading states, especially within the Chicago Convention system; the responsibility of the states entrusted with FIR services during conflict; the legality of establishing zones over the airspace of the high seas; the relation between the concept of FIRs and the concept of state sovereignty and whether the FIRs affect state sovereignty over its territory; and finally, what jurisdiction the ICAO Council has to adjudicate matters relating to the Chicago Convention and its annexes, especially if this matter is claimed to be related to bigger issues outside the jurisdiction of the ICAO.

As stated above, if the restrictive measures taken against Qatar are considered without reliance on the lawfulness of countermeasures, these measures would be in a conflict with international law. The first concern starts with both the UN Charter, according to which states are obligated to fulfil their obligations to treaties to which they are parties in good faith, and the UN Convention on the Law of Treaties, which states, 'Every treaty in force is binding upon the parties and must be performed by them in good faith.' Moreover, the UNCLOS – namely, article 87 – gives all states the freedom to a bundle of rights over the high seas, among which are freedom of navigation and freedom of overflight. This means that international law does not allow states to claim sovereignty over the high seas, nor does it allow states to prevent other states from the aforementioned freedoms. Also, freedom of overflight over the high seas is regulated: states have to comply with all ICAO rules and procedures, as stated in article 12 of the Convention, as well as rules of the air stipulated in annex 2. Furthermore, the main convention with which these restrictive measures are in legal conflict is the Chicago Convention, beginning with the Preamble, which emphasises that friction is to be avoided in the civil aviation field and cooperation between nations is desirable and should be promoted; it perceives the abuse of international civil aviation as a threat to general security. The Chicago

Convention recognises states' sovereignty only over their territories while preventing states from deviating from its regulations over the high seas, where all rules must be applied in a non-discriminatory manner to all aircraft nationalities.

The restrictions are also out of line with article 4, which is about the misuse of civil aviation for purposes inconsistent with the objective of the Convention; article 5, the denial of the right to non-scheduled flight, which is also safeguarded by article I, section 1, of IASTA; article 6, regarding scheduled flights, which is also granted by bilateral or multilateral air service agreement in which states grant each other the rights and entitlements they wish to exchange; article 9, which gives states the right to restrict or prohibit flight over any part of their territory on condition that this prohibition is exceptional during an emergency or in the interest of public safety and applied without distinguishing between the nationalities of the aircraft of all contracting states; article 12, concerning applicable rules over the high seas; article 37, securing the highest degree of conformity with the ICAO Standards; article 38, filing a difference with the ICAO Council in case of the inability to comply with these standards; and finally, article 89, which is seen as derogation clause allowing states to derogate from their obligations under the Convention – including the abovementioned articles – in the case of war or in a duly declared national emergency, for which the ICAO Council must also be notified.

As indicated before, the restrictive measures of the blockading states were not taken during war, nor was there any national emergency declared or any notification sent to the ICAO Council. All of this put the blockading states in violation because of their non-compliance with all the aforementioned articles of the Chicago Convention and its annexes as well as their international obligations under the UN Charter, the UN Convention on the Law of Treaties and the UNCLOS.

This inevitably led the blockading states to rely on countermeasures as a justification or excuse as a mechanism of precluding any wrongfulness arose from their noncompliance with these international obligations. However, the lawfulness of countermeasures requires the existence of wrongful acts, the first and basic prerequisite for lawful resort to countermeasures, and countermeasures must be proportionate and taken only by injured states. The lawfulness of countermeasures depends on them meeting these requirements; otherwise, it will not serve as precluding mechanism of wrongfulness. Regarding the first of

these prerequisites, the blockading states' restrictive measures, as shown in chapter one, were not taken as a response to an internationally wrongful act. Rather, they were taken on the basis of a mere allegation of wrongful acts attributed to Qatar that had no proof or acceptable conclusive evidence, which means that the international wrongful act had not materialised, and what the blockading states had against Qatar were merely unproven allegations versus equivalent allegations from Qatar against them. Thus, they did not qualify as lawful countermeasures that could preclude the wrongfulness of the blockading states on the basis of the absence of the basic requirement of the existence of wrongful acts in the first place.

