



LAPIN YLIOPISTO
UNIVERSITY OF LAPLAND

**The Legality of Nationality-Based Airspace Closures
under the Chicago Convention and Countermeasures
Doctrine**

Public International Law
Master's Thesis

Mariel Tähtivaara

Spring 2026
University of Lapland



Lapin yliopisto, oikeustieteiden tiedekunta

Työn nimi: ”The Legality of Nationality-Based Airspace Closures under the Chicago Convention and Countermeasures Doctrine” (Kansalaisuuteen perustuvien ilmatilan sulkemisten oikeudellinen arviointi Chicagon yleissopimuksen ja vastatoimiopin valossa).

Tekijä: Mariel Tähtivaara

Koulutusohjelma / opetuskokonaisuus / oppiaine: Oikeustieteen maisterin tutkinto

Ohjaaja(t): Professori Lotta Viikari

Työn laji: Pro gradu -tutkielma

Sivumäärä, liitteiden lukumäärä: 72 sivua

Vuosi: 2026

Tiivistelmä: Tutkielmassa tarkastellaan, rikkovatko kansallisuuteen perustuvat ilmatilan sulkemiset kansainvälisen siviili-ilmailun yleissopimusta (Chicagon yleissopimus) ja voidaanko mahdollinen rikkomus oikeuttaa vastatoimien doktriinin perusteella. Pääasiallisena tutkimuskohteena ovat Euroopan unionin (EU:n) ja Venäjän helmikuusta 2022 alkaen voimassa olleet vastavuoroiset ilmatilan sulkemiset.

Tutkimusmetodi on lainopillinen ja kriittisesti orientoitunut. Tutkielma hyödyntää Aulis Aarnion lainopillista metodia, jota täydentävät Martti Koskenniemen kriittinen metodinen tietoisuus ja Andrea Bianchin metodinen pluralismi. Aineistona käytetään Chicagon yleissopimusta, Yhdistyneiden kansakuntien (YK:n) peruskirjaa, Wienin valtiosopimusoikeutta koskevaa yleissopimusta, YK:n kansainvälisen oikeuden toimikunnan valtioiden vastuuta koskevaa artiklaluonnosta (ARSIWA) sekä oikeuskäytäntöä ja kirjallisuutta.

Tutkielman lopputulos on doktriinin näkökulmasta epäsymmetrinen. Molemmat ilmatilan sulkemiset ovat Chicagon yleissopimuksen *prima facie* -rikkomuksia, sillä ne eivät täytä yleissopimuksen 9 artiklan edellytyksiä eivätkä syrjimättömyysperiaatetta koskevia vaatimuksia. Vastatoimien doktriinin tasolla lopputulema kuitenkin eroaa. EU:n ilmatilan sulkemisia voidaan pitää ARSIWA:n 54 artiklan ja 48 artiklan 1 kohdan b alakohdan nojalla kolmannen valtion vastatoimina Venäjän YK:n peruskirjan 2 artiklan 4 kohdan vastaiseen voimankäyttöön. Venäjän vastavuoroinen sulkua jää sen sijaan ARSIWA:n 49 artiklan 1 kohdan perusteella vastatoimipuolustuksen ulkopuolelle. Venäjän sulkua ei myöskään täytä vastatoimilta edellytettävää velvoitteiden noudattamiseen tähtäävää vaatimusta eikä menettelyllisiä vaatimuksia riippumatta siitä, miten EU:n asemaa koskeva kysymys arvioidaan.

Johtopäätöksenä esitetään, että kansallisuuteen perustuvien ilmatilan sulkemisten oikeudellinen sallittavuus määräytyy Chicagon yleissopimuksen ja valtiovastuopin välisen vuorovaikutuksen kautta.

Avainsanat: Chicagon yleissopimus, ilmatila, vastatoimet, kansainvälinen ilmailuoikeus, syrjimättömyys

Table of Contents

SOURCES	V
TREATIES AND EU LEGISLATION	X
ABBREVIATIONS	XII
1 Introduction	1
1.1 Research Context	1
1.2 Research Questions.....	2
1.3 Methodology.....	4
1.4 Scope and Limitations	6
1.5 Structure of the Thesis	8
2 Airspace Sovereignty and the Treaty Limits of Nationality-Based Airspace Closures	10
2.1 Complete and Exclusive Sovereignty as the Baseline	10
2.2 Lawful Airspace Closures Under the Chicago Convention.....	12
2.2.1 <i>Structure and Scope of the Closure Regime</i>	13
2.2.2 <i>Legitimate Purpose</i>	15
2.2.3 <i>The Prohibition of Nationality-Based Discrimination</i>	17
2.2.4 <i>Reasonableness and Temporariness</i>	19
2.3 Non-Discrimination as a Structural Principle of the Chicago Convention.....	20
2.4 Residual Sovereign Authority Beyond Treaty Limitations	23
2.5 Chapter Conclusion	25
3 Countermeasures and Nationality-Based Airspace Closures	26
3.1 Retorsion and Countermeasures: Threshold Classification	27
3.2 Applicability of Countermeasures to Chicago Convention Obligations	28
3.2.1 <i>Protected Obligations and the Limits of Countermeasures</i>	29
3.2.2 <i>Lex Specialis and the Chicago Convention Dispute Settlement System</i>	31
3.2.3 <i>The Integral Character of Chicago Convention Obligations</i>	32
3.3 Conditions for Lawful Countermeasures.....	34
3.3.1 <i>Prior Internationally Wrongful Act</i>	35
3.3.2 <i>Standing and Third-Party Countermeasures</i>	37
3.3.3 <i>Compliance Purpose</i>	40
3.3.4 <i>Proportionality</i>	41
3.3.5 <i>Reversibility and Temporary Character</i>	43
3.3.6 <i>Procedural Conditions</i>	44
3.4 Chapter Conclusion	46
4 Case Study: EU-Russia Airspace Closures (2022–Present)	47
4.1 Regulatory and Factual Background.....	47
4.2 Prima Facie Compatibility with the Chicago Convention	48

4.3	The EU Airspace Closures as Countermeasures Under ARSIWA.....	50
4.3.1	<i>Prior Internationally Wrongful Act</i>	50
4.3.2	<i>Standing and Third-Party Countermeasures</i>	51
4.3.3	<i>Compliance Purpose</i>	53
4.3.4	<i>Proportionality</i>	54
4.3.5	<i>Reversibility and Temporary Character</i>	55
4.3.6	<i>Procedural Conditions</i>	56
4.3.7	<i>The EU Closures as Lawful Countermeasures</i>	57
4.4	Russia's Airspace Closures	58
4.4.1	<i>Precluded by Prior Lawful Countermeasures</i>	58
4.4.2	<i>Independent Grounds of Illegality</i>	60
4.4.3	<i>Russia's Submission to the International Civil Aviation Organization</i>	62
4.5	Chapter Conclusion	65
5	Conclusion	67
5.1	Main Findings	68
5.2	Implications for the Chicago Convention and the Law of State Responsibility.....	69
5.3	De Lege Ferenda.....	70
5.4	Limitations and Prospects for Future Research	71

SOURCES

[All internet sources have been visited on 20.05.2026]

Literature

- Aarnio, Aulis, *Luentoja lainopillisen tutkimuksen teoriasta*. Helsingin yliopiston oikeustieteellisen tiedekunta 2011.
- Abeyratne, Ruwantissa, *Convention on International Civil Aviation: A Commentary*. Springer 2014.
- Bianchi, Andrea, *International Law Theories: An Inquiry into Different Ways of Thinking*. Oxford University Press 2016.
- Cardwell, Paul James – Moret, Erica, *The EU, Sanctions and Regional Leadership*. *European Security* 2023 32 (1), pp. 1–21.
- Cheng, Bin, *The Law of International Air Transport*. Stevens 1962.
- Cheng, Chia-Jui (ed.), *Studies in International Air Law: Selected Works of Bin Cheng*. Brill Nijhoff 2017.
- Correia, Vincent, *The Legacy of the 1919 Paris Convention Relating to the Regulation of Aerial Navigation*, pp. 3–23 in Pablo Mendes de Leon – Niall Buissing (eds.), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*. Kluwer Law International 2019.
- Costas, Samantha, *Controlling the Skies: Leveraging Airspace as a Foreign Policy Tool*. Loyola University Chicago 2024.
- Crawford, James, *State Responsibility: The General Part*. Cambridge University Press 2013.
- Crawford, James, *Brownlie's Principles of Public International Law*. 9th edition. Oxford University Press 2019.
- David, Eric, *Primary and Secondary Rules*, pp. 27–33 in James Crawford – Alain Pellet – Simon Olleson (eds.), *The Law of International Responsibility*. Oxford University Press 2010.
- Dawidowicz, Martin, *Third-Party Countermeasures in International Law*. Cambridge University Press 2017.
- Hakapää, Kari, *Uusi kansainvälinen oikeus*. 3rd edition. Talentum 2010.
- Havel, Brian F. – Sanchez, Gabriel S., *The Principles and Practice of International Aviation Law*. Cambridge University Press 2014.
- Hayashi, Mika – Yamaguchi, Akihiro, *Economic Sanctions against Russia: Questions of Legality and Legitimacy*. *International Community Law Review* 26(1) 2024, pp. 69–98.

- Hirvonen, Ari, *Mitkä metodit? Opas oikeustieteen metodologiaan*. Helsinki University 2011.
- Hobe, Stephan, *Sovereignty as a Basic Concept of International Law and a Core Principle of Air Law*, pp. 35–44 in Pablo Mendes de Leon – Niall Buissing (eds.), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*. Kluwer Law International. 2019.
- Hofer, Alexandra, *Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?* *International & Comparative Law Quarterly* 74 (2) 2025, pp. 287–317.
- Jennings, R. Y., *International Civil Aviation and the Law*. *British Year Book of International Law* 22/1945, pp. 191–209.
- Jennings, Robert – Watts, Arthur (eds.), *Oppenheim's International Law Vol. 1: Peace*. 9th ed. Longman 1996.
- Katselli Proukaki, Elena, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community*. Routledge 2010.
- Klabbers, Jan, *International Law*. 3rd edition. Cambridge University Press 2021.
- Konert, Anna, *The Development of Civil Aviation and Its Impact on Sovereignty*, pp. 45–51 in Pablo Mendes de Leon – Niall Buissing (eds.), *Behind and Beyond the Chicago Convention: The Evolution of Aerial Sovereignty*. Kluwer Law International 2019.
- Koskenniemi, Martti, *Tyyli metodina*, pp. 173–188 in Häyhä, Juha (ed.), *Minun metodini*. Werner Söderström Lakitieto 1997.
- Masson-Zwaan, Tanja – Hofmann, Mahulena, *Introduction to Space Law*. 4th ed. Kluwer Law International 2019.
- Masutti, Anna – Mendes de Leon, Pablo (eds.), *Elgar Concise Encyclopedia on Aviation Law*. Edward Elgar Publishing 2023.
- Mendes de Leon, Pablo, *Introduction to Air Law*. 11th edition. Kluwer Law International 2022.
- Ostroumov, Ivan – Ivannikova, Veronika – Kuzmenko, Nataliia – Zaliskyi, Maksym, *Impact Analysis of Russian-Ukrainian War on Airspace*. *Journal of Air Transport Management* 124/2025.
- Shaw, Malcolm N., *International Law*. 8th edition. Cambridge University Press 2017.
- Sicilianos, Linos-Alexander, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, pp. 1137–1148 in James Crawford – Alain Pellet – Simon Olleson (eds.), *The Law of International Responsibility*. Oxford University Press 2010.
- Sipos, Attila, *Milde's International Air Law and ICAO: Revised by Attila Sipos*. 4th edition. Eleven 2023.

Tzanakopoulos, Antonios, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions*. Oxford University Press 2011.

Zengerling, Zarah Lea – Kumpa, Sami – Clococeanu, Maximillian – Mendiguchía Meuser, Maximillian. – Solzer, Julian – Dahmann, Katrin, *Assessing Climate Effects Resulting From Airspace Closures Following the Ukrainian Crisis*. *Journal of Open Aviation Science* 2(2) 2024.

Zhang, Wanlu, *Protection of Aviation Security Through the Establishment of Prohibited Airspace*. Leiden University 2023.

Official Documents

ICAO Documents

A41-WP/456. *The Incompatibility of Unilateral Restrictive Measures Impacting International Civil Aviation Activities with the Provisions of the Convention on International Civil Aviation*. Working Paper presented by the Russian Federation to the Executive Committee, 41st Session of the ICAO Assembly. Montreal 1.8.2022.

A42-WP/256. *Incompatibility of Unilateral Coercive Measures with the Provisions of the Convention on International Civil Aviation, Their Impact on International Civil Aviation and the Consequences of Their Application*. Working Paper presented by the Russian Federation to the Executive Committee, 42nd Session of the ICAO Assembly. Montreal 12.9.2025.

ICAO Assembly Resolution A42-2, *Infraction of the Convention on International Civil Aviation by the Russian Federation*. Adopted at the 42nd Session of the ICAO Assembly, Montreal, 23.9.–3.10.2025.

ICAO Assembly Resolution A42-5, *Consolidated Statement of Continuing ICAO Policies in the Legal Field*. Adopted at the 42nd Session of the ICAO Assembly, Montréal, 23.9.–3.10.2025.

United Nations and ILC Documents

International Law Commission, *Draft Articles on the Law of Treaties with Commentaries*. Yearbook of the International Law Commission 1966, Volume II. UN Doc A/CN.4/L.117. United Nations 1966. (ILC Draft Articles 1966)

International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*. UN Doc A/56/10. Yearbook of the International Law Commission 2001, Volume II, Part Two. United Nations 2001. (ARSIWA Commentary 2001)

- International Law Commission (Fitzmaurice, Gerald), Second Report on the Law of Treaties. UN Doc A/CN.4/107. Yearbook of the International Law Commission 1957, Volume II. United Nations 1957. (Fitzmaurice 1957)
- International Law Commission (Fitzmaurice, Gerald), Fourth Report on the Law of Treaties. UN Doc A/CN.4/120. Yearbook of the International Law Commission 1959, Volume II. United Nations 1959. (Fitzmaurice 1959)
- International Law Commission (Koskenniemi, Martti), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1. United Nations 2006. (Koskenniemi 2006)
- International Law Commission (Waldock, Humphrey), Third Report on the Law of Treaties. UN Doc A/CN.4/167 and Add.1-3. Yearbook of the International Law Commission 1964, Volume II. United Nations 1964. (Waldock 1964)
- International Law Commission, Reports of the Commission to the General Assembly. UN Doc A/6309/Rev.1. Yearbook of the International Law Commission 1966, Volume II. Monaco 1966. (ILC 1966)
- UN General Assembly Resolution 217 A (III), Universal Declaration of Human Rights. UN Doc A/RES/217(III) adopted 10.12.1948. United Nations 1948.
- UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. UN Doc A/RES/2625(XXV) adopted 24.10.1970. United Nations 1970.
- UN General Assembly Resolution 76/161, Human Rights and Unilateral Coercive Measures. UN Doc A/RES/76/161 adopted 16.12.2021. United Nations 2021.
- UN General Assembly Resolution 76/191, Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries. UN Doc A/RES/76/191 adopted 16.12.2021. United Nations 2021.
- UN General Assembly Resolution 78/135, Human Rights and Unilateral Coercive Measures. UN Doc A/RES/78/135 adopted 19.12.2023. United Nations 2023.
- UN General Assembly Resolution ES-11/1, Aggression Against Ukraine. UN Doc A/RES/ES-11/1 adopted 2.3.2022. United Nations 2022.
- UN Security Council, Draft Resolution S/2022/155, On the situation in Ukraine. UN Doc S/2022/155, 25.2.2022. United Nations 2022.