Regarding the second prerequisite, the blockading states' countermeasures were not proportionate from many aspects, including the gravity and the seriousness of the alleged violation of Qatar vis-à-vis the restrictive measures taken on qualitative and quantitative levels. In addition, the appropriateness of both the aims and the methods of the countermeasures can be evidently used to prove the non-applicability of the principle of proportionality. The aims of the blockading states' countermeasures are seen in their list of thirteen demands, which can be described as a literal demand for the surrender of state sovereignty and total submission to the will of the blockading states, not to mention that the countermeasures applied and the requested remedies for such wrongful acts are all at considerably distinct levels. Hence, the countermeasures used against Qatar were not commensurate with the alleged violation according to any of the criteria for assessing the proportionality requirement for countermeasures.

Regarding the third prerequisite is that only injured states are entitled to countermeasures; the lawfulness of collective countermeasures, as illustrated above, is still a grey area in international law, and their lawfulness is quite debatable, depending on the circumstance and the seriousness of the wrongful act attributable to the responsible state. In fact, the ARSIWA does not provide a clear-cut answer regarding the lawfulness of collective countermeasures, as it neither endorses nor precludes them. Nonetheless, the ARSIWA allows states other than the injured states to invoke the responsibility of another state if the obligation breached is owed to a group of states, including the invoking state, and established for the protection of a collective interest of the group or if the obligation breached is owed to the international community as a whole. This position is in line with what Crawford and the Institut de Droit

International have proposed as a way of elevating the fear of abuse of collective countermeasures. They proposed that collective countermeasures are limited to those wrongful acts that are serious, well-attested and 'widely acknowledged grave breach[es] of an *erga omnes* obligation'. However, this proposal, although sounding simple and logical, raises many questions about how to distinguish a serious, well-attested breach from other types of breaches; this could eventually lead to the issue of auto-interpretation. With that being said, the blockading states admitted in their memorial document before the ICJ that Qatar's violation by supporting a hostile group and terrorism was an issue of particular interest to Egypt. This implies that their countermeasures were based on the lawfulness of collective countermeasures since Egypt was the only injured state; yet Egypt is not a party to the Riyadh Agreement, nor is it a fundamental subject of the same. As stated above, for third parties' countermeasures to be lawful, the wrongful acts attributable to Qatar must be serious, well-attested and 'widely acknowledged grave breach[es] of an *erga omnes* obligation'. As shown above, the blockading states could not produce acceptable legal evidence to prove the mere existence of wrongful acts, let alone proof of the seriousness and gravity of such acts.

Therefore, it can be said that the lawfulness of collective countermeasures in the GCC crisis is questionable due to the absence of evidence concerning wrongful acts in the first place, as well as the failure to meet the criteria for the seriousness of a breach that would entail the use of collective countermeasures. Furthermore, the maxim of *lex specialis* articulated in article 55 of the ARSIWA states that in conflicts between treaties and/or any area of international law, precedence is given to the specific rule over the general one: the 'specific prevails over the general'. Qatar claimed this was the case in that the Chicago Convention is a self-contained regime on the same footing as the WTO, diplomatic law, European Community law and human rights.

However, there are some limitations to this principle: the Study Group on the Fragmentation of International Law concluded that the application of such special laws does not entirely exclude the relevant general law, as the latter will remain applicable in situations wherein the former does not provide remedies. The group also indicated that there are situations where the general law will prevail over the special law, such as if the prevalence of the special law could disturb the purpose of the general law, if third parties might be affected due to the

application of such special law or if the general law in question falls under the category of non-derogable law. However, the exclusion of countermeasures in the aviation field is greatly relevant, especially in consideration of the peculiarity of aviation, as it is a unique and very specific branch of international law, and its rules and regulations tend to be standardised among all states, with the paramount objective of the maintenance of aviation safety. This is also one of the fundamental objectives of the ICAO that has been achieved through the introduction of the SARPs, the main intention of which is to have sets of rules and standards to be equally applied on a universal level without any discrimination among the parties to the Chicago Convention. Discrimination could cause a huge disruption to the system; therefore, the Chicago Convention is considered a non-discriminatory regime. The reflection of this statement is enlarged throughout its articles, such as articles 9, 11 and 35, which repeatedly state that there must not be any distinction made between the nationality of aircraft for the application of the Convention.

In addition, the Chicago Convention, like the WTO system, does not allow any state to derogate from its rules except in very limited circumstances, such as times of war or duly declared national emergency. Moreover, the Convention under article 82 obligates contracting states to abrogate all obligations and understandings that are not consistent with the Convention and, more importantly, not to undertake any arrangements, agreements or understandings that are inconsistent with the Convention. All of these considerations may suggest or grant that Qatar's claim that the Chicago Convention is a non-discriminatory system that excludes the application of countermeasures in reliance on article 55 of the ARSIWA has merit. This is especially true when the special nature of international civil aviation is considered. However, it is quite difficult to assert or deny such a claim, as it is a grey area in international law and, with some uncertainty, a feature of state practices. Such a claim could be true in some situations where a derogation from the Convention has no legal basis, while it might not be the case in others.

Finally, the blockading states' reliance on countermeasures as a justification or excuse as a mechanism of precluding any wrongfulness arose from their noncompliance with their international obligations is highly questionable. As they could not prove the existence of the wrongful acts attributed to Qatar in the first place, and even on the assumption that these wrongful acts were proven, their countermeasures failed to meet the principle of

proportionality. Also, even if their countermeasures were proportionate, they failed to demonstrate that wrongful acts attributable to Qatar were serious, well-attested and 'widely acknowledged grave breach[es] of an *erga omnes* obligation' that entitle them to use collective countermeasures. Finally, even if all of these conditions were met, the application of the maxim of *lex specialis* articulated in article 55 of the ARSIWA – if appropriately applied – could hinder the use of countermeasures in the field of aviation.

The second aspect of this research focused on the concept of FIRs in terms of international rules and regulations applicable to it, its definitions, how they are being delineated, their legal implications and the extent to which they create obligations for states. A FIR is defined as 'an airspace of defined dimensions within which flight information service and alerting service are provided'. The term FIR itself is not mentioned in the Convention; it is a concept founded and developed by ICAO, after which ICAO embodied the regulations regarding FIRs into different sets of enactments: the SARPS as annexes to the Convention and the PANS and SUPPS. Each of these regulations has a different legal status in terms of its obligatory nature.

FIRs are governed by the principles, rules and recommendations contained in annex 11 to the Chicago Convention on Air Traffic Services. As previously mentioned, the convention does not mention FIRs at all except in annex 11, which only recommends that the delineation of FIRs be based on technical, rather than national, considerations and 'be delineated to cover the whole of the air route structure to be served by such regions'. Once a state is assigned an FIR, it incurs the responsibility of providing ATS in accordance with the provisions of both the Convention and its annexes (SARPS). Such obligations stem from article 28, which obligates the contracting states of the Convention to provide ATS services within their delegated FIRs. However, this obligation is not absolute, as it gives states discretion to comply as much as they find practicable, as stated in article 37 of the Convention, the escape clause. Nevertheless, this escape clause is subject to article 38, which gives any state that finds adherence to ICAO's policy impractical the opportunity to give notice to the ICAO of the difference between what is recommended or required by the ICAO and the practice prevalent in that state. This is the only option available to states that provide ATS within FIRs: either comply or file a difference. This excludes matters related to annex 2, concerning ATS over the high seas, where deviation is strictly not allowed.

The blockading states' actions towards Qatar must be analysed from three different perspectives: 1) restrictions imposed over the high seas, 2) restrictions imposed over territorial airspace over Qatar and 3) restrictions over the blockading states' airspace. Concerning the first category, article 12 of the Convention establishes very clearly that the only rules applicable over the high seas are those established under the Convention, specifically annex 2. This annex is mandatory, without any exceptions, not even under article 38 of the Conventions, and a state entrusted with ATS responsibility is not thereby given the right to misuse or discriminate against airspace users. Regarding the second category, restrictions were imposed on Qatar over its airspace that fell under the Bahrain FIR. It goes without saying that such restrictions violated the sovereignty of another state in violation of the Convention, namely articles 1, 2 and 12. Regarding the third, restrictions were imposed on Qatar over the blockading states' territories. In this regard, article 12 states that the applicable rules are those of the state over which the aircraft is flying; however, the same article says, '[E]ach contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention.' Therefore, whenever a state cannot comply with this article with regard to the third category, it is obligated to file a difference under article 38. Such notifications must be communicated immediately to the ICAO, after which the ICAO will immediately notify all member states about this difference. However, the notification of difference does not pardon states from continuing their obligation under article 37, wherein they are required to 'collaborate in securing the highest practicable degree of uniformity in international regulations, standards, and procedures'. Nevertheless, the blockading states did not file any differences, nor did they comply with the Convention; their noncompliance with the Convention could be understood as not related to the impracticably of such regulations but merely to their intention to deny ATS to Qatari carriers. Therefore, the escape clause does not apply to their actions, which means that the restrictions imposed on Qatar, including the denial of ATS over the high seas, were not in accordance with the abovementioned provisions.