Other Official Sources

European Commission (von der Leyen, Ursula), Statement by President von der Leyen on Further Measures to Respond to the Russian Invasion of Ukraine. Brussels 27.2.2022. https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441. (European Commission 2022)

European Parliament (Webb, Philippa), Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine. Brussels 23.2.2024. [https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2024\)759602](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2024)759602). (Webb, 2024).

IATA, The Impact of the War in Ukraine on the Aviation Industry. IATA Economics Factsheet, 25.3.2022. <https://www.iata.org/en/iata-repository/publications/economic-reports/the-impact-of-the-conflict-between-russia-and-ukraine-on-aviation/>. (IATA 2022)

ICAO, ICAO Statement on the Safety and Security of Aviation Operations. Montreal 2.3.2026. <https://www.icao.int/news/icao-statement-safety-and-security-aviation-operations>. (ICAO 2026)

ICAO, Member States. <https://www.icao.int/about-icao/member-States>.

International Transport Forum, How the War in Ukraine Impacts Aviation – And What to Do About It. Transport Policy Responses to the War in Ukraine, No. 3. 22.12.2022. (ITF 2022)

State Aviation Administration of Ukraine, NOTAM A0009/24, Closure of FIR LVIV (UKLV), FIR KYIV (UKBV), FIR DNIPRO (UKDV), FIR SIMFEROPOL (UKFV) and FIR ODESA (UKOV) to Civil Aviation. 24.2.2022.

Russian Federal Air Transport Agency (Rosaviatsiya), Информационное сообщение, 28.2.2022. <https://famt.gov.ru/novosti-novosti/?id=8963&>. (Rosaviatsiya 28.2.2022)

International Cases and Arbitral Awards

International Court of Justice (ICJ)

ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, ICJ Reports 2022, p. 211.

ICJ, 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, p. 81.

ICJ, Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, ICJ Reports 1972, p. 46.

ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment, ICJ Reports 1970, p. 3.

ICJ, Frontier Dispute (Benin v. Niger), Judgment, ICJ Reports 2005, p. 90.

ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7.

ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422.

ICJ, Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, ICJ Reports 1994, p. 6.

Arbitral Tribunals

Case concerning Air Service Agreement of 27 March 1946 between the United States of America and France (United States v. France), Arbitral Award 1978, Volume XVIII RIAA pp. 417–493.

Corn Products International Inc. v. United Mexican States, Decision on Responsibility 2008, ICSID Case No. ARB(AF)/04/01. 146 ILR pp. 581–624.

Cysne (Responsibility of Germany for Acts Committed Subsequent to 31 July 1914 and Before Portugal Entered the War) (Portugal v. Germany), Arbitral Award 1930, Volume II RIAA pp. 1035–1057.

Online Sources

Reuters, Russian flights ban hit airlines from 36 countries – aviation authority. 28.2.2022. <https://www.reuters.com/business/aerospace-defense/russia-imposes-sweeping-flight-bans-airlines-36-countries-2022-02-28/>.

Reuters (Lampert, Allison), Russia loses U.N. aviation council seat in rebuke. 1.0.2022. <https://www.reuters.com/world/europe/russia-not-re-elected-un-aviation-agencys-36-member-council-2022-10-01/>.

TASS, Russia Closes Airspace to Germany, Spain, Italy, Other Countries as Retaliation Measure. 28.2.2022. <https://tass.com/economy/1413353>.

TREATIES AND EU LEGISLATION

European Union

Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

United Nations and League of Nations

Charter of the United Nations, adopted 26.06.1945, entered into force 24.10.1945. 1 UNTS XVI.

- Statute of the International Court of Justice, annexed to the Charter of the United Nations 26.6.1945.

Convention on International Civil Aviation, adopted 7.12.1944, entered into force 4.4.1947. 15 UNTS 295. (Chicago Convention)

- Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3*bis*), adopted 10.5.1984, entered into force 1.10.1998, 2122 UNTS 337.
- ICAO, Annex 11 to the Convention on International Civil Aviation – Air Traffic Services. 15th edition. Montreal 19.11.2018.
- ICAO, Annex 2 to the Convention on International Civil Aviation – Rules of the Air. 10th edition. Montreal 24.11.2005.

Convention Relating to the Regulation of Aerial Navigation, adopted 13.10.1919, entered into force 29.3.1922, 11 LNTS 173. (Paris Convention)

Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, adopted 15.4.1994, entered into force 1.1.1995, 1869 UNTS 401. (DSU)

Vienna Convention on the Law of Treaties, adopted 23.5.1969, entered into force 27.1.1980, 1155 UNTS 331. (VCLT)

ABBREVIATIONS

ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
Art./ Arts.	Article/ Articles
ASA	Air Service Agreement
CFSP	Common Foreign and Security Policy
DSU	Dispute Settlement Understanding
EU	European Union
FIR	Flight Information Region
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILC	International Law Commission
p./ pp.	Page/ Pages
para./ paras.	Paragraph/ Paragraphs
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1 Introduction

1.1 Research Context

Since 1944, the Convention on International Civil Aviation (“Chicago Convention” or “the Convention”) has provided the legal framework for international civil aviation through a dense system of uniform rules, technical standards and reciprocal rights and obligations.¹ Concluded on 7 December 1944 at the Chicago Conference attended by 54 States, and entering into force in April 1947, the Chicago Convention remains the principal multilateral treaty governing international civil aviation.² The Chicago regime balances sovereignty with cooperation: while every State retains complete and exclusive sovereignty over the airspace above its territory, the Chicago regime of international civil aviation depends on a stable legal order that can function regardless of political disagreement.

In late February 2022, that balance came under exceptional strain when Russia launched an armed attack against Ukraine,³ prompting the European Union (“EU”) and several other States to close their airspace to Russian aircraft, and Russia to respond with reciprocal closures (together “EU-Russia closures”).⁴ More than four years later, the consequences remain visible across international civil aviation. Established air routes across Europe and Asia have had to be changed, air carriers have been excluded from vast areas of international airspace, and civil aviation has been transformed into a visible arena of geopolitical pressure.

The tension between sovereignty and cooperation raises a foundational question in international air law: whether States may lawfully exclude another State's aircraft from their airspace on the basis of nationality as a form of geopolitical retaliation. The issue is whether the Chicago Convention permits the selective exercise of sovereignty that infringes on the cooperative legal order upon which international civil aviation depends. The EU-Russia closures have also raised the question of whether States can close their airspace not for safety or technical reasons, but as a response to grave breaches of international law.

¹ Convention on International Civil Aviation, adopted 7.12.1944, entered into force 4.4.1947. 15 UNTS 295.

² Jennings–Watts 2008, p. 652.

³ Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; European Commission 2022.

⁴ Rosaviatsiya 28.2.2022; Reuters 28.2.2022.

This thesis examines nationality-based airspace closures, measures that a State uses to restrict or prohibit the overflight of aircraft registered in, or operated by, one State or a defined group of States, while permitting aircraft of all other States to operate freely in the same airspace. The legality of such closures under the Chicago Convention and the law of State responsibility is analysed in this thesis.

The issue arises most prominently in the EU-Russia closures adopted at the end of February 2022. The legality of Russia's underlying conduct is not in dispute in this thesis, the issue, instead, is whether the Chicago Convention permits the particular form of response that EU Member States and Russia have adopted, specifically airspace closures. If the Convention does not permit such measures, it raises the additional question of whether the wrongfulness of the resulting breach may be precluded under the law of State responsibility, through the countermeasures codified in the International Law Commission's ("ILC's") Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA")⁵.

1.2 Research Questions

Existing scholarship on airspace sovereignty in general international law is long-established and reasonably settled.⁶ Specialised air law scholarship treats the Chicago Convention as a structured cooperative regime and analyses specific provisions, including Articles 9, 11 and 15.⁷ Air law scholarship has also recently examined the use of prohibited airspace from a security and safety perspective.⁸ The general law of State responsibility and, in particular, the countermeasures doctrine have been extensively treated by Crawford, Dawidowicz, Sicilianos.⁹

Existing commentary on the EU-Russia closures has tended to address their descriptive aspects or present empirical findings on their operational impact.¹⁰ In legal commentary specifically, the closures are generally treated as part of the broader sanctions regimes adopted against Russia, with scholarly attention focusing on sanctions law and EU external relations law rather than on the Chicago Convention as the constitutive treaty of the international civil aviation regime.¹¹ What remains underdeveloped is the doctrinal question of how the Convention's non-

⁵ Although the draft articles are not a binding instrument, the articles are widely recognised as reflecting customary international law on State responsibility, and are treated as such throughout this thesis. Crawford 2013, p. 45.

⁶ See Shaw 2017; Crawford 2019; Klabbers 2021.

⁷ Abeyratne 2014; Masutti – Mendes De Leon 2023; Mendes De Leon 2022; Havel – Sanchez 2014.

⁸ See Zhang 2023.

⁹ Crawford 2013; Dawidowicz 2017; Sicilianos 2010.

¹⁰ See for example Zengerling *et al* 2024; Ostroumov *et al.* 2025;

¹¹ Hayashi – Yamaguchi 2024; Cardwell – Moret 2023.

discrimination framework, together with the secondary rules of State responsibility, applies when States restrict access to airspace in response to internationally wrongful conduct by other States.

The lawfulness of nationality-based airspace closures cannot be assessed solely under the Chicago Convention or under the law of State responsibility. The central problem lies in the interaction between primary rules governing the exercise of sovereign discretion over airspace and secondary rules governing the legal consequences of an internationally wrongful act.¹² The two bodies of law operate at different levels, and the question this thesis examines is how they interact when a State imposes nationality-based airspace closures on grounds specifically listed in the provision regarding airspace closures in the Convention.

The primary research question is:

To what extent does the Chicago Convention permit or prohibit nationality-based airspace closures, and under what conditions may countermeasures under general international law preclude the wrongfulness of such closures?

The question is approached through three sub-questions:

- How does the Chicago Convention limit a State's discretion to close its airspace to foreign aircraft on the basis of nationality?
- Under what conditions may countermeasures under general international law preclude the wrongfulness of conduct that would otherwise breach the Chicago Convention?
- How do the conditions and limits of the countermeasures doctrine apply to the reciprocal EU and Russian airspace closures of 2022, and how does this application affect the interpretation of countermeasures within the multilateral framework of the Chicago Convention?

The questions are presented in this order because international law operates on two levels: primary rules, which establish what States may and may not do, and secondary rules, which determine when conduct that does not conform to primary rules is nonetheless internationally lawful.¹³ The first sub-question concerns the primary rules governing the Chicago Convention's regulation of airspace closures. The second is a question regarding secondary rules governing the application of the countermeasures doctrine, as codified in ARSIWA. The third question is

¹² ARSIWA Commentary 2001, General Commentary, paras. 1–3; Crawford 2013, pp. 64–66.

¹³ David 2010, pp. 27–33.

about application, examining the interaction of the two sets of rules when applied to a case of contemporary State practice: the EU-Russia airspace closures imposed in February 2022.

1.3 Methodology

The methodological foundation of this thesis rests on the Finnish tradition of doctrinal legal scholarship, complemented by a critical orientation drawn from international legal theory. Aarnio distinguishes theoretical from practical doctrinal scholarship: the former systemises legal norms, the latter interprets them and produces concrete recommendations, with the two in continuous dialogue.¹⁴ For a thesis, this interaction means that one cannot merely list or describe the state of the law. Aarnio stresses that scholarly work must advance at least one core claim; without one, research becomes descriptive rather than analytical. The value of doctrinal scholarship lies in identifying legal problems, systematising them within the field, and proposing justified interpretations or recommendations.¹⁵

The core claim advanced in this thesis is that nationality-based airspace closures are *prima facie* breaches of the Chicago Convention's framework on non-discrimination and airspace closures, and cannot be justified only by reference to State sovereignty under Article 1. Their wrongfulness may be precluded in exceptional circumstances under the countermeasures doctrine of general international law. The legality of such closures, therefore, depends on the interaction between the bodies of law.

Aarnio's criteria for competent doctrinal work follow from this: familiarity with key literature; command of the core content of general doctrines in the relevant legal field; precise identification of the central problems and their connections to one another; justified claims supported by relevant legal sources, and a touch of critical perspective, including *de lege ferenda* proposals when justified.¹⁶ This thesis takes those criteria, situating the analysis within the doctrines of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT")¹⁷ and ARSIWA. Treaty interpretation proceeds primarily through Articles 31 and 32 VCLT: ordinary meaning in context, in the light of object and purpose, with recourse to supplementary means where the primary methods of interpretation leave the meaning unclear.

¹⁴ Aarnio 2011, pp. 126–127.

¹⁵ *Ibid*, pp. 133–135; Hirvonen 2011, p. 18.

¹⁶ Aarnio 2011, pp. 133–136.

¹⁷ Vienna Convention on the Law of Treaties, adopted 23.5.1969, entered into force 27.1.1980, 1155 UNTS 331.

A purely doctrinal approach, however, leaves important aspects of international legal reasoning out of view. As Koskeniemi has argued, the reasoning is both predictable and indeterminate: formally coherent reasoning can be mobilised to support a wide range of positions, and a single method does not guarantee determinate answers.¹⁸ He describes legal method as a style: a way of writing, speaking, and living within a professional community and recognising methodology as a style allows for critical distance: by shifting style, one can reveal the silences and exclusions in existing diplomatic or academic consensus.¹⁹ Bianchi adds that each scholar is “positioned”: each of us looks at international law from a standpoint shaped by intellectual upbringing, presuppositions and personal history.²⁰ Each offers its own lens, with strengths and blind spots.²¹

Therefore, Aarnio’s doctrinal discipline, Koskeniemi’s critical scepticism, and Bianchi’s pluralism guide the analysis in this thesis. The methodological choice made is to take Aarnio’s framework as the operating method while utilising Koskeniemi’s caution and Bianchi’s reminder that choice itself is positioned. The critical orientation is reflected clearly in chapter 4, which develops a primary reading of the EU-Russia closures alongside an alternative reading that tests the robustness of the framework’s conclusions under contrary assumptions.

As Bianchi guided, it is worth noting the perspective from which this thesis is written: a European legal context, a Finnish law faculty, and a State that has closed its airspace to Russian aircraft. This requires methodological consideration, and therefore, the same doctrinal standards are applied to EU Member State conduct as to Russia’s.

The sources used are in accordance with the traditional source hierarchy of public international law reflected in Article 38(1) of the Statute of the International Court of Justice (“ICJ”)²², the analysis primarily relies on treaty law, customary international law, and general principles of law, with judicial decisions and scholarly writings as subsidiary means of interpretation where appropriate. The central treaties are the Chicago Convention of 1944 and its antecedent, the Convention Relating to the Regulation of Aerial Navigation of 1919 (“Paris Convention”).²³

¹⁸ Koskeniemi 1997, pp. 179–180.

¹⁹ *Ibid*, pp. 185–187.

²⁰ Bianchi 2016, p. 16.

²¹ *Ibid*, pp. 80–81.

²² Statute of the International Court of Justice, annexed to the Charter of the United Nations 26.6.1945, 1 UNTS xvi.

²³ Convention Relating to the Regulation of Aerial Navigation, adopted 13.10.1919, entered into force 29.3.1922, 11 LNTS 173.

The ICJ has observed in *Nicaragua* that customary international law continues to exist alongside treaty law, and the two do not perfectly overlap in coverage or content.²⁴ It was also found in *Gabčíkovo-Nagymaros* that the question of whether a treaty obligation is in force, suspended or terminated falls to the law of treaties. In contrast, an evaluation of whether a suspension is incompatible with the obligation engages the law of State responsibility.²⁵ That distinction structures the argument that follows.

1.4 Scope and Limitations

The temporal scope of this thesis extends from the post-Second World War Chicago regime to the present, with primary focus on State practice and legal developments since February 2022, when the reciprocal airspace closures between the EU Member States and Russia were imposed.²⁶ Earlier practice is examined only to the extent necessary to establish the baseline for the rights and obligations arising under the Chicago Convention. The geographical scope is limited to airspace over State territory and territorial waters within the meaning of Articles 1 and 2 of the Chicago Convention. Airspace over the high seas, polar areas under special regimes, and other non-sovereign airspace fall outside the analysis.