Another aspect addresses the legality of Bahrain's unilateral establishment of what it called a buffer zone adjacent to its territorial waters over international waters: Bahrain verbally threatened that Qatar-registered aircraft entering that zone would be met with miliary interception. This led to a discussion of the position of international law, particularly the

Chicago Convention, concerning the establishment of ADIZs and no-fly zones and their permissibility and application.

As for ADIZs, a distinction must be made whether they are established over national territory or over international airspace. If the former, then this falls within a state's exclusive sovereignty over its airspace; a state can enforce and enact relevant laws, so establishing ADIZs with specific rules within them falls under this prerogative and ADIZ rules sound legal and do not seem to be in violation of articles 6 and 11 of the Chicago Convention with respect to territorial airspace. On the other hand, the legality of the establishment of ADIZs outside territorial airspace is arguable, and views are split. One side claims it is unlawful: over international waters, only those rules established by the Convention – annex 2 – are applicable, and deviation is not allowed except in case of war or duly declared national emergency (article 89). The other side argues that even though annex 2 is mandatory over the high seas and deviation is not allowed, ADIZs still have a legal basis as long as annex 2 and freedom of aviation have not been substantially sabotaged or infringed on.

With regard to no-fly zones, the same approach followed in ADIZs applies: a distinction is made between establishing such a zone over territorial airspace or over international water. The legality of a no-fly zone is highly questionable, especially over international waters. However, article 9 of the Chicago Convention gives contracting states the right to prohibit or restrict flight over certain areas within their territories for reasons of military necessity. They also have the right to temporarily prohibit flight over the whole of their territorial airspace 'in exceptional circumstances or during a period of emergency, or in the interest of public safety'. In both scenarios, prohibition or restriction must be applicable without any distinction of nationality regarding the aircraft of all other states, and notification must be given to the ICAO Council. With regard to the legality of establishing no-fly zones over the high seas, it is questionable whether a legal basis for such conduct can be found in international law. The high seas are beyond state sovereignty, and hence, the applicable law that must be complied with is international law, not the national laws of states.

The Chicago Convention stated that, over the high seas, the rules that must be followed and applied are those contained in the Convention, which limits states' national laws to their territories while urging them to endeavour to the highest level possible of uniformity in regulations, standards and procedures. Therefore, establishing no-fly zones over the high seas

would conflict with the international treaties just mentioned. The only deviation that might allow a state to not adhere to the abovementioned provisions is available under article 89 during war or duly declared state of national emergency; on such occasions, states' freedom of action shall not be affected by the Convention. With that being said, it is safe to say that Bahrain's unilateral zone establishment lacks a legal basis for the following reasons.

First, its establishment was not done through the formal channel of issuance through a NOTAM; instead, it was issued through verbal conversation, which seems to contradict the decision made by the ICAO Council at the ninth meeting of its thirteenth session in 1951. Second, Bahrain did not declare a national emergency, nor was there any war that could justify deviation from the provisions of the Chicago Convention. Third, this buffer zone was established above airspace adjacent to its territory above the high seas, which by default falls outside article 9 of the Conventions, which states that states have the right to establish such zones above their territories. This immediately put that zone in conflict with the applicable international treaties concerning freedom of access to the high seas and freedom of overflight and navigation. Fourth, even if this zone had been over Bahrain's territorial airspace and there had been a national emergency or military necessity falling within the application of article 9 of the Convention, it would still have been in violation of the Convention, as the right entertained under article 9 must be exercised without distinction of nationality to aircraft of all other states. In the matter at hand, Bahrain targeted only Qatar-registered aircraft; therefore, that zone seems to violate article 9 even in a hypothetical scenario. Also, if states are not allowed to distinguish between the nationalities of the aircraft of other states when restricting or prohibiting flight over their territories, it stands to reason that they are not allowed to make the same distinction over the high seas, which are open to all states. Fifth, the objective behind establishing that zone was not the same as that behind establishing ADIZs, as it was a denial of access to international waters rather than an identification requirement. Even if the zone in question were to be categorised as a legitimate ADIZ, it still failed to meet the non-discrimination criterion of the Chicago Convention. Finally, the establishment of that zone did not seem to be in line with ICAO's resolution from the 39th session of its Assembly, at which states were urged to avoid adapting any unilateral and extraterritorial measures that might affect the development of international air transport.

One of the major consequences that emerged from these restrictions imposed on Qatar is the redistribution of FIRs in the Arabian Gulf region. Before it, the region had been distributed disproportionately to the advantage of Bahrain, the smallest country in the region, which retained control of most of the airspace over the Arabian Gulf between Kuwait and the United Arab Emirates. On 12 January 2020, Qatar initiated a proposal for the amendment of the ANP of the Middle East Region (Doc 9708, Volume I) to establish a Doha FIR and a Doha search and rescue region (SRR). Qatar was not only seeking safety enhancement and improvement in the efficiency and economy of flight operations but also aiming at airspace independence to freely use its own airspace as well as having access to the high seas.

Naturally, Bahrain, supported by Saudi Arabia, the UAE, Egypt and Yemen, strongly opposed the proposal entirely, arguing that the current arrangement and FIR boundaries were satisfactory and well established. Bahrain recalled its role and long experience and capabilities in providing ATS for over five decades of excellent management of all of its responsibilities within the Bahrain FIR. It argued that Qatar's proposal lacked technical, operational, safety and efficiency justifications that would improve the current service level and that introducing a new FIR would not promote safety but would reduce the safety level in the region. Moreover, the introduction of an additional ATS unit in a region with many conflicts and complex, high-density traffic such as the Middle East would make coordination between ATS units more complicated and put more workload on controllers and pilots, ultimately affecting safety. However, after a lengthy process of meetings and discussions, the ICAO Council agreed with the establishment of the Doha FIR as proposed by Qatar, covering its own territorial airspace and extending to contiguous airspace over the high seas. The Council backed its decision on Qatar's right to withdraw from its delegation arrangements with Bahrain by saying that Bahrain had been delegated to provide ATS over Qatar's territory in accordance with paragraphs 2.1.1 of annex 11 to the Chicago Convention. In addition, the Council acknowledged that Qatar's proposal to have its own FIR over its territorial airspace with access to the high seas was in line with article 1 of the Chicago Convention, which is the prevalence of the principle of state sovereignty over any technical consideration, and Assembly Resolution A40-4, Appendix G.

Nonetheless, whether the position of the blockading states with regard to the safety or technical elements of Qatar's proposal was right or wrong, the true argument behind their

objections was far beyond technicality or safety concerns; rather, they aimed to deprive Qatar of ATS independence. Bahrain's denial of access to Qatar-registered aircraft over Qatar's territory, as well as over international airspace above the high seas, was not justifiable. Bahrain might argue by presenting the outstanding history of its level of service, but its actions against Qatar during the crisis negated all that. It is also not surprising that Bahrain would refuse a proposal to establish a Doha FIR that would deprive Bahrain of monetary revenue for providing ATS for all users within its FIR, including Qatar. It seems that both views with regard to Qatar's proposal were subjectively built; however, the argument of Qatar prevailed, as it was based on sovereign right over its territory, safeguarded by the Chicago Convention, article 1, and supported by the actions of the blockading states themselves, as they gave clear evidence of how FIRs can be misused and abused.

One of the significant effects of the emergence of the Doha FIR is that 70% of the flights operating to the UAE will pass through Qatar's FIR, which will give Qatar great leverage in the future and deter the blockading states, especially Bahrain and the UAE. In addition, Qatar's position will be strengthened as a regional aviation player in the region, especially with Qatar having newly joined the ICAO Council, a testimony to its contributions and efforts in the civil aviation industry.

The third aspect of this research is the answer to a question raised by these restrictive measures, as well as the emergence of the Doha FIR: whether there is a conflict between the concept of state sovereignty and the concept of FIR. First, the concept of sovereignty, like all other concepts, is a product of its history, and since it came into existence, the term has been defined variably from many different perspectives and across different disciplines, such as political science, sociology and law, and the definition varies accordingly. However, most of these definitions share a similar core meaning and orbit around supremacy and absoluteness of authority within a territory, and regardless of all the changes and developments it has been through and the limitations that have been put on it, it still exists as an extremely important element of international law respected and cherished by all states. And states, with all the limitations they have accepted, whether through treaties or any international obligations, are still sovereign in the eye of international law, and the quality of their statehood is not affected. Moreover, the principle of sovereignty has undoubtedly deep roots in international law derived from the general and consistent practices of states, the violation of which has been

regarded as a breach of international obligation. Its long legal history and deep roots result in this concept being an accepted binding legal principle and therefore translated into respected fundamental principles in international treaties, international court judgments, and state practices.