The material scope of the thesis is confined to overflight and transit rights under the Chicago Convention, rather than traffic rights that are governed by the separate system of air service agreements (“ASAs”), which are the product of commercial interests being traded between States.²⁷ Their granting or refusal is a matter of commercial negotiations between States, rather than an expression of the general rules on territorial airspace access. Examining landing rights alongside overflight rights would require a separate analytical framework and risk conflating legally distinct questions. Within this scope, the thesis uses “closure” as the umbrella term covering full and partial denials of overflight access.²⁸

²⁴ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14 at para. 176.

²⁵ ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7 at para. 47.

²⁶ Council Regulation (EU) 2022/334; Rosaviatsiya 28.2.2022; Reuters 28.2.2022.

²⁷ Havel – Sanchez 2014, p. 69; Sipos 2023, p. 37.

²⁸ Literature and State practice use a combination of “closure”, “restriction”, “ban”, “prohibition” and “suspension” and the use of a singular word “closure” aids in the clarity of the argument.

This thesis concerns civil aircraft only. According to Article 3(a) of the Convention, the Convention only applies to civil aircraft, not to State aircraft.²⁹ Article 3(c) provides that no State aircraft of a contracting State may fly over the territory of another State without special permission. State aircraft are therefore outside the non-discrimination framework of the Convention because they were never within it: their overflight is discretionary according to Article 3(c), whereas the overflight of civil aircraft is subject to conditions in the Convention.

No-fly zones and flight prohibitions imposed by the United Nations (“UN”) Security Council (“UNSC”) under Chapter VII of the UN Charter³⁰ are excluded. Such measures present distinct legal questions concerning the relationship between the UN Charter and the Chicago Convention. This thesis focuses on unilateral State action and the conditions under which such action may be justified under the law of State responsibility.

The analysis is limited to peacetime conditions. Article 89 of the Convention grants contracting States broad freedom of action in the event of war or a national emergency, operating as *lex specialis* that displaces the ordinary treaty regime. The classification is significant for the doctrinal framework applied in this thesis. Russia is a party to the armed conflict in Ukraine, but the EU Member States that have closed their airspace are not. The closures imposed by EU Member States are accordingly assessed under the Chicago Convention's peacetime provisions, and have not invoked Article 89's procedure with the International Civil Aviation Organization (“ICAO”). Russia has also not invoked Article 89 and has refrained from using the term “war” when describing its armed attack on Ukraine, and used “special military operation” instead.³¹

The reciprocal EU–Russia airspace closures are used as the primary case study because they provide a contemporary and ongoing example through which both the primary rules of the Chicago Convention and the secondary rules of State responsibility can be examined. Although the analytical framework developed in this thesis may also apply to airspace closures adopted by other States in response to Russia's invasion of Ukraine, the legal assessment of standing differs depending on whether a State is an injured State or a third party under the law of State responsibility.

²⁹ Article 3(b) defines State aircraft as those used in “military, customs and police services”. The definition is very broad, and the question of what constitutes a State aircraft has generated discussion in literature. See Mendes de Leon 2022, pp. 47–48.

³⁰ Charter of the United Nations, adopted 26.06.1945, entered into force 24.10.1945. 1 UNTS XVI.

³¹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order of 16 March 2022, ICJ Reports 2022, p. 211 at paras. 32, 39, 41.

This thesis assumes Russia's armed attack on Ukraine as a breach of Article 2(4) of the UN Charter based on the view of authoritative institutional claims that classify it as such; these include the UNGA Resolution ES-11/1,³² and the ICJ in its Order on Provisional Measures of 16 March 2022, ordered Russia to suspend its military operations in the territory of Ukraine.³³ The lawfulness of Russia's conduct under *jus ad bellum* is the primary-rule question, and the answer to which is what the secondary-rules analysis of this thesis is built in chapters 3 and 4. Questions of *jus in bello* fall outside the scope of this thesis.

EU internal law, sanctions and technical aviation safety regulations are examined only to the extent necessary to explain the international legal context. The focus of this thesis is public international law, specifically the legal limits imposed by the Chicago Convention and the law of State responsibility on unilateral State action in territorial airspace. Although ARSIWA are not a binding instrument, the articles are recognised as reflecting customary international law on State and are treated as such in this thesis.³⁴

As established in section 2.1, for this thesis, airspace sovereignty refers to the competence inherent in territorial sovereignty to regulate the use of the airspace above a State's territory. Airspace closure refers to a unilateral measure by which a State restricts or denies foreign civil aircraft the right to fly over its territory. Nationality-based airspace closures are measures by which a State restricts or prohibits the overflight of aircraft registered in, or operated by carriers of, one State or a defined group of States, while permitting aircraft of all other States to operate freely in the same airspace.

1.5 Structure of the Thesis

Chapter 2 examines the Chicago Convention's regulation of airspace closures. The starting point is Article 1's recognition of complete and exclusive sovereignty, which serves as the baseline for the rest of the regime. Article 9 is then analysed as the Convention's specific provision on airspace closures, imposing conditions dependent on the type of airspace closure: a permissible purpose of military necessity or public safety, application without distinction of nationality,

³² UN General Assembly Resolution ES-11/1, Aggression Against Ukraine. UN Doc A/RES/ES-11/1 adopted 2.3.2022. United Nations 2022, para. 2.

³³ *Ukraine v. Russian Federation* (Provisional Measures), para. 86.

³⁴ Although the draft articles are not a binding instrument, the articles are widely recognised as reflecting customary international law on State responsibility, and are treated as such throughout this thesis. Crawford 2013, p. 45. *Gabčíkovo-Nagymaros*, para. 83.

reasonable extent and location and temporariness. Article 9 is read together with the Convention's broader non-discrimination architecture in Articles 11, 15, 22, 37 and 44 and with the preamble's equality of opportunity. The chapter asks whether nationality-based closures fit within the framework these provisions establish.

Chapter 3 turns to the countermeasures doctrine in general international law. The chapter first addresses the threshold classification of nationality-based closures as countermeasures rather than retorsion, as this determines whether Article 54 of the ARSIWA is engaged at all. It then considers the availability of countermeasures for Chicago Convention obligations, examining Article 50 ARSIWA on obligations the performance of which may not be impaired by countermeasures and Article 55 on the *lex specialis* question. The integral character of the Convention's non-discrimination obligations is introduced as a structural feature of the regime within which the cumulative conditions operate. The conditions of Articles 49 to 53 are then applied in turn to nationality-based airspace closures: the requirement of a prior internationally wrongful act, standing, the inducement requirement, proportionality, reversibility and temporary character, and the procedural conditions of notification and prior demand. The chapter also addresses the operation of Articles 22 and 49(1) read together, where a measure is taken in response to another State's prior lawful countermeasure.

Chapter 4 applies the framework developed in the chapter 2 and 3 to the EU-Russia closures, structured around the asymmetry that the doctrine produces between them. The EU closures are assessed against the ARSIWA conditions for third-party countermeasures; Russia's reciprocal closures are categorically foreclosed by Article 49(1) ARSIWA and, independently, fail the inducement condition. The chapter also addresses the attribution question arising from the collective EU measure and Russia's ICAO Assembly submissions before testing the asymmetric verdict against the alternative reading of the Article 54 standing condition.

Chapter 5 returns to the primary research question and the three sub-questions in light of the analysis. It draws the findings together, considers their implications for the interpretation of the Chicago Convention and for the operation of the countermeasures doctrine in the aviation sector, offers a brief *de lege ferenda* perspective, and identifies the limitations of the present research and prospects for future research.

2 Airspace Sovereignty and the Treaty Limits of Nationality-Based Airspace Closures

This chapter analyses the principle of State sovereignty over territorial airspace and the framework established by the Chicago Convention for its exercise. The thesis is concerned with nationality-based airspace closures, which can be defined as measures by which a State restricts or prohibits the overflight of aircraft registered in, or operated by carriers of, one State or a defined group of States, while permitting aircraft of all other States to operate freely in the same airspace.

The analysis in this chapter proceeds in three steps. Section 2.1 establishes the principle of complete and exclusive sovereignty under Article 1 of the Convention and the customary rule it recognises. Section 2.2 turns to Article 9, the specific provision in the Convention governing airspace closures within the Chicago regime, and applies three cumulative legal tests: a permissible purpose, non-discrimination, and reasonableness or temporariness, depending on the sub-provision being considered. Section 2.3 examines the Convention's non-discrimination framework more broadly, drawing on Articles 11, 15, 22, 37 and 44, as well as the preamble. Section 2.4 discusses the interpretation that Article 1's complete and exclusive sovereignty can be used as residual power for closures that Article 9 does not permit. Section 2.5 concludes the analytical discussion. All in all, the chapter focuses on whether the imposition of nationality-based closures complies with the Convention's framework.

2.1 Complete and Exclusive Sovereignty as the Baseline

The foundational principle of the international civil aviation regime is the sovereignty of States over their airspace.³⁵ It has been characterised as “the fundamental postulate upon which other norms and virtually all air law is based.”³⁶ Article 1 of the Chicago Convention recognises that every State has “complete and exclusive sovereignty over the airspace above its territory.” The

³⁵ Mendes de Leon 2022, pp. 43–45; Havel – Sanchez 2014, pp. 17–18.

³⁶ Abeyratne 2014, p. 17.

provision speaks of “every State” rather than “every contracting State”, and the verb “recognize” instead of “establish”, indicating that the Convention is acknowledging a pre-existing rule of customary international law rather than the creation of a new treaty right.³⁷

Before the First World War, the legal status of airspace remained unsettled, and a choice had to be made between two competing models: a regime of free overflight or one of exclusive territorial sovereignty. The security risks the war exposed pushed States decisively towards the latter, and customary international law emerged rapidly.³⁸ As a result, complete and exclusive sovereignty was first codified in the Paris Convention in 1919 and reaffirmed in Article 1 of the Chicago Convention in 1944. The Convention is now in force between 193 States and constitutes the principal multilateral framework for international civil aviation.³⁹

Complete and exclusive sovereignty means that foreign aircraft do not have an inherent right of passage through another State’s airspace.⁴⁰ Unlike the regime of innocent passage in the law of the sea, civil aviation does not have an equivalent default permission; access to national airspace depends on the consent of the territorial State, expressed through bilateral or multilateral agreement.⁴¹ National airspace is, therefore, as a matter of law, *de iure* closed to foreign aircraft unless and until it is opened by treaty.⁴² As a result, without a treaty, there are no freedoms.⁴³ Unauthorised civil overflight may be intercepted, though under Article 3*bis* of the Convention, the use of force is prohibited.⁴⁴ Sovereignty over airspace is territorial in scope and follows the surface territory. Under Article 2, it extends to the airspace above land territory and territorial waters,⁴⁵ a position confirmed by the ICJ in *Frontier Dispute* in describing a boundary as the line of separation between sovereign states “not only the earth’s surface but also in the subsoil and in the superjacent column of air.”⁴⁶ The structural consequence of sovereignty being

³⁷ Jennings 1945, p. 195. The textual choice was noted by Jennings shortly after the Convention's adoption. In *Nicaragua* the ICJ held that the principle of respect for territorial sovereignty is directly infringed by the unauthorised overflight of a State's territory by aircraft belonging to or under the control of the government of another State (*Nicaragua*, paras. 91, 251).

³⁸ Mendes de Leon 2022, p. 44; Klabbers 2021, p. 274; Shaw 2017, pp. 403–404.

³⁹ ICAO, Member States.

⁴⁰ Crawford 2019, p. 192; Klabbers 2021, p. 274.

⁴¹ Cheng 2017, pp. 39–40; Klabbers 2021, p. 274.

⁴² Mendes de Leon 2022, p. 44; Cheng 1962, p. 293; See also Jennings–Watts 1996, p. 652.

⁴³ Klabbers 2021, p. 274.

⁴⁴ *Ibid*, p. 276; Shaw 2017, p. 404.

⁴⁵ Havel – Sanchez 2014, pp. 40–41; Crawford 2019, p. 199.

⁴⁶ ICJ, *Frontier Dispute* (Benin v. Niger), Judgment, ICJ Reports 2005, p. 90 at para. 124. The upper limit of territorial airspace remains more ambiguous and a formal boundary is yet to be agreed upon on the boundary between airspace and outer space. See Masson-Zwaan & Hofmann 2019, p. 12.

the foundational point is that international air transport is possible only through inter-State arrangements.⁴⁷ The Chicago Convention itself does not distribute traffic rights between States; that work is done by more than 4000 air service agreements (“ASAs”).⁴⁸

The principle is foundational, but not unlimited. Within the Chicago system, sovereignty serves as the baseline from which the rest of the regime proceeds, but is qualified by the substantive obligations that the Convention imposes upon a State. Specialised air-law scholarship has consistently read obligations as qualifying the exercise of sovereignty rather than displacing it. Scholarship has also made the interpretive point that a reading of Article 1 that ignored these qualifications would undermine the Convention’s other provisions, its Annexes and the dense framework of bilateral and multilateral aviation treaties that have been built around it.⁴⁹

2.2 Lawful Airspace Closures Under the Chicago Convention

Article 9 governs airspace closures within the Chicago regime. It addresses several points: who may impose a restriction or prohibition, on what grounds and subject to what limitations. The provision is permissive, not mandatory: the word “may” in sub-provision (a) and “reserves [...] the right” in sub-provision (b) give a competence to “each contracting State” to close its airspace where the conditions of Article 9 are met, but are under no obligation to do so.⁵⁰ The two sub-provisions confirm the right and simultaneously qualify such right.⁵¹

The provisions of the Convention are mandatory;⁵² when a contracting State decides to close its airspace, the State must satisfy the requirements set out in Article 9 for the closure to be lawful under the Convention. Article 9 concerns transit rights and overflight only, not traffic rights (e.g. airport access, landing rights or general aviation facility access).⁵³ The analysis is

⁴⁷ Sipos 2023, p. 37.

⁴⁸ Havel – Sanchez 2014, p. 20.

⁴⁹ Mendes de Leon 2022, p. 44; Havel – Sanchez 2014, p. 43. The point is regarding treaty interpretation under Article 31 VCLT: the principle of effectiveness requires that all treaty provisions be given meaning, and a reading of Article 1 as residual authorisation for any conduct not expressly prohibited would deprive the Convention's substantive obligations of legal force.

⁵⁰ Zhang 2023, p. 90. Note that ICAO has more recently characterised the ICAO framework as “requiring” closures where safety of passengers or crew is threatened. The ICAO position is in tension with Article 9's permissive wording. ICAO 2026.

⁵¹ Zhang 2023, p. 58.

⁵² Sipos 2023, p. 20.

⁵³ Zhang 2023, p. 57; Havel – Sanchez 2014, p. 20. While Article 6 requires permission for scheduled services, the focus of this thesis is the more fundamental question of whether basic overflight transit rights can be denied on grounds that select aircraft by nationality.

structured around the legal conditions articulated in Article 9: a permissible purpose, non-discrimination, and a third condition that differs for each of the two relevant sub-provisions. Article 9(a) requires a reasonable extent and location, and Article 9(b) requires temporariness and immediate effect. Each of the three tests per sub-provision must be satisfied independently, meaning that a closure that fails any one of them falls outside the framework established by Article 9.

2.2.1 Structure and Scope of the Closure Regime

Article 9 contains two operative sub-provisions,⁵⁴ each establishing a distinct competence to restrict or prohibit overflight.⁵⁵ They differ in geographic scope, the grounds that may be invoked, the character of their non-discrimination requirements, and the additional limits they impose. Understanding their relationship is necessary before applying them to nationality-based airspace closures.

Article 9(a) governs partial closures of airspace.