In addition, the principles of sovereignty and territoriality are essential pillars of international law, and they are interrelated; sovereignty is founded upon the existence of territory, and without it, a state does not exist. Territorial sovereignty extends to land boundaries (mainland) and the airspace above that land, while coastal states own certain zones of the sea, all of which are governed by the UNCLOS.

As for sovereignty over airspace and the extent to which a state can exercise sovereignty over its airspace, this was fiercely debated by two rival schools of thought. The first school advocated for full liberty of air navigation and considered the airspace a 'res communes' that can never be acquired exclusively and is used and entertained by everyone, applying the notion of the high seas to the concept of airspace. The other school took the opposite view, advocating the traditional approach, according to which each state has absolute sovereignty over the entire airspace above its territory. As shown, there has not been a consensus among scholars and states regarding the vertical limit of states' sovereignty. Also, it seems the only effective way to solve the problem of the limit of states' sovereignty over their airspace is through an international agreement at the ICAO level setting whatever altitude limit is suitable for all states. Such an agreement could make a distinction between civil aviation and military activities and set a limit accordingly.

But do states want that, and how can civilian and military planes be distinguished in practice? The decisive factor in arriving at a solution is the willingness of states to find a common ground and set a ceiling to their vertical limit of sovereignty. This could happen if they see a benefit to such a limit, but otherwise the problem cannot be solved, and states will continue using the current practice, which is that foreign aircraft can be granted access to a state's airspace only through bilateral and multilateral agreements.

With regard to a state's sovereignty over outer space, the situation is much like that of airspace. There is a consensus among states that outer space is free for use by any state and is not subject to any state territorial sovereignty, similar to the situation on the high seas, both

of which states take under the concept of the '*res communis*'. However, problems arise as to where outer space starts. This sparked another heated debate and resulted in different views and positions at both the scholarly and state levels. Hence, the lack of boundaries between airspace and outer space will always be problematic, as it is essential to know the end of state sovereignty and the start of free outer space, as well as its significance for the application of the Outer Space Treaty. Moreover, any setting of the limits of outer space based on current factors would be arbitrary and be difficult for states to agree on. This issue will be very difficult to solve until states see an acute need for that solution, their interest in solving it clearly manifests and that need drives the solution; otherwise, the matter will remain unsolved. However, it seems there is a common understanding among states that the boundary between outer space and airspace should be the altitude of 100 km above mean sea level, as proposed by the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space in its fifty-seventh session.

Finally, the high seas are considered a '*res communis*' owned by humankind as a whole and not subject to any state's sovereignty. That having been said, however, the freedom of the high seas is not absolute, as there are certain limitations and duties which states are bound by.

The second concept is FIRs, and although the intention behind them is supposed to be a technical safety consideration and not a conferral of power or sovereignty over the entrusted region, whether over the high seas or another state's territory, the reality is something else. This was evident in the examples of Indonesia vs Singapore, Turkey vs Greece and Qatar vs Bahrain, all of which prove that the FIR concept can neglect many different aspects of the principle of state sovereignty.

As mentioned earlier, one of the main characteristics of the sovereign state is exclusiveness of authority over its territory; no other state should have a share in that right. However, the concept of an FIR gives the state in control of it an effective exercise of control over another state's airspace, which results in putting the latter state at the mercy of the controlling state. This control is exercised through the ability of the controlling state to give permission to foreign aircraft to enter the controlled state's territory, manage airway structures and the controlled airspace classes, monitor military aircraft movements, designate restricted or prohibited areas of airspace, and many ways of exercising control over another state's

territory. Another fundamental issue between the two concepts is that an FIR can threaten the national security of a state and undermine its ability to monitor its airspace properly; the FIR may therefore affect a fundamental element of sovereignty, the state's ability to be ready to respond to military and security threats.