“Each contracting State may, for reasons of military necessity or public safety, restrict or prohibit the aircraft of other States uniformly from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting States likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.”

The grounds for closures are narrow, allowing only military necessity or public safety, which a reasonable reading would interpret as immediate threats such as conflict zones, missile testing or air traffic control failures, not economic sanctions or political retaliation.⁵⁶ The geographic scope is limited to “certain areas” of the State’s territory, and the “reasonable extent and location” requirement limits the size and placement of the closure. A procedural obligation is also

⁵⁴ Article 9 also has a third sub-provision (c) which establishes that an aircraft that enters a prohibited area (in the meaning of sub-provisions (a) or (b)) may be required to land as soon as possible at an airport by the State who the prohibited area belongs to. This provision; however, relates to the consequences of breaches in airspace closures instead of their qualification and will therefore not be discussed further in this thesis.

⁵⁵ Article 9 uses "restrict or prohibit." ICAO Annex 2, 1-8, distinguishes between "restricted areas" (flight restricted in accordance with specified conditions) and "prohibited areas" (flight prohibited). The distinction is operational as Article 9 treats restriction and prohibition as a single competence, and the legal requirements developed below apply equally to both. The term "airspace closure" is used throughout to refer to either.

⁵⁶ Zhang 2023, p. 77.

attached: descriptions of the prohibited areas must be communicated to the other contracting States and ICAO. The non-discrimination requirements establish that the restriction or prohibition must apply “uniformly” to the aircraft of other States, and the sub-provision requires no distinction between domestic and foreign scheduled air services. This is essentially a national treatment standard, meaning that the State imposing the airspace closure cannot treat its own airlines more favourably than foreign airlines within the prohibited area.⁵⁷

Article 9(b) governs closures of the whole or any part of the territory.

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

The grounds are broader than those available under Article 9(a): exceptional circumstances, a period of emergency or the interest of public safety. The geographic scope is also broader, allowing closure of the entire territory or any part of it, rather than only certain areas. It has two further limitations. First, the closure must be temporary, different to Article 9(a). Second, the closure must take immediate effect. The non-discrimination requirement is also different; the closure must apply “without distinction of nationality to aircraft of all other States”, which is a most-favoured-nation standard, meaning that every foreign State’s aircraft must be treated identically.⁵⁸ The wording of this condition is significant: the jurisdictional powers to restrict overflights “lies in the obligation to apply the non-discrimination principle with respect to the nationality of the aircraft”.⁵⁹

The non-discrimination requirements of 9(a) and 9(b) thus differ in scope and target. Article 9(a)'s "uniformly" governs the application of the restriction to foreign aircraft as a class, and governs the relationship between domestic and foreign scheduled services. Article 9(b)'s "without distinction of nationality to aircraft of all other States" governs the relationship among foreign aircraft of different nationalities.

The reference to “aircraft of all other States” in Article 9(b) raises a question about interpretation, because the text does not specify whether “all other States” means all contracting States or all States generally. Article 9(a) uses a more specific “the aircraft of the other contracting

⁵⁷ On the distinction between the two non-discrimination requirements in Article 9, see Zhang 2023, pp. 80–82.

⁵⁸ Zhang 2023, p. 81.

⁵⁹ Mendes de Leon 2022, p. 63.

States". A literal reading of these would suggest that 9(b)'s scope is broader and extends to aircraft of non-contracting States as well.

Article 31(1) VCLT requires that a treaty be interpreted "in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The ordinary meaning of "all other States" supports the literal reading. The context and the Convention's object and purpose, however, support an opposite reading. The Chicago Convention is an agreement between contracting States, and its obligations operate within the network of commitments created by joining the Convention. The Convention's object and purpose include developing international civil aviation "based on equality of opportunity" among the contracting States, avoiding friction and promoting cooperation between nations. This does not support a reading that the Convention imposes obligations on contracting States in favour of States that have not acceded to it.

This is supported by the logic behind why States may be willing to give up their sovereign choice regarding airspace closures: they do not want their own airlines subjected to nationality-based airspace closures by other States.⁶⁰ A contracting State that has accepted the qualification of its sovereignty by Article 9 would reasonably expect the obligations to run only to those States that have also accepted the same qualification. Furthermore, the Convention's other non-discrimination provisions are not consistent in their wording. Articles 9(a), 11, 15 and 44(g) refer to "contracting States"; Articles 9(b) and 35(b) refer to "other States" without the "contracting" qualifier. The drafting history of the Convention does not address the inconsistency, and does not record any discussion of the choice. Therefore, the formulation appears to be a drafting variation rather than a substantive distinction.⁶¹ Read in context and in light of the Convention's object and purpose, "all other States" in Article 9(b) is most plausibly understood as "all other contracting States."

2.2.2 Legitimate Purpose

Article 9 includes a purpose requirement, meaning that the grounds on which a contracting State may impose a closure are specified in each sub-provision. Article 9(a) permits closures only "for reasons of military necessity or public safety." Article 9(b) permits closures in "exceptional

⁶⁰ Havel – Sanchez 2014, p. 43.

⁶¹ The drafting history of the Convention does not address the inconsistency, and does not record any discussion of the choice.

circumstances or during a period of emergency, or in the interest of public safety.” Public safety appears in both sub-provisions, reflecting its centrality to the Convention’s framework. Safety is emphasised in the Convention’s preamble and can be seen as one example among many in the addition of Article *3bis*, which prohibits the use of weapons against civil aircraft.⁶²

Article 9 contains a list of grounds that is exhaustive, when read in the light of the Convention’s structure and object and purpose, rather than as an illustrative one. Article 9(a) uses “for reasons of” rather than “including” or “such as”, and the list specifies the specific grounds without leaving textual room for similar or analogous grounds. Similarly, Article 9(b) also specifies a defined list of grounds. As mentioned, the Convention’s object and purpose commit to the development of international civil aviation “in a safe and orderly manner” to the establishment of international air transport services “on the basis of equality”, and to avoiding “friction” and promoting the “cooperation between nations and peoples upon which the peace of the world depends”. Article 9’s sub-provisions read together with the Convention’s purpose, support reading Article 9 as the framework within which permissible airspace closures are defined.⁶³ The Convention contains no separate provision authorising closures on grounds other than those in Article 9. If the listed grounds were merely illustrative, contracting States could close their airspace on any ground they chose, and the careful enumeration in the provision would be without effect. That reading is foreclosed by the principle of effective interpretation: treaty provisions are to be given a meaning that is consistent with the treaty's object and purpose, not one that renders them redundant.⁶⁴

Article 9 also does not define “public safety”, “military necessity”, “exceptional circumstances” or “period of emergency”. This could be read as making the criteria self-judging, leaving their assessment entirely to the discretion of the invoking State. However, the ICJ has rejected that self-judging reading when a treaty text lacks explicit self-judging language. In *Nicaragua*, the Court held that the “essential security interests” clause of a specific treaty was not self-judging, observing that the text did not use formulations such as “which it considers necessary” that would indicate self-judgment.⁶⁵ The same reasoning can be applied to Article 9, as the sub-

⁶² ICAO Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article *3bis*), adopted 10.5.1984, entered into force 1.10.1998, 2122 UNTS 337.

⁶³ The role of the preamble in treaty interpretation is established in Article 31 VCLT.

⁶⁴ On the principle that treaty provisions should be given effect, see Mendes de Leon 2022, p. 44, who applies the principle to reject readings of the Convention that would deprive its substantive obligations of legal force. The logic applies to Article 9, as a reading that treats the provision's grounds as illustrative leaves Convention's substantive obligations vulnerable to be avoided through whatever grounds.

⁶⁵ *Nicaragua*, paras. 221-222.

provisions specify grounds but do not qualify them as self-judging. Therefore, the assessment of whether a closure satisfies the purpose requirement is subject to objective assessment against the standards established by the Convention and general international law.

Article 9's grounds are read narrowly when the closing State acts in peacetime.⁶⁶ In the case of war, heads of State adopt the measures they deem appropriate, irrespective of international obligations, such as those set out in Article 9 of the Convention.⁶⁷ The Convention includes a different framework for wartime: Article 89 provides that, in the event of war, the Convention's provisions "shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals." The application of Article 9 in peacetime conditions has been established in section 1.4 of this thesis.⁶⁸ The analysis that follows, therefore, proceeds on the basis that Article 9's substantive requirements apply.

Nationality-based airspace closures of the kind this thesis addresses are imposed for reasons that lie outside the grounds Article 9 specifies. The measures aim to apply political or economic pressure on the targeted State rather than to address military necessity, public safety, exceptional circumstances, or an emergency arising in the closing State's own territory. Regardless of their political legitimacy, such closures are invoked on grounds Article 9 does not list as permissible, and the absence of self-judging language means that a State invoking Article 9 to justify them cannot rely on its own characterisation of the measure's purpose to bring it within the provision.

2.2.3 The Prohibition of Nationality-Based Discrimination

Even when a closure satisfies the purpose requirement, it must also satisfy Article 9's non-discrimination obligations. The restriction on a State's jurisdictional powers lies precisely in this obligation to apply the non-discrimination principle with respect to the nationality of the aircraft.⁶⁹ The non-discrimination requirements take different forms in 9(a) and 9(b).

Article 9(a) imposes two non-discrimination requirements. The first is uniformity in the prohibition: the restriction or prohibition must apply "uniformly" to the aircraft of other States. This

⁶⁶ Zhang 2023, p. 77.

⁶⁷ Mendes de Leon 2022, p. 61.

⁶⁸ Briefly, the closures at the centre of this analysis are imposed in peacetime conditions. The closing States have not declared war and have not invoked Article 89 of the Convention. The analysis therefore proceeds under Article 9 in its ordinary application.

⁶⁹ Mendes de Leon 2022, p. 63.

requirement concerns the relationship between the closing State and foreign aircraft. A nationality-based closure that applies to the aircraft of some foreign States but not others does not apply uniformly to the aircraft of other States, and fails this requirement.⁷⁰

The second is the standard, which states that no distinction may be made between the aircraft of the territorial State engaged in international scheduled airline services and the aircraft of other contracting States likewise engaged. This is a national-treatment standard, as the closing State cannot use a prohibited area to give a privilege to its own aircraft at the expense of foreign aircraft.⁷¹ The requirement was designed to prevent contracting States from using prohibited airspace for commercial advantage or to discourage international air transport, functioning as a qualification on sovereignty that requires equality of opportunity for foreign aircraft.⁷² A closure may fail one without failing the other, but it must satisfy both to comply with 9(a).

Under Article 9(b), the non-discrimination requirement is slightly different, as the standard is “without distinction of nationality to aircraft of all other States.” State A cannot close airspace over a particular area to States B and C while allowing State D’s aircraft to continue operations through the same area. This giving up of sovereign choice makes sense given that States do not want their own airlines subjected to discriminatory airspace closures by other States.⁷³ The structure of the requirement reflects the logic that a contracting State accepts the qualification of its sovereignty imposed by 9(b) because it expects other contracting States to accept the same qualification in return.

The reference to “no distinction” has been interpreted as mandating equality of opportunity as per one of the objectives of the Convention rather than requiring identical treatment in all respects.⁷⁴ According to the preamble of the Convention, “international air transport services may be established based on equality of opportunity”, and the non-distinction requirement in Article 9 can be read as giving effect to this commitment in the specific context of airspace closures and ensuring non-distinction to participate in the civil aviation regime.

The non-discrimination requirements of both Article 9(a) and 9(b) establish that contracting States may not differentiate between foreign aircraft based on nationality when imposing air-

⁷⁰ Zhang 2023, pp. 84–86.

⁷¹ *Ibid*, p. 80.

⁷² *Ibid*, p. 81; Jennings 1945, p. 205.

⁷³ Havel – Sanchez 2014, p. 43.

⁷⁴ Zhang 2023, p. 77, 82.

space closures. Nationality-based airspace closures cannot satisfy Article 9(a)'s uniformity requirement as the closures do not apply uniformly to the aircraft of all other States, and they cannot satisfy Article 9(b)'s "without distinction of nationality" requirement, because the closure operates precisely by making such a distinction. The conclusion is that nationality-based airspace closures fail Article 9's non-discrimination requirement.⁷⁵

2.2.4 Reasonableness and Temporariness

The third requirement Article 9 imposes is different for the two sub-provisions: reasonableness in 9(a) and temporariness in 9(b). Article 9(a) requires that prohibited areas "shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation." The provision lists "extent" and "location" as their own distinct terms. The ordinary meaning of each, as required by Article 31(1) VCLT, supports treating them as separate and independently assessable factors. Extent refers to the geographic size of the closure, and location refers to the geographic placement.

ICAO Annex 11 clarifies the dimension of the extent factor, with a recommendation for the delineation of prohibited areas to be "as small as practicable, and contained within simple geographical limits."⁷⁶ Therefore, the geographic scope should be proportionate and no greater than is required by the safety hazard, military risk or other permissible ground. A closure that extends beyond what the underlying purpose requires fails the reasonableness requirement.

In addition, the location factor can be inferred from the provision's permissible grounds: a closure must correspond geographically to the location where those grounds exist. A closure imposed for reasons of military necessity must correspond geographically to the location where the military necessity arises, and a closure imposed for public safety must correspond geographically to the location of the safety hazard. A closure where the geographic placement of the closure does not correspond to the geographic location of the permissible ground also fails the reasonableness requirement.

Nationality-based airspace closures characteristically extend over the closing State's entire national airspace, which places them outside the geographic scope 9(a) permits. Furthermore,

⁷⁵ This view is also supported in recent literature, see Hofer 2025, pp. 313–314 who states that closures under Article 9 "cannot single out one State in particular."

⁷⁶ ICAO Annex 11, 2-19. The recommendation is in the context of ICAO standards for air traffic services and is not mandatory, but it gives context to 9(a)'s reasonableness requirement.

when a closure is imposed on grounds that are outside 9(a)'s permissible purposes, there is no military necessity or public safety hazard within the closing State's airspace that limits or measures the closure's location. Nationality-based airspace closures, therefore, also fail both the extent and location factors of the reasonableness requirement. Also, full airspace bans cannot rely on Article 9(a) since it only permits partial closures over certain areas. They would therefore need to be assessed under Article 9(b), which permits closure of the whole or any part of the territory but requires the closure to be temporary.

Article 9(b) authorises a contracting State "temporarily to restrict or prohibit flying over the whole or any part of its territory." Temporariness reflects the grounds listed in 9(b), as the provision is available in exceptional circumstances, during periods of emergency, or in the interest of public safety, which are themselves temporary. If a closure extends beyond the duration of the triggering circumstance, it is no longer responding to that circumstance. The Convention does not specify a maximum duration; however, the requirement is not satisfied by a closure that is permanent or continues long after the triggering circumstance has ended. This is combined with the immediate-effect requirement, a feature that fits an emergency response. Therefore, nationality-based closures of indefinite or extended duration fail the temporariness requirement of 9(b).

2.3 Non-Discrimination as a Structural Principle of the Chicago Convention

The previous analysis of Article 9 establishes that non-discrimination is a binding condition on the exercise of airspace closures within said provision. This section advances the argument that non-discrimination is not only a condition of Article 9 but a structural principle of the Convention as a whole. Articles 11, 15, 22, 37 and 44, read with the preamble, demonstrate that the Chicago regime is built on a coherent non-discrimination architecture whose commitments run uniformly through the entire framework.⁷⁷

The starting point is the preamble. The contracting States adopted the Convention with the purpose that international civil aviation should develop "in a safe and orderly manner", and that international air transport services should be established "on the basis of equality of opportunity," in a way designed to "avoid friction" and to promote "cooperation between nations and

⁷⁷ Article 15 is discussed in this section despite being about airport access rather than transit rights due to the fact that it demonstrates that non-discrimination is a structural part of the Convention.

peoples." These commitments form the interpretive context for the substantive provisions analysed.

The Chicago Convention operates within the broader framework of general international law and treaty law.⁷⁸ The VCLT governs interpretation and, under Article 31, requires that a treaty's object and purpose inform the interpretation of its provisions, with the preamble forming part of the context for interpretation.⁷⁹ The preamble sets out the objective and purpose of the Convention as including, among others, cooperation, safety and equality of opportunity, Mendes de Leon notes that this may limit the ability of States to adopt measures that might undermine the Convention's core objectives.⁸⁰ One of the principles underlying the Convention is that all States should be able to participate in civil air transportation on an equal basis, directly derived from the principles of sovereignty and the equality of States under international law.⁸¹ Equality of opportunity is therefore not merely a political aspiration; it is a principle used to interpret each provision. In this wider legal framework, complete and exclusive sovereignty over the airspace is interpreted not as an unrestricted entitlement but rather as a right exercised for mutual international benefit and cooperation.⁸² A reading of the Convention that allows nationality-based airspace closures for political purposes would undermine the very cooperative framework its drafters designed.

Article 11 requires that the laws and regulations of contracting States relating to the admission or departure of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft within their territory, be applied to the aircraft of all contracting States "without distinction as to nationality". The provision is broad as it covers not only airspace closure decisions but the entire body of aviation regulation within the State. A contracting State may not apply its rules selectively on the basis of aircraft nationality. In the context of airspace closure, this means that if the State's airspace is open to international air navigation, the rules governing access must be applied to all foreign aircraft without distinction of nationality. A closure that excludes the aircraft of one contracting State while leaving the airspace open to others applies closures precisely in the manner Article 11 does not permit. Article 11, therefore, imposes a non-discrimination requirement similar to Article 9. Therefore, even if Article 9 were

⁷⁸ Havel – Sanchez 2014, p. 20; Sipos 2023, pp. 19–20.

⁷⁹ Sipos 2023, pp. 19–20; Hakapää 2010, p. 44; Mendes de Leon 2022, p. 42.

⁸⁰ Mendes de Leon 2022, p. 42.

⁸¹ *Ibid* p. 52.

⁸² Sipos 2023, p. 36.

not the governing provision, Article 11 would independently prohibit the selective application of airspace regulations based on nationality.⁸³

Article 15 establishes that every airport open to public use by a State's national aircraft must be open to the aircraft of all other contracting States "under uniform conditions," and the same applies to the use of air navigation facilities, including radio and meteorological services. Charges may be levied for the use of these facilities, but only on a non-discriminatory basis. Once a State has opened its aviation infrastructure to international air navigation, it cannot operate that infrastructure on a discriminatory basis. Article 15 reinforces Article 9's non-discrimination requirement: all aircraft shall receive equal treatment regardless of their nationality.

Article 22 established that each contracting State agrees "to adopt all practicable measures... to facilitate and expedite navigation by aircraft between the territories of contracting States, and to prevent unnecessary delays to aircraft, crews, passengers and cargo." The contracting State must therefore take action to aid international air navigation. Nationality-based airspace closures create exactly the type of obstacle that Article 22 wishes to prevent.

Article 37 includes that contracting States should collaborate in securing "the highest practicable degree of uniformity" in regulations, standards, procedures, and organisation, in all matters in which such uniformity will facilitate and improve air navigation. The provision supports the Chicago regime being a multilateral framework: uniformity, by its nature, requires that Contracting States apply common standards to all other Contracting States.

Article 44 reinforces this reading. The provision sets out the objectives of ICAO, which include both ensuring "that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines" (Article 44(f)) and avoiding "discrimination between contracting States" (Article 44(g)). Non-discrimination is therefore not only a condition embedded in specific provisions, but it is also explicitly identified as an objective of the institution responsible for administering the Convention. The reference to "fair opportunity" connects directly to the preamble's "equality of opportunity", which establishes that the structural commitment to non-discrimination operates at the level of the regime as a whole.

⁸³ Article 11 functions as a general non-discrimination requirement complementing Article 9's *lex specialis* on airspace closures specifically. Where Article 9 governs the specific question whether a closure is permissible, Article 11 governs the general question whether the rules around aviation regulation are applied without distinction of nationality. The two operate together rather than in competition.

Articles 9, 11, 15, 22, 37, and 44, read together with the preamble, set out a framework built on three principles: non-discrimination, uniformity, and facilitation. The framework balances these principles against State sovereignty over airspace and the operational requirements of international civil aviation. The Convention qualifies the exercise of sovereignty through a framework of mutual obligations that contracting States have accepted as the condition of participation. As a result, the regime is one in which sovereignty cannot be exercised in complete isolation from the interests of other States,⁸⁴ and sovereignty over airspace should be seen as a right that is to be exercised for mutual international benefit and cooperation.⁸⁵ Once access has been granted, differential treatment based on nationality is difficult to reconcile with the Convention's provisions.⁸⁶ Nationality-based airspace closures are not in conformity with the non-discrimination framework as a whole. The remaining question of whether Article 1's sovereignty can be relied on as a residual authority for closures that fall outside this systemic architecture is addressed in the following section.

2.4 Residual Sovereign Authority Beyond Treaty Limitations

The analysis in the previous sections concludes that nationality-based airspace closures fail each of Article 9's requirements and that the Convention's framework on airspace access is structured around non-discrimination as a principle that operates across its key provisions. A question that follows from this conclusion is whether Article 1 can independently authorise closures that fall outside Article 9's framework? If a contracting State has "complete and exclusive" sovereignty over its airspace, and Article 9 specifies particular conditions under which closures are permitted, then closures imposed on grounds outside of it might be understood as exercises of residual sovereign power. This is supported by the fact that sovereignty over airspace is the foundational principle of the Chicago regime.⁸⁷ The position taken in this thesis is that such an interpretation does not survive scrutiny on the textual and structural grounds of the Convention.

First of all, the principle of *lex specialis* establishes that when two rules of international law govern the same subject matter, the more specific rule prevails over the more general rule.⁸⁸

⁸⁴ Abeyratne 2014, p. 29; Sipos 2023, p. 36.

⁸⁵ Sipos 2023, p. 36.

⁸⁶ Konert 2019, p. 48; Correia 2019, p. 19.

⁸⁷ Mendes de Leon 2022, pp. 43–45; Havel – Sanchez 2014, pp. 17–18. The Convention has been vulnerable to misinterpretation and has also been used by States for political purposes before; for example, Article 1 on sovereignty has been used to block attempts to liberalise air transport. See Abeyratne 2014, p. v.

⁸⁸ Koskenniemi 2006, p. 4.

Article 9 is the specific provision of the Convention governing airspace closures, and Article 1 is the general provision that recognises airspace sovereignty. Therefore, in cases concerning the legality of airspace closures specifically, Article 9 provides the relevant conditions.

Furthermore, the principle of effectiveness in treaty interpretation requires that treaty provisions be interpreted to give effect to their substantive content rather than render them inoperative.⁸⁹ The ILC, in its commentary to the draft articles of the VCLT, treated effectiveness as implicit in good-faith interpretation: "when a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."⁹⁰ The ICJ applied the principle of effectiveness in *Territorial Dispute* by interpreting the treaty so that two provisions produced a definitive boundary settlement, rather than leaving the provisions without operative effect.⁹¹

Mendes de Leon applies the same interpretive logic to the Chicago Convention specifically, arguing that a reading of Article 1 as residual authorisation for any conduct not expressly prohibited would deprive the Convention's substantive obligations of legal force.⁹² Article 9's purpose, non-discrimination and reasonableness/temporariness requirements would become optional in practice, and a contracting State could invoke Article 1 instead to fit its purposes, leading to the provisions not doing the work they are designed to do. The same logic applies to the broader non-discrimination architecture established in section 2.3. If a contracting State could rely on Article 1 to act on grounds outside the scope of Articles 11, 15, 22, and the preamble, each of those provisions would constrain only the narrow conduct it expressly addresses, and States would remain free to achieve the same restrictive ends through other means. A residual-authorisation reading is, therefore, inconsistent with the Convention's status as a binding multilateral framework.

These considerations support reading Article 1 as the recognition of a principle whose conditions of exercise are specified elsewhere in the Convention, rather than as an independent residual source of authorisation for closures not permitted by Article 9. Closures that fail to satisfy

⁸⁹ Mendes de Leon 2022, p. 44. Article 31 VCLT requires that all treaty provisions be given meaning, and a reading of Article 1 as residual authorisation for any conduct not expressly prohibited would deprive the Convention's substantive obligations of legal force.

⁹⁰ ILC Draft Articles 1966, p. 219.

⁹¹ ICJ, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Reports 1994, p. 6 at paras. 51, 73.

⁹² Mendes de Leon 2022, p. 44.

Article 9's requirements are accordingly not permitted by Article 1. They are *prima facie* breaches of the Convention.

2.5 Chapter Conclusion

Nationality-based airspace closures are measures that restrict or prohibit the overflight of aircraft of one State or a group of States while permitting the aircraft of all others to operate freely, and which are not grounded in military necessity, public safety, exceptional circumstances, or an emergency arising on the closing State's own territory. The analysis in this chapter establishes that such closures constitute *prima facie* breaches of the Chicago Convention.

As established, such closures fail Article 9 on each of the cumulative requirements. It fails the purpose requirement, because political motivation falls outside the grounds listed in Article 9(a) and 9(b), and the absence of self-judging language means that a State invoking Article 9 cannot rely on its own characterisation of the measure's purpose to bring it within the provision. It fails Article 9(a)'s uniformity requirement and Article 9(b)'s requirement of application without distinction of nationality. Where the closure extends over the closing State's entire national airspace and operates indefinitely, it also fails the further requirements that apply under each sub-provision: Article 9(a)'s reasonable extent and location requirement, because the closure has no territorial anchor to the closing State's own safety or military concerns; and Article 9(b)'s temporariness requirement, because closures imposed in response to another State's foreign policy conduct typically extend beyond the duration of any discrete emergency. Each requirement operates independently, and each failure is independently sufficient to place the closure outside Article 9's framework.

The failure is not confined to Article 9. The systemic non-discrimination architecture analysed in section 2.3 describes a regime in which non-discrimination operates as a structural principle across the Convention, especially evident in Articles 11, 15, 22, 37 and 44. At the same time, the preamble frames the Convention as a regime of cooperation, equality of opportunity and the avoidance of friction. Nationality-based airspace closures are inconsistent with this framework as a whole. They are not only violations of one provision that happens to require non-discrimination. They work against the Convention's cooperative architecture. The Convention's non-discrimination architecture is not a network of separable bilateral obligations among contracting States. It is structured around a multilateral framework in which each State's adherence to non-discrimination and uniformity is a condition of the regime's coherence as a whole.

The Chicago regime is therefore sufficient to establish that nationality-based airspace closures are *prima facie* breaches of the Convention. Still, it does not resolve whether the wrongfulness of those breaches may be precluded under the law on State responsibility, including the countermeasures doctrine. That question is addressed in the following chapter.

3 Countermeasures and Nationality-Based Airspace Closures

Having shown in chapter 2 that nationality-based airspace closures constitute a *prima facie* breach of the Chicago Convention, the analysis now turns to whether that wrongfulness can be precluded under general international law. The law of State responsibility, as codified by the ILC in ARSIWA, identifies the circumstances precluding the wrongfulness of conduct that would otherwise not conform with the State's international obligations.⁹³ They do not annul or terminate the underlying obligation under the VCLT, but they justify or excuse non-performance temporarily, provided the relevant conditions are satisfied.⁹⁴ They operate as a shield against wrongdoing, rather than as a primary source of rights.⁹⁵ Where a State has breached an international obligation in response to another State's prior internationally wrongful act, the circumstance that requires consideration is the doctrine of countermeasures.

The doctrine is codified in the Arts. 49 to 53 ARSIWA. It permits a State injured by an internationally wrongful act of another State to take measures that would otherwise be unlawful, subject to conditions: a prior internationally wrongful act, standing to invoke responsibility, a purpose of inducing compliance rather than punishment, proportionality, reversibility, temporary character and the procedural requirements of notification and prior demand. The doctrine is exceptional in character and oriented towards the resumption of performance, rather than the suspension of obligations.⁹⁶

This chapter addresses whether the countermeasures doctrine remains, in principle, available for nationality-based airspace closures that would otherwise breach the Chicago Convention, and what the Convention's structural features do to the application of the conditions when tested against such measures. The analysis proceeds in three steps. Section 3.1 addresses the threshold question of classification: whether nationality-based airspace closures fall within the category

⁹³ ARSIWA Commentary 2001, Part One Chapter V intro, paras. 1–2; Crawford 2013, p. 45–49.

⁹⁴ *Ibid.*, Part One Chapter V intro, para. 2.

⁹⁵ *Ibid.*, Part One Chapter V intro, para. 2.; Hakapää 2010, pp. 297–298; Crawford 2013, pp. 274–275.

⁹⁶ *Ibid.*, commentary to Art. 49, para. 1.

of retorsion, in which case the ARSIWA framework is not engaged, or within the category of countermeasures, in which case their lawfulness depends on the conditions in Chapter V of Part One of ARSIWA. Section 3.2 examines whether the Chicago Convention obligations fall within the field in which countermeasures can operate at all, considering Article 50 ARSIWA on obligations the performance of which may not be impaired by countermeasures, the *lex specialis* question under Article 55, and the integral character of the Convention's non-discrimination architecture as a structural feature of the regime within which the cumulative conditions are applied. Section 3.3 applies the relevant ARSIWA conditions in turn to nationality-based airspace closures. Section 3.4 concludes.

3.1 Retorsion and Countermeasures: Threshold Classification

The classification of nationality-based airspace closures as retorsion or as countermeasures is the threshold question on which the rest of this chapter depends. If such closures are retorsion, no justification is required because no obligation has been breached and the ARSIWA framework is not engaged. If they constitute conduct that would otherwise be wrongful, their lawfulness turns entirely on whether the conditions set out in Chapter V of ARSIWA are satisfied.

Retorsion refers to unfriendly but lawful acts taken in response to another State's conduct.⁹⁷ The category covers measures that lie within the acting State's sovereign discretion and are not limited by any primary rule of international treaty or customary law; they require no justification because no wrongfulness arises. Examples of this include withdrawing voluntarily granted economic assistance, imposing limitations on diplomatic relations, or imposing embargoes on goods to which the target State has no entitlement.⁹⁸ Countermeasures, on the other hand, are defined by Article 22 ARSIWA as a circumstance precluding the wrongfulness of conduct that would otherwise constitute the breach of an international obligation.⁹⁹ Their lawfulness depends on the satisfaction of the conditions in Articles 49 to 54.¹⁰⁰

The boundary between the two categories is therefore objective: it depends on the existence of a primary obligation governing the conduct. A measure that the acting State is free to take under treaty and custom is a retorsion, and a measure that would breach a primary obligation in the absence of justification is a countermeasure. The classification does not depend on how the

⁹⁷ Crawford 2013, p. 675–676; Hakapää 2010, p. 523.

⁹⁸ ARSIWA Commentary 2001, Part Three Chapter II intro, para. 3.

⁹⁹ Crawford 2013, p. 292; Hakapää 2010, p. 523.

¹⁰⁰ Crawford 2013, p. 293. ARSIWA Commentary 2001, commentary to Art. 22, para. 2.

acting State chooses to characterise its conduct or on the political framing in which it is presented; the application of the doctrine depends on the conduct.¹⁰¹

Regarding nationality-based airspace closures specifically, this classification was addressed in chapter 2. Article 9 of the Chicago Convention and the Convention's broader non-discrimination architecture impose genuine legal obligations on the exercise of sovereignty over territorial airspace. A closure that discriminates based on aircraft nationality is therefore not an exercise of unconstrained sovereign discretion. It is the suspension of a treaty obligation owed to the contracting States and, within the meaning of Article 2 ARSIWA, an internationally wrongful act unless the wrongfulness is precluded.