Admittedly, the idea of the delineation of an FIR on the basis of technical considerations seems to be a valid idea and goal for the international community to achieve, but its application confers on one state control over another state's territory, which, whether we like it or not, degrades the latter state's sovereignty and represents a threat to its national security. The misconduct or potential misconduct of the delegated state is enough evidence of a conflict between the concepts of FIR and state sovereignty. From a legal point of view, the concept of FIR has no power to limit or undermine the concept of sovereignty, which resulted in FIRs being delineated on technical considerations as a mere recommendation of annex 11. The truth of this statement is reflected in the ICAO Council's recent decision, when it stated its position very clearly with regard to the relationship between the concepts of state sovereignty and FIRs, agreeing to Qatar's proposal to have its own FIR over its territorial airspace and a portion over the high seas although it was seen by many to be not technically viable for civil aviation. Therefore, FIRs should not be delineated on the basis of technicality only, but on many other considerations, most importantly state boundaries, national security and dignity.

The final discussion was of the ICAO Council's jurisdiction over matters presented to it in relation to the interpretation of the Chicago Convention and its annexes. The ICAO is a specialised UN agency exclusively authorised to carry out purely technical and professional operations in international civil aviation. The ICAO consists of two main bodies: the Assembly and the Council. The main objectives of the ICAO are derived from the Preamble to the Chicago Convention, which states, among other things, that international civil aviation should 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'. In achieving this, the Chicago Convention set out a list of objectives in article 44 and sets of functions in article 54, empowering the ICAO Council with economic, environmental, technical, administrative, supervisory, law-making and juridical functions covering a wide range of fields within civil aviation. Two of these functions are of great relevance to this research: the Council's law-making power and judicial function. The law-

making power of the ICAO Council lies in its ability to prescribe civil rules of conduct. This is reflected in article 54(l), the adoption of international standards and recommended practices and their designation as annexes to the Convention.

The judicial function of the Council lies in its ability to decide disputes among the member states of the ICAO and is derived from chapter XVIII, articles 84–88, upon the fulfilment of four conditions for the Council to exercise jurisdiction over a dispute. First, the existence of disagreement between members of the ICAO. Second, the disagreement must be related to the interpretation or application of the Chicago Convention and its annexes. Third, only the contracting states concerned in the disagreement can invoke chapter XVIII and request the adjudication of the Council. Fourth, for the dispute-settlement provisions of the Convention to be invoked, the contracting states must first have attempted to settle the dispute by themselves through negotiation. The ICAO Council, in performing its judicial duties, must act in accordance with the provisions contained in article 84 of the Chicago Convention as well as the ICAO Rules.

Throughout its history, the ICAO Council has been asked to decide disputes in seven cases, none of which ended with a decision by the ICAO Council on the merits of the case. It seems obvious that the Council prefers mediation and the use of good office roles rather than to be a judicial panel. However, the fact that the Council has never decided a dispute and rendered a decision on the merits does not necessarily mean the inability and insufficiency of the ICAO Council judicial functions, as the Convention itself bestows upon it that ability. Whether the Council has chosen in its discretion not to use that ability is a separate issue that does not change that fact.

Moreover, the Council should exercise its functions and propose an amendment to article 54(n) to solve the dichotomy in its terminology, as the current wording seems contradictory and confusing. On strict interpretation, this function seems to be broad enough to cover any issue related to the Convention, whether technical or not, encompassing even matters that fall under article 84. Also, article 84 stipulates that it can be invoked only for disputes that cannot be settled through negotiation, while article 54(n) states no such condition. As the Secretary General of the Council stated, there are differences between the two provisions, for instance, and article 54(n) could be related to a dispute; however, this dispute is different from those in article 84 from a procedural perspective. The process followed in article 54(n) is fully

governed by the Rules of Procedure for the Council, while article 84 requires a special process to be followed that is completely governed by ICAO Rules. Also, article 54(n) deals with matters that are considered top-urgency items that need the intervention of the ICAO Council to determine the appropriate actions to be taken, while article 84 deals with nonurgent matters. This explanation of the difference seems to be convincing: the dichotomy in the terminology of the Convention is not solved, and the scope of article 54(n) strictly interpreted is not limited. If the explanation given by the Secretary General is accepted by consensus or agreed upon by the members of the ICAO, the Council should exercise its functions and propose an amendment to this provision.