Hayashi & Yamaguchi take the contrary position, briefly treating airspace closures as retorsion falling within the closing State's sovereign discretion.¹⁰² They argue that a sovereignty-first reading of the Chicago Convention would take this form, resting on the premise that the Convention imposes no binding limits on the exercise of sovereignty over airspace beyond what the closing State chooses to accept. This would mean that the closure of national airspace is always within the acting State's discretion, regardless of the basis on which it is implemented. That premise is the one chapter 2 has rejected. Once Article 9 and the Convention's non-discrimination architecture are read as imposing genuine obligations rather than aspirational standards, the retorsion characterisation collapses, because retorsion depends on the absence of an obligation that the conduct would otherwise breach.

The classification, therefore, concludes that nationality-based airspace closures are not retorsion. Whether their wrongfulness can be precluded under the countermeasures doctrine is the question that the remainder of this chapter examines.

3.2 Applicability of Countermeasures to Chicago Convention Obligations

Before the conditions for a lawful countermeasure under ARSIWA can be applied to non-performance of Chicago Convention obligations, it must be addressed whether the countermeasures doctrine is available at all in this field. ARSIWA itself contemplates two threshold limitations on the field within which the doctrine operates. Article 50 excludes certain categories of obligations from the application of countermeasures, and Article 55 gives way to special rules

¹⁰¹ ARSIWA Commentary 2001, Part Three Chapter II intro, para. 3.

¹⁰² Hayashi – Yamaguchi 2024, p. 89.

of international law when a treaty regime governs the same subject matter more concretely than the general framework. A third question arises from the Convention's integral architecture of non-discrimination and Dawidowicz's position that integral obligations cannot be the subject of countermeasures. This section addresses each in turn.

3.2.1 Protected Obligations and the Limits of Countermeasures

Article 50 ARSIWA is the natural starting point, because before asking whether the conditions for countermeasures are satisfied, one must first ask whether the suspended obligation falls within the field in which countermeasures may operate at all or whether it is excluded. Article 50(1) identifies a list of obligations "the performance of which may not be impaired by countermeasures." It lists four categories of protected obligations: obligations concerning the threat or use of force under the UN Charter, obligations for the protection of fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and "other obligations under peremptory norms of general international law."¹⁰³ The last category is an open one, as it draws on the definition of *jus cogens* in Article 53 VCLT, and the ARSIWA Commentary to Article 40 illustrates it by reference to accepted examples: the prohibition of aggression, of slavery and the slave trade, of genocide, of racial discrimination and apartheid, and of torture.¹⁰⁴ The commentary explicitly states that the list is not exhaustive and that the international community of States may recognise further peremptory norms as a whole within the meaning of Article 53 VCLT.¹⁰⁵

The question for present purposes is whether the obligation to permit foreign aircraft to overfly national territory falls within this category, which it does not. Freedom of overflight is a treaty-based entitlement whose content and structure derive from the Chicago Convention and its associated instruments. As Chapter 2 established, the Convention is built on the recognition of complete and exclusive sovereignty over territorial airspace in Article 1, and subsequent airspace access is a qualification of that sovereignty rather than an independent right. No State practice or *opinio juris* points in that direction, and the examples of peremptory norms recognised are at considerable distance from anything that could be described in such terms.

¹⁰³ ARSIWA Commentary 2001, commentary to Art. 50, paras. 1–4.

¹⁰⁴ *Ibid.*, commentary to Art. 50, para. 9; commentary to Art. 40, para. 4–6.

¹⁰⁵ *Ibid.*, commentary to Art. 40, para. 6; commentary to Art. 50, para. 9.

The remaining categories in Article 50(1) are also not engaged. Nationality-based airspace closures are not a use of force within Article 2(4) of the UN Charter. They involve denying access to a State's own territory rather than the projection of force into another State's territory.¹⁰⁶ They do not engage fundamental human rights in the sense of Article 50(1)(b), which addresses obligations protecting persons.¹⁰⁷ And they are not obligations of a humanitarian character prohibiting reprisals in the Article 50(1)(c) sense, which is understood to refer to the laws of armed conflict.¹⁰⁸ Article 50(1), therefore, does not exclude Chicago Convention obligations from the field within which countermeasures may operate.

Article 50(2)(a) provides that a State taking countermeasures is not relieved from any dispute settlement procedure applicable between it and the responsible State. The provision imposes a duty on the responding State to continue to honour any dispute settlement procedure that is applicable between it and the responsible State.¹⁰⁹ The ICJ held in *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* that a unilateral suspension cannot make the Article 84 mechanism inoperative, since one of the purposes of the jurisdictional clauses is precisely to enable the validity of the suspension to be tested.¹¹⁰ Whether the existence of the ICAO Council's jurisdiction itself amounts to a *lex specialis* regime displacing the countermeasures doctrine in the manner of the World Trade Organization's ("WTO's") Dispute Settlement Understanding ("DSU")¹¹¹ is addressed in the following subsection. For present purposes, Article 50(2)(a) limits only the conduct of the responding State in relation to the dispute settlement procedure and does not exclude the resort to countermeasures as such.

The conclusion is that Article 50 of the ARSIWA does not exclude Chicago Convention obligations from the field of countermeasures. Whether the doctrine is available and whether its conditions are satisfied depends on further questions addressed in the remainder of this section and the next.

¹⁰⁶ *Ibid*, commentary to Art. 50, paras. 4–5.

¹⁰⁷ *Ibid*, commentary to Art. 50, paras. 6–7.

¹⁰⁸ *Ibid*, commentary to Art. 50, para. 8.

¹⁰⁹ *Ibid*, commentary to Art. 50, para. 11–13.

¹¹⁰ ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, para. 16.

¹¹¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, adopted 15.4.1994, entered into force 1.1.1995, 1869 UNTS 401.

3.2.2 Lex Specialis and the Chicago Convention Dispute Settlement System

Article 55 ARSIWA provides that the articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act, or the content or implementation of the international responsibility of a State, are governed by special rules of international law. This provision is a *lex specialis* clause, and it gives way to a treaty or specialised system that occupies the same subject more concretely than the general regime.¹¹² The question for this subsection is whether the Chicago Convention, either as a whole or in its dispute settlement architecture specifically, constitutes such a special rule, with the result that unilateral countermeasures are unavailable for its obligations.

Two competing positions are available. The first would hold that the Chicago Convention is a technical multilateral instrument intended to remain neutral, insulating civil aviation from the kind of political retaliation that countermeasures entail. According to this view, the obligations of the Convention should be read as self-contained, and a general secondary rules framework such as ARSIWA should give way to the logic of a regime designed, through technical cooperation, to displace *ad hoc* unilateral responses. The second position rests on the positive law of ARSIWA itself, as the articles do not carve out a category of technical or sectoral treaty, and the countermeasures doctrine applies to all non-peremptory international obligations unless and until a *lex specialis* demonstrably displaces it.

The Chicago Convention contains no provision expressly excluding countermeasures. The ARSIWA Commentary to Article 55 identifies the WTO DSU as an example of the regimes that displace the general rules.¹¹³ DSU Article 23 is treated as an exclusive dispute-resolution clause, as it requires Members seeking a remedy for a violation to abide by the DSU's rules and procedures and to refrain from unilaterally resolving their disputes outside its framework.¹¹⁴ The Chicago Convention contains no comparable provision. Articles 84 to 88 confer jurisdiction on the ICAO Council, subject to appeal to the ICJ, but they describe a merits-based dispute resolution process rather than a centralised enforcement regime. They do not prohibit unilateral determinations of breach, do not subject the resort to countermeasures to centralised review or prior authorisation, and do not provide for interim measures during pending proceedings. The Convention's enforcement architecture, as set out in Articles 87 and 88, is triggered only by a

¹¹² ARSIWA Commentary 2001, commentary to Art. 55, para. 2.

¹¹³ *Ibid.*, commentary to Art 55, paras. 3-4.

¹¹⁴ *Ibid.*, commentary to Art. 50, para. 10 (citing Article 23 DSU as creating an exclusive dispute resolution regime that displaces unilateral countermeasures).

finding on non-conformity through the Council or the Assembly, not by unilateral State action. It operates through Convention-internal mechanisms (e.g. the denial of overflight rights against non-conforming airlines and the suspension of voting rights against non-conforming States) rather than through any centralised authorisation of unilateral suspension.¹¹⁵ The ICAO Council has also mainly addressed purely technical issues and avoided political issues.¹¹⁶ The structural difference is that the WTO DSU is built around the displacement of unilateral self-help.

The Convention's enforcement architecture, as set out in Articles 87 and 88, is triggered only by a finding of non-conformity through the Council or the Assembly, not by unilateral State action. It operates through Convention-internal mechanisms (e.g. the denial of overflight rights against non-conforming airlines and the suspension of voting rights against non-conforming States) rather than through any centralised authorisation of unilateral suspension.

In contrast, the Chicago regime is built around technical uniformity, but it does not foreclose self-help in the way Article 55 of the ARSIWA discusses. In the absence of a clear textual or structural indication of exclusivity, the presumption under Article 55 is that the general rules apply. The residual application of the general law of State responsibility remains the stronger interpretation. Therefore, the Convention does not, through Article 55, displace the countermeasures doctrine.

The Chicago Convention does not, under Article 55 ARSIWA, displace the countermeasures doctrine. Its obligations remain subject to the general regime of State responsibility, including the conditions and limits on resort to countermeasures examined in the following sections.

3.2.3 The Integral Character of Chicago Convention Obligations

Section 3.2.2 concluded that the Chicago Convention does not displace ARSIWA through the Article 55 threshold, and the countermeasures doctrine is therefore formally available for the non-performance of Chicago Convention obligations. The question that remains is whether the structure of the Convention nevertheless conditions the operation of the countermeasures doctrine.

¹¹⁵ Abeyratne 2014, p. 443; The Council's jurisdiction was most recently affirmed by the ICJ 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), Judgment, ICJ Reports 2020, p. 81.

¹¹⁶ Abeyratne 2014, p. 478.

The Chicago Convention non-discrimination framework has an integral character; unlike ordinary bilateral obligations, integral obligations operate as multilateral standards whose performance depends upon their uniform observance among the parties. Fitzmaurice developed the distinction in his work on the law of treaties at the ILC.¹¹⁷ Whereas bilateral obligations may be suspended selectively without affecting the legal position of the rest, integral obligations are structured and each party's performance is dependent upon the same performance towards the others.¹¹⁸

The distinction is reflected in the law of treaties and State responsibility. Article 60(2)(c) VCLT permits any party other than the defaulting State to invoke a material breach as a ground for suspension if the treaty is of such a character that a breach of its provisions by one party radically changes the position of every party with respect to the further performance.¹¹⁹ Article 42(b)(ii) ARSIWA treats as injured any State to which the breached obligation is owed where the breach radically changes the position of all the other States to which the obligation is owed with respect to the further performance of the obligation. The ARSIWA Commentary describes such obligations as arising particularly within treaty regimes whose operation depends upon mutual and uniform compliance.¹²⁰

The Chicago Convention's non-discrimination architecture is integral. As section 2.3 established, non-discrimination is not confined to a single provision but forms part of the Convention's broader structure. Article 37 requires contracting States to collaborate in securing "the highest practicable degree of uniformity in regulations, standards and procedures and organisation [...] in all matters in which such uniformity will facilitate and improve air navigation." Uniformity is a multilateral standard; it requires equal treatment amongst the relevant States. While Article 44 identifies the avoidance of discrimination among contracting States as one of ICAO's objectives. The Convention therefore establishes a multilateral framework within which uniform treatment constitutes part of the substance of the obligations.

This can be illustrated with Article 15, for example, which requires that airports open to public use by national aircraft be open, under uniform conditions, to the aircraft of all other contracting States. A State that selectively suspends the obligation toward one State while continuing to perform it toward the others is not only limiting performance bilaterally but also departing from

¹¹⁷ Fitzmaurice 1957, p. 54; Waldock 1964, pp. 27–28, 43–44.

¹¹⁸ See Fitzmaurice 1957, p. 54; Waldock 1964, pp. 27–28, 43–44.

¹¹⁹ ILC 1966, pp. 217, 255.

¹²⁰ ARSIWA Commentary, commentary to Art. 42, paras. 13–15.

the requirement of uniformity that defines the obligation itself. The breach is therefore structural rather than bilateral.

However, this integral character does not operate as a prohibition on countermeasures. State practice and scholarship support the view that Chicago Convention obligations may nevertheless be suspended through countermeasures in exceptional circumstances.¹²¹ Dawidowicz identifies aviation-sector measures as part of the practice capable of supporting third-party countermeasures under customary international law, including the suspension of Aeroflot landing rights in 1980, restrictions on South African Airways in 1986, and measures against the Federal Republic of Yugoslavia in 1998.¹²² In each case, aviation obligations forming part of a multilateral and non-discriminatory framework were selectively suspended in response to internationally wrongful conduct external to the aviation regime itself.

For present purposes, these precedents support the narrower proposition that obligations of an integral character are not excluded from the operation of countermeasures merely because they form part of a multilateral regulatory regime. Their integral character instead conditions how the ARSIWA requirements are applied. Most importantly, the suspension of obligations founded upon uniform treatment affects the proportionality assessment, because the breach caused is not confined to bilateral relations between the responding and responsible States but affects the multilateral regime itself.

3.3 Conditions for Lawful Countermeasures

Section 3.2 concluded that the Chicago Convention does not exclude the operation of countermeasures as a secondary rule of State responsibility. This subsection addresses whether the doctrine provides a lawful basis for nationality-based airspace closures. The ICJ held in *Nicaragua* and *Gabčíkovo-Nagymaros* that countermeasures are justifiable only when certain conditions are met,¹²³ and ARSIWA Articles 49 to 53 set out those conditions and limitations to taking countermeasures.¹²⁴ The following analysis works through each condition in turn.

¹²¹ Dawidowicz 2017, p. 284

¹²² See Dawidowicz 2017, chapter 4.

¹²³ *Gabčíkovo-Nagymaros*, para. 83. *Nicaragua*, para. 249.

¹²⁴ ARSIWA Commentary 2001, p. 128, Part Three Ch. II intro, para. 2. This is also confirmed in *Corn Products International Inc. v. United Mexican States*, Decision on Responsibility 2008, ICSID Case No. ARB(AF)/04/01. 146 ILR pp. 581–624 at para. 145; Crawford 2013, pp. 293–294, 306.

The abstract level of the ARSIWA framework complicates that task. The Commentary's treatment proceeds largely on the assumption of a bilateral dispute between States, using examples such as the suspension of trade, the freezing of State assets, and the withdrawal of diplomats.¹²⁵ Nationality-based airspace closures fit awkwardly within such examples and treatment. They operate within a technical multilateral treaty regime designed to function as an integrated whole, which creates difficulties when the ARSIWA conditions are applied. Analysis in this section is limited to whether, on their own, ARSIWA terms, the conditions can be met by nationality-based airspace closures. Throughout the analysis, “invoking State” refers to the State that responds by way of countermeasures, and “target State” refers to the State whose prior wrongful act is alleged to justify the response. The findings of this section are tested against the facts of the EU-Russia closures in chapter 4.

3.3.1 Prior Internationally Wrongful Act

The first condition that is a “fundamental prerequisite” for a lawful countermeasure is the existence of a prior internationally wrongful act against which the measures are taken.¹²⁶ Article 49(1) ARSIWA states that countermeasures may be taken only against a State responsible for an internationally wrongful act; it is a fundamental prerequisite for lawful countermeasures. The ICJ confirmed the same in the *Gabčíkovo-Nagymaros* case that countermeasures “must be taken in response to a previous international wrongful act of another State and must be directed at that State.”¹²⁷ The Court’s first established that the target State had committed a prior wrongful act and then turned to whether the wrongfulness of the invoking State’s response could be precluded.¹²⁸ Therefore, the invoking State must be able to identify a specific breach of a specific international obligation attributable to a specific State before the countermeasures doctrine is engaged.

The content of the condition is set by Articles 1, 2 and 12 of ARSIWA. Article 1 ARSIWA confirms that an internationally wrongful act entails the international responsibility of the State concerned. Article 2 defines an internationally wrongful act as an act or omission attributable to a State that constitutes a breach of an international obligation of that State. Both elements (attribution and breach) must be established. Article 12 specifies that a breach occurs whenever

¹²⁵ ARSIWA Commentary, commentary to Art 49, para. 5, and commentary to Art 50, para. 15, and commentary to Art. 52, para. 6.

¹²⁶ Dawidowics 2017, p. 287, citing ARSIWA Commentary, commentary to Art. 49, para. 2.

¹²⁷ *Gabčíkovo-Nagymaros*, para. 83.

¹²⁸ *Ibid*, para. 52.

an act is not in conformity with an obligation, regardless of its origin or character. Conduct that is unfriendly or politically adversarial but does not breach an international obligation does not satisfy the condition. Without a prior breach, the countermeasures defence cannot be invoked.

On a similar note, ARSIWA sets out secondary rules of State responsibility and does not supply the content of the primary obligation alleged to have been breached.¹²⁹ Whether a breach has occurred is assessed according to the primary rule governing the conduct (e.g., a treaty or the relevant customary norm), not by the secondary rules. In the context of airspace closures, the preliminary question is therefore which primary rule is said to have been breached. Only once the primary-rule breach has been established can the secondary rules framework of ARSIWA be engaged.

In addition, the invoking State's own assessment of whether a prior breach has occurred is not self-validating. Dawidowicz articulates the ILC position as "a State which resorts to countermeasures based on its own unilateral assessment of the situation does so at its own peril and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment."¹³⁰ Therefore, if the invoking State mischaracterises the prior conduct and no breach of international obligation has occurred, the measures adopted cannot qualify as countermeasures. Instead, they constitute ordinary internationally wrongful acts for which the invoking State incurs responsibility under the general law of State responsibility. The prior wrongful act requirement thus excludes from the doctrine of countermeasures any measure adopted in the absence of a clearly identifiable breach of a primary obligation by the target State.

A structural consequence follows from the prior-wrongful-act requirement; a lawful countermeasure is not itself an internationally wrongful act, as the wrongfulness of the conduct has been precluded.¹³¹ The Article 49(1) condition, therefore, cannot be satisfied by a measure whose triggering act is another State's lawful countermeasure. Therefore, ARSIWA's structure strongly works against the recognition of counter-countermeasures. The consequence of this is that in a reciprocal closure situation, only one of two airspace closures can succeed as a lawful countermeasure.

¹²⁹ The distinction between primary and secondary rules is foundational to ARSIWA's structure. See ARSIWA Commentary 2001, General commentary, paras. 1–4; Crawford 2013, p. 61.

¹³⁰ ARSIWA Commentary 2001, Art. 49, para. 3.

¹³¹ *Ibid.*, Art. 22, para. 4.

3.3.2 Standing and Third-Party Countermeasures

The question of whether third parties have standing to take countermeasures is the most contested of the six ARSIWA conditions when applied to nationality-based airspace closures. It is also the condition that has not been conclusively resolved by international jurisprudence or agreed upon in scholarship. The standing question has two relevant dimensions. The first is whether a State not individually injured may invoke the responsibility of another State for breach of an obligation owed to the international community as a whole. The second is whether invocation extends to taking countermeasures, as distinct from the more limited remedies of calling for cessation and reparation in Articles 48 and 54.

Article 42 ARSIWA limits the category of injured States to those to whom the breach is owed individually, or to whom it is owed as part of a group of States affected in a way that alters their legal position from that of the rest of the obligees. Only an injured State in that sense has an uncontested right to take countermeasures.¹³² A State that suffers the factual consequences of another State's wrongdoing without itself being the direct addressee of the breached obligation does not normally qualify, and the ICJ in *Barcelona Traction* drew the same line between rights infringed and interests affected.¹³³

Article 48 extends the right to invoke responsibility to States other than an injured State in two circumstances: where the breached obligation is owed to a group of States including the invoking State and is established for the protection of a collective interest of the group (Article 48(1)(a)), or if it is owed to the international community as a whole (Article 48(1)(b)). The importance of the provision lies in severing standing from the protection of rights given to the invoking State individually. It takes the move away from strict bilateralism further by breaking the link between substantive rights and procedural standing that previously restricted the development of the law.¹³⁴ In 2012, in *Belgium v Senegal*, the ICJ confirmed that any State party to the Torture Convention may invoke the responsibility of another State party for

¹³² ARSIWA Commentary 2001, commentary to Art. 42, para. 1.

¹³³ ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3, para. 46.

¹³⁴ Crawford 2013, pp. 366–367.

breaches of obligations *erga omnes partes*.¹³⁵ Standing under Article 48 is therefore no longer dependent on individual injury.

The remedies available under Article 48 are exhaustive: cessation, assurances and guarantees of non-repetition, and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached.¹³⁶ Countermeasures are not on that list. Their availability for non-injured States is addressed instead in Article 54, which states that the countermeasures chapter does not prejudice the right of any State entitled under Article 48 to take "lawful measures" against the responsible State to ensure cessation of the breach and reparation. The ILC's choice of "lawful measures" rather than "countermeasures" was deliberate. At the time of drafting, there appeared to be "no clearly recognised entitlement" of non-injured States to take countermeasures in the collective interest, and the State practice on which any such entitlement might rest was characterised as "controversial" and "embryonic."¹³⁷ The ILC expressly left "the resolution of the matter to the further development of international law", and Article 54 was described as "a saving clause" that preserves the possibility of third-party countermeasures without resolving it.¹³⁸

The doctrinal question for present purposes is whether, in the more than two decades since the adoption of ARSIWA, further development has rendered third-party countermeasures available under international law. Scholarly opinion continues to be divided. Dawidowicz finds that contemporary practice is no longer embryonic and "decidedly points to a virtually uniform conduct capable of forming the basis of a general rule of custom", also concluding that third-party countermeasures are permissible under international law for claims of cessation.¹³⁹ Sicilianos, Katselli, Proukaki and Webb arrive at broadly the same conclusion through their own analyses of State practice.¹⁴⁰ Hofer's 2025 article takes the contrary view: the practice is too ambiguous and the *opinio juris* element too absent to ground a customary rule, and the ILC was right to leave Article 54 as a saving clause.¹⁴¹

¹³⁵ ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, p. 422 at para. 69; Crawford 2013, pp. 369–370 reads the judgment as a cautious step rather than a resolution of the standing question that Article 54 was designed to leave open.

¹³⁶ ARSIWA Commentary 2001, commentary to Art. 48, paras. 11–12.

¹³⁷ *Ibid*, Chapter II intro, para. 8, and commentary to Art. 54, para. 6.

¹³⁸ *Ibid*, commentary to Art. 54, para. 6.

¹³⁹ Dawidowicz 2017, pp. 282–284.

¹⁴⁰ Sicilianos 2010, 1145–1148; Proukaki 2010, pp. 208–209; Webb 2024, p. 25.

¹⁴¹ Hofer 2025, pp. 316–317.

The position this thesis adopts is that third-party countermeasures are available for grave *erga omnes* breaches, with aggression as the strongest case with call for cessation. To engage with the critique, *opinio juris* cannot be inferred from practice on the ground that States frame their measures politically rather than legally, the customary status of bilateral countermeasures is also placed in question. The ARSIWA Commentary itself notes that States will only reluctantly officially qualify their reactions as countermeasures.¹⁴² The critique is better read as a call for caution than as a foreclosure, and the catalogue of recent statements from Estonia, Costa Rica, Poland, Ireland, Italy and others points toward the gradual shift acknowledged.¹⁴³

Furthermore, the aviation sector itself supplies the supporting State practice. The ARSIWA Commentary to Article 54 cites three aviation-sector measures as relevant to the evolving customary position: the suspension of Aeroflot and LOT landing rights following the imposition of martial law in Poland in 1981, the ban on South African Airways in response to apartheid in 1986, and the flight ban on the Federal Republic of Yugoslavia during the Kosovo crisis in 1998.¹⁴⁴ None of these is conclusive on its own, but the Commentary's choice to cite them in connection with Article 54 signals that they form part of the practice on which the saving clause's eventual resolution might rest.

The ICJ's in *Nicaragua*, held that a use of force of lesser gravity than an armed attack cannot justify collective countermeasures involving the use of force.¹⁴⁵ However, the holding is read in the literature as the Court not excluding the possibility that third-party countermeasures might be permissible in order to enforce obligations *erga omnes partes*.¹⁴⁶ The standing question that Article 54 was designed to leave open, therefore, remains open in the ICJ's jurisprudence.

¹⁴² *Ibid.*, pp. 311–312.

¹⁴² ARSIWA Commentary 2001, commentary to Art. 54, para. 3.

¹⁴³ Hofer 2025, pp. 311–312.

¹⁴⁴ ARSIWA Commentary 2001, commentary to Art. 54 para. 3. Dawidowicz extends the Commentary's catalogue with the suspension of Aeroflot landing rights following the Soviet invasion of Afghanistan in 1980 and measures responding to the downing of Korean Air Lines Flight 007 in 1983: Dawidowicz 2017, chapter 4. The aviation sector has therefore supplied recurring State practice on third-party measures across more than four decades.

¹⁴⁵ *Nicaragua*, paras. 210–211, 249.

¹⁴⁶ Dawidowicz 2017, p. 70.

3.3.3 Compliance Purpose

According to Article 49(1), “an injured State may only take countermeasures against a State which is responsible for an internationally wrongful act to induce that State to comply with its obligations under Part Two.” This sub-provision provides that the measure must be taken against the State responsible for the prior wrongful act, and that it must be taken to induce that State’s compliance. The requirement follows from Article 1, which provides that “every internationally wrongful act of a State entails the international responsibility of that State”. The countermeasure must therefore be directed at the responsible State and not others. In the context of airspace closures, the question is whether the closure has been imposed on the State whose conduct constitutes the prior wrongful act, and it must be taken to induce that State’s compliance, not to punish or coerce that State for matters unrelated to the prior breach.

According to scholarship, “there is no clearly recognized entitlement to obtain reparation by way of third-party countermeasures. The instrumental function of third-party countermeasures thus appears to be limited to claims for cessation.”¹⁴⁷ The ARSIWA Commentary makes the point that countermeasures are generally an instrument for achieving compliance and need to be directed at the resumption of performance, establishing that they are not intended as a form of punishment.¹⁴⁸ The test is therefore whether the invoking State takes the measure with compliance as its aim. However, a recent study of airspace closures as a foreign policy tool finds that closures do not, in practice, change target-State behaviour.¹⁴⁹ It finds that airspace closures are not effective at changing the target State’s behaviour, but rather they act as a signal to the international community. The finding raises the question of whether the inducement condition can be satisfied by a measure that is unlikely to induce compliance.

The position taken here is that it can, because Article 49(1) is framed in terms of purpose rather than effect. The text uses “in order to induce,” not “with the effect of inducing.” This is supported by scholarship that: third-party countermeasures “may have been less than ideal in terms of inducing full compliance with communitarian norms, but their real effectiveness is best measured in contextual and incremental terms.”¹⁵⁰ Whether the measure actually produces compliance is an empirical question of efficacy that ARSIWA does not impose as a condition of lawfulness. Nevertheless, the finding is relevant as circumstantial evidence: where a State’s

¹⁴⁷ Dawidowicz 2017, p. 380.

¹⁴⁸ ARSIWA Commentary 2001, commentary to Art. 49, para. 1.

¹⁴⁹ Costas 2024, p. 185.

¹⁵⁰ Dawidowicz 2017, p. 284.

expressed purpose has no clear relationship to the compliance outcome the State has claimed, the State has claimed.

3.3.4 Proportionality

Article 51 ARSIWA requires countermeasures to be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." The formulation is short, but the application is demanding. The ICJ confirmed the substantive content of the test in *Gabčíkovo-Nagymaros*, weighing the effects of Czechoslovakia's diversion of the Danube against the prior Hungarian breach and the rights at stake.¹⁵¹ The ARSIWA Commentary specifies that the proportionality assessment combines both quantitative and qualitative elements: the injury suffered, the importance of the interest protected by the breached rule, and the seriousness of the breach.¹⁵² The proportionality requirement is close to the inducement requirement in Article 49(1), as a measure that is clearly disproportionate may be found to have a punitive aim and therefore to fall outside the permitted purpose of countermeasures.¹⁵³

The *Air Services Agreement* arbitration is a foundational authority on countermeasures proportionality. Its factual setting, involving aviation route restrictions imposed as a countermeasure, also makes it directly analogous to nationality-based airspace closures.¹⁵⁴ The dispute arose from France's refusal to permit Pan American Airways a change of gauge in London on its onward route to Paris; the United States responded by suspending Air France's right to operate flights from Paris to Los Angeles. The Tribunal found that countermeasures must have "some degree of equivalence with the alleged breach," while emphasising that strict numerical equivalence is not required, and observed that judging proportionality "is not an easy

¹⁵¹ *Gabčíkovo-Nagymaros*, para. 85–87. The Court conducted the proportionality analysis in a holistic way, with the relevant rights extending to a shared resource whose use affected interests beyond the bilateral relationship between the two States.

¹⁵² ARSIWA Commentary 2001, commentary to Art. 51 para. 6. The proportionality requirement is also confirmed in the related self-defence context of *Nicaragua*, paras. 176, 194.

¹⁵³ ARSIWA Commentary, commentary to Art. 51, para. 7. Hobe makes a related observation in the context of sovereignty-based airspace restrictions, that the exercise of sovereignty for the protection of airspace must be proportionate to the anticipated danger. The point is made about exercising sovereignty rather than countermeasures, but it is related: a broad nationality-based closure that affects large segments of international civil aviation must be proportional to the breach it is responding to. Hobe 2019, pp. 40–41.

¹⁵⁴ The *Air Service Agreement* award is an *ad hoc* inter-State arbitration rather than an ICJ judgment, but it is treated as authoritative in the ARSIWA Commentary 2001, commentary to Art. 51, para. 3.

task and can at best be accomplished by approximation".¹⁵⁵ These observations apply to airspace closures, where proportionality cannot be assessed by comparing numerical losses from rerouting against the gravity of the triggering wrong. The wider principles at stake must also be weighed, including Chicago's cooperative multilateral framework expressed in the preamble.

Dawidowicz takes the view that the same proportionality test governs third-party and bilateral countermeasures, with Article 51 sufficiently flexible to accommodate the discrete features of communitarian enforcement.¹⁵⁶ The condition is therefore not more demanding when applied to third-party measures, although the elements of the test may be weighed differently.

The most demanding element of the proportionality analysis in the airspace-closure context concerns effects on parties outside the underlying dispute, third-parties. The ARSIWA Commentary recognises that some incidental effects on third parties are built into the countermeasures doctrine: third parties without individual rights cannot complain of the indirect or collateral effects of measures lawfully taken between the disputing States.¹⁵⁷ In the airspace-closure context, however, the third-State effects are structural, as section 3.2.3 established, the integral character of the non-discrimination obligations means that suspension against one contracting State is a modification of the uniform standard owed to all. Airspace closures produce substantial third-party effects that are not caused by the target State. Airlines based in States outside the dispute lose routing options, passengers face longer journeys and connectivity is worsened. These third-party harms are imposed by the responding State's measures rather than attributable to the target State's wrongful act.

Furthermore, full airspace closures are blunt instruments, as they exclude all aircraft of a given nationality regardless of any connection between an individual flight and the wrongful conduct. And closures often last for years rather than days or weeks, and rarely come with a clear endpoint.¹⁵⁸ These features of airspace closures do not foreclose the proportionality analysis,

¹⁵⁵ *Air Service Agreement*, para. 83.