The final discussion concerns the jurisdiction of the ICAO over the issue at hand. As stated earlier, the blockading states did not accept the decision rendered by the ICAO Council when it rejected their preliminary objections, instead using their right of appeal safeguarded by article 84 of the Chicago Convention and submitting a joint application to the ICJ on 4 July 2018.

Their application was constructed on three grounds of appeal. First, they asserted that the Council had committed procedural irregularities during its decision-making process. Second, they asserted that the Council had failed to accept their first preliminary objection concerning its jurisdiction. Third, they asserted that Qatar failed to comply with the precondition of negotiation set out in article 84 of the Chicago Convention, as well as the requirements of article 2(g) of the ICAO Rules.

However, after an in-depth cross-examination of these three grounds of appeal, the following findings were reached: The disagreement between Qatar and the blockading states was related to the Chicago Convention and its annexes. Therefore, the ICAO Council had jurisdiction over the dispute, and although the dispute arose in a wider context, the jurisdiction of the Council under article 84 of the Convention was not affected. For this reason, the adjudication of the Council was in line with judicial propriety, not the other way around. Furthermore, the efforts made by Qatar suggested that it made a genuine attempt to negotiate and met the requirements of negotiation under article 84 of the Convention, and the refusal of the blockading states could be interpreted as an ‘immediate and total refusal’ to negotiate, which discharges Qatar from the negotiation requirement under article 84 of the Convention. Likewise, Qatar complied with article 2, subparagraph (g) of the ICAO Rules, as its

application and memorial satisfied that article. Finally, the ICAO Council's procedures did not prejudice in any fundamental way the requirements of a just procedure, as illustrated above, and even if there were irregularities, they were not fundamental. More importantly, even if these procedural irregularities had been fundamental, the Council, as determined above, did answer the jurisdictional question correctly, rendering any procedural irregularities that might exist irrelevant. Therefore, the Council and the ICJ were right to reject the preliminary objections and the appeal for all the reasons set forth above. The outcome of this rejected preliminary objections and appeal forces the blockading states to file a counter-memorial per article 4 of the ICAO Rules. Once they submit their counter-memorial, the Council will allocate the consideration of the case to a committee consisting of five individuals who are members of the ICAO Council not concerned with the disagreement, as explained earlier. However, this will not happen, as the case ended through settlement between the parties in 2021 when they signed the Al Ula agreement, which stipulates the withdrawal of all submitted disputes, including the dispute relating to the Chicago Convention.

This thesis has comprehensively achieved its aims by examining the legality of the airspace restrictions imposed on Qatar during the 2017 GCC crisis through the frameworks of international law, countermeasures, FIRs, and state sovereignty. The research confirmed that these measures failed to fulfil the legal criteria for lawful countermeasures, particularly in terms of proportionality and proof of wrongful acts, as outlined in the Articles on State Responsibility. It demonstrated that the actions of the blockading states, labeled as countermeasures, were unlawful and disproportionate, appearing to function more as measures of political coercion than as actions justified by international law principles. This analysis not only reinforced the importance of proportionality in countermeasures but also underscored the risks of using such measures to achieve political goals, thereby contributing to the scholarly debate on countermeasures in international law. Furthermore, by critically reassessing the role of FIRs, the research illustrated how FIRs can transcend their technical purpose and act as instruments of geopolitical influence, particularly when used to restrict access over international airspace. The analysis of Bahrain's closure of its FIR as well as the unilateral creation of a buffer zone over international waters exemplified this conflict, revealing a deeper tension between FIRs and state sovereignty. This perspective not only contributes to the academic discourse but also carries practical implications, as evidenced by

the establishment of Qatar's own FIR. This development sets a precedent that could inspire similar actions by other states seeking greater control over their airspace, emphasizing the thesis's potential impact on international aviation practices. Additionally, the thesis's exploration of ICAO's jurisdiction, particularly through the ICJ's acknowledgment of ICAO's broader role in resolving disputes, offers a new perspective on how international aviation law can adapt to complex geopolitical conflicts. This insight could pave the way for rethinking ICAO's potential as a self-contained regime, suggesting a path for future legal frameworks that integrate a more flexible approach to international dispute resolution. The findings of this research thus extend beyond academic discussions, offering practical implications for policymakers, international lawyers, and aviation regulators by providing a foundation for more robust legal mechanisms in managing geopolitical disputes within international aviation law.

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