¹⁵⁶ Dawidowicz 2017, p. 382.

¹⁵⁷ ARSIWA Commentary 2001, commentary to Art. 22, paras. 4–5, citing *Cysne* (Responsibility of Germany for Acts Committed Subsequent to 31 July 1914 and Before Portugal Entered the War) (Portugal v. Germany), Arbitral Award 1930, Volume II RIAA pp. 1035–1057. The *Cysne* Tribunal held that legitimate reprisals against an offending State may affect the nationals of an innocent State as an indirect and unintentional consequence which the injured State will always endeavour to avoid or limit as far as possible.

¹⁵⁸ The temporal feature is discussed separately under Articles 49(2) and (3) in section 3.3.5, but it bears on Article 51 to the extent that duration multiplies the cumulative third-party harm.

but make satisfying the test of proportionality difficult to satisfy. The proportionality of a specific closure depends on the qualitative and quantitative factors of the specific breach.

3.3.5 Reversibility and Temporary Character

Article 49(2) ARSIWA limits countermeasures to "the non-performance for the time being of international obligations". Article 49(3) adds that they shall, "as far as possible," be taken in a way that permits the resumption of performance. Article 53 requires termination "as soon as the responsible State has complied with its obligations under Part Two". Together, these provisions establish that countermeasures must be temporary in character, reversible in principle, and terminated once the target State has complied with the obligations the breach of which triggered the countermeasures.

Airspace closures are inherently reversible, as access to the airspace is instantaneously restored. A State that closes its airspace suspends a treaty-based entitlement, the content of which can be restored when the closure is lifted. Therefore, airspace closures are the opposite of measures that produce permanent or irreversible effects, such as the confiscation of property, the termination of a treaty or the expulsion of a population.

The temporary-character requirement is slightly different as the text refers to the "non-performance for the time being", which does not specify a maximum duration in clock time. Temporariness is assessed in relation to the underlying breach: countermeasures are temporary in the sense that they are directed at inducing compliance and are terminable on that compliance.¹⁵⁹ Such circumstances "cut down neither the obligation nor the primary rule underlying it; they merely defend against them." The obligation remains in force, and the non-performance "looks towards a resumption of performance so soon as the factors causing and justifying the non-performance are no longer present."¹⁶⁰ The ICJ also found in *Gabčíkovo-Nagymaros*, that the obligation "may be ineffective as long as the condition of necessity continues to exist, but... as soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives."¹⁶¹ Applied to the countermeasures doctrine, the same logic holds: a countermeasure is temporary in the sense that it lasts only as long as the triggering breach.

¹⁵⁹ ARSIWA Commentary 2001, commentary to Article 49, para. 7.

¹⁶⁰ Crawford 2013, pp. 281-282, citing Fitzmaurice 1959, p. 41.

¹⁶¹ *Gabčíkovo-Nagymaros*, para. 101.

Therefore, a nationality-based airspace closure that extends for as long as the triggering breach continues satisfies the temporary requirement regardless of its duration in clock time. A closure that continues beyond the triggering breach fails Article 53 independently. The *Air Services Agreement* confirms the same reading: the Tribunal accepted that the United States measures could continue while France was in breach, treating the duration of the countermeasure as tied to the continuation of the wrongful act it was responding to.¹⁶² In conclusion, duration in clock time is not the basis for assessment; rather, the continued existence of the triggering breach is.

3.3.6 Procedural Conditions

Article 52 ARSIWA imposes three procedural conditions regarding the countermeasures defence. Article 52(1) sets out that before taking them, the injured State shall (a) call upon the responsible State to fulfil its obligations under Part Two and (b) notify the responsible State of any decision to take countermeasures and offer to negotiate. Article 52(2) permits "such urgent countermeasures as are necessary to preserve [the injured State's] rights." Article 52(3) requires countermeasures to be suspended without undue delay where the wrongful act has ceased, and the dispute is pending before a court or tribunal with authority to render decisions binding on the parties. However, it does not apply according to Article 52(4) if the responsible State fails to implement the dispute settlement procedure in good faith.

The notification and prior demand requirements in Article 52(1) are elaborated on by the ARSIWA Commentary: "Considering the exceptional nature and potentially serious consequences of countermeasures, they should not be taken before the responsible State is given notice of a claim and some opportunity to present a response."¹⁶³ The function of these conditions is to allow space for compliance and a negotiated solution before resorting to countermeasures. This is supported by the *Air Services Agreement* arbitration, which is considered the leading authority on procedural matters.¹⁶⁴ No specific form for the notification is expressed where extensive prior negotiations have already taken place, and the claim has been communicated, a separate demand under Article 52(1)(a) is not required.¹⁶⁵

The temporal relationship between the prior demand under 52(1)(a) and the notification of intent to take countermeasures under 52(1)(b) is not strict, and the two communications can be

¹⁶² *Air Service Agreement*, para. 83.

¹⁶³ ARSIWA Commentary 2001, commentary to 52, para. 4.

¹⁶⁴ *Ibid.*, Art. 52, paras. 2–3, citing *Air Service Agreement*, paras. 91, 94–96.

¹⁶⁵ *Ibid.*, Art. 52, para. 4.

made close in time or even simultaneously.¹⁶⁶ The Tribunal in *Air Service Agreement* confirmed that it does not require the conclusion of negotiations before countermeasures may be taken. It was accepted that the United States measures could be adopted while negotiations were ongoing, provided the parties continued to negotiate in good faith.¹⁶⁷ The condition appears to be satisfied with sufficient communication.

Article 52(2) includes an exception for urgent measures, which have the function of preserving the invoking State's rights in circumstances where prior notification would undermine the purpose of the countermeasure. For example, withdrawing assets from banks in the injured State to immunise them from response, which can be done quickly, would be undermined by prior notification.¹⁶⁸ Therefore, the urgency exception can be engaged where the function of an immediate measure is to prevent the responsible State from defeating the countermeasure before it is taken.

Article 52(3) is engaged after a countermeasure has been taken, requiring suspension when the wrongful act has ceased, and the dispute is pending before a court or tribunal with authority to render decisions binding on the parties. The provision assumes that the court or tribunal presiding over the dispute has the power to order provisional measures.¹⁶⁹ The authority to order provisional measures is significant, as a court or tribunal that lacks this power cannot act as a substitute for self-help.

Applied to nationality-based airspace closures, the procedural conditions can be satisfied, depending on the case-by-case analysis. The Article 52(1) requirements can be satisfied through sufficient communication where the invoking State articulates the claim and the intention to respond. The Article 52(2) exception is available where prior notification would undermine the purpose of the countermeasure. The Article 52(3) condition does not apply as long as the underlying breach continues, and its application after cessation depends on whether the relevant court or tribunal has the binding-decision and provisional-measures authority contemplated by the provision.

¹⁶⁶ *Ibid*, Art. 52, para. 5.

¹⁶⁷ *Air Service Agreement*, paras. 91, 98.

¹⁶⁸ ARSIWA Commentary 2001, commentary to Art. 52, para. 6.

¹⁶⁹ *Ibid*, commentary to Art. 52, para. 8.

3.4 Chapter Conclusion

The analysis in this chapter establishes that the countermeasures doctrine is in principle available to preclude the wrongfulness of nationality-based airspace closures that otherwise breach the Chicago Convention. Whether the doctrine is available in fact for any particular closure depends on the cumulative satisfaction of the conditions. Section 3.1 established that nationality-based airspace closures are not retorsion, because chapter 2 found that they constitute a *prima facie* breach of the Chicago Convention's non-discrimination obligations. The availability of countermeasures for Chicago obligations, which is addressed in section 3.2, is not foreclosed by ARSIWA's own threshold limitations. Article 50 does not exclude Chicago obligations because the freedom of overflight is a treaty-based entitlement rather than a peremptory norm, and airspace measures do not engage the other Article 50(1) categories. The Chicago Convention also does not displace ARSIWA under Article 55: its dispute-settlement architecture lacks the centralised authority that the ARSIWA Commentary identifies as displacing the general rules, and the Convention contains no provision expressly excluding self-help. The integral character of the non-discrimination architecture does not foreclose the doctrine either, but conditions the application of the conditions.

The conditions in Articles 49 to 53, addressed in section 3.3, are demanding when applied to nationality-based airspace closures, and the proportionality condition is the most demanding of them. The prior-wrongful-act condition requires a clearly identified primary-rule breach attributable to the target State. The standing condition is the most contested of the six, and the position is defended that third-party countermeasures are available for claims of cessation for grave breaches of obligations *erga omnes*. The inducement condition is satisfiable by the invoking State's purpose rather than the measure's empirical efficacy. The proportionality condition is very demanding in the aviation context, because the third-party effects of nationality-based closures are structural, and their typical duration multiplies the harm. Reversibility and temporary character are generally satisfied for obligations of airspace access. The procedural conditions in Article 52 can be satisfied through sufficient communication, but their application is highly case-specific and cannot be assessed categorically.

The conclusion is therefore that the countermeasures doctrine is available for nationality-based airspace closures in theory, but only when the invoking State's standing is defensible under the contested law governing third-party countermeasures. Whether the reciprocal EU-Russia airspace closures satisfy these conditions in fact is the question addressed in the following chapter.

4 Case Study: EU-Russia Airspace Closures (2022–Present)

This chapter applies the findings from chapters 2 and 3 to the airspace closures imposed by the EU against Russian aircraft after its armed attack against Ukraine on 24 February 2022 and the reciprocal closures by Russia against EU-registered aircraft.

Chapter 2 established that nationality-based airspace closures imposed for political purposes are *prima facie* breaches of the Chicago Convention. Chapter 3 examined whether the wrongfulness of Chicago Convention breaches can be precluded under the law of State responsibility, concluding that countermeasures are doctrinally available for such breaches but that the Convention's multilateral character makes each ARSIWA condition harder to satisfy than in bilateral situations. Whether those conditions are satisfied in the specific case of the post-2022 EU-Russia closures is addressed in this chapter.

The chapter proceeds by setting out the factual background of the closures in section 4.1, applying the chapter 2 framework regarding the Chicago Convention to both closures in section 4.2. Whether the EU's airspace closure satisfies the ARSIWA conditions is examined in section 4.3, and Russia's closures in section 4.4. Section 4.5 draws together the chapter's findings.

4.1 Regulatory and Factual Background

Before February 2022, Russian airspace was a structural feature of the Europe–Asia long-haul market. The route offered carriers operating between Northern Europe and East Asia significantly shorter flight paths, and the business models of multiple European carriers were built around the overflight rights through Russian airspace.¹⁷⁰ On 24 February 2022, Russia launched a full-scale armed attack on Ukraine.¹⁷¹ Ukraine closed its airspace to civil aviation on the same day, due to the active conflict over its territory.¹⁷² The closures examined in this thesis are those imposed in the days that followed by the EU against Russia and by Russia against the EU and other States, and which are nationality-based.

On the 28th of February, the Council of the European Union adopted Council Regulation (EU) 2022/334¹⁷³ and the Council Decision (CFSP) 2022/335, which gave effect to the closure of

¹⁷⁰ Ostroumov *et al.* 2025, pp. 9–11.

¹⁷¹ UNGA Resolution ES-11/1; *Ukraine v. Russia* (Provisional Measures), para. 17.

¹⁷² NOTAM A0009/24.

¹⁷³ Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

EU airspace to Russian aviation.¹⁷⁴ Regulation 2022/334 inserted a new Article 3d into Council Regulation (EU) 833/2014¹⁷⁵, which is the existing Russia sanctions framework. Article 3b prohibits aircraft operated by Russian air carriers, aircraft registered in Russia, and any non-Russian-registered aircraft owned, chartered or otherwise controlled by a Russian natural or legal person, entity or body from landing in, taking off from, or overflying the territory of the Union. The measure was adopted as a restrictive measure under the Common Foreign and Security Policy framework.¹⁷⁶ The provision includes exceptions for humanitarian, emergency, and certain diplomatic operations, but the general prohibition applies uniformly across all 27 Member States.¹⁷⁷

Russia responded with reciprocal closures. The Federal Air Transport Agency (Rosaviatsia) announced the restriction the use of Russian airspace by airlines registered in 36 States, including all EU Member States.¹⁷⁸ The instrument was framed as a response to the closures imposed on Russian aircraft, and Russia has continued to characterise the measure in reciprocal terms in its submissions to ICAO.¹⁷⁹

Both closures remain in force as of the date of submission. Council Regulation (EU) 2022/334's Article 3d prohibition contains no built-in expiry date, and the measure has remained in force since its adoption. Russia's reciprocal closure has likewise persisted. Together with Ukraine's safety-based closure of its own airspace, the closures cover approximately 18 million square kilometres, the largest segregation of civil airspace since the Cold War.¹⁸⁰

4.2 Prima Facie Compatibility with the Chicago Convention

Chapter 2 established that nationality-based airspace closures imposed for political purposes constitute *prima facie* under the Chicago Convention. That conclusion applies in almost identical terms to both closures.

Article 9(a) is unavailable as a legal basis for either closure. Neither closure is grounded in military necessity or public safety within the closing party's own territory: the EU's measure

¹⁷⁴ Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

¹⁷⁵ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

¹⁷⁶ Council Decision (CFSP) 2022/335.

¹⁷⁷ Council Regulation (EU) 2022/334.

¹⁷⁸ Rosaviatsiya 28.2.2022; TASS 28.2.2022.

¹⁷⁹ Rosaviatsiya 28.2.2022.

¹⁸⁰ Ostroumov *et al.* 2025, p. 2.

was adopted as a political response to Russia's armed attack on Ukraine,¹⁸¹ and Russia's airspace closure responded reciprocally to the EU's closure.¹⁸² Neither is geographically limited to a defined area; each extends across the entire territorial airspace. Neither applies uniformly to the aircraft of other States, since each targets specifically the aircraft of the other party while permitting overflight by aircraft of the remaining contracting States. Each of the three tests of Article 9(a) are failed, on the same basis, by both closures.¹⁸³ Article 9(b) is also not available. The provision permits closures over "the whole or any part" of the closing State's territory. Still, it requires no distinction of nationality and is limited to "exceptional circumstances," "a period of emergency," or "the interest of public safety." Political motivation falls outside the exhaustive list; therefore, both closures fail on the nationality-based feature.

The broader provisions analysed in chapter 2 support the same conclusion. Article 11 requires air navigation laws and regulations to be applied without distinction of nationality; Article 15 requires uniform conditions regarding access to airports and air navigation facilities; Article 22 obliges contracting States to facilitate international air navigation. By selectively excluding aircraft connected to a particular State, both closures depart from that non-discrimination framework.

Article 89 suspends the Convention's operation in respect of a contracting State "in case of war" or where a State "declares a state of national emergency." The language of the provision of pairing war with a self-declared emergency supports the reading that Article 89 is self-judging. It is triggered by the contracting State's own declaration, not by an objective assessment. Russia has not invoked Article 89. Russia's official position, is that the conflict is a "special military operation" and that the airspace measures of February 2022 are a general sovereign decision rather than a wartime suspension.¹⁸⁴ Even if Article 89 were to be read objectively, as triggered by the international community's characterisation of the conflict as armed conflict regardless of Russia's position, the measure Russia took in February 2022 was not a general suspension of its Convention obligations but a selective closure directed at carriers of named States in retaliation for those States' closures.

¹⁸¹ European Commission 2022.

¹⁸² Rosaviatsiya 28.2.2022.

¹⁸³ See Zhang 2023, pp. 83–86, who notes that registration nationality and operator nationality typically coincide, and that closures structured around either or both axes engage the same Article 9(a) non-discrimination requirements.

¹⁸⁴ *Ukraine v. Russian Federation (Provisional Measures)*, paras. 32, 39, 41.

Both closures, therefore, constitute *prima facie* breaches of the Chicago Convention on identical grounds. Both fail the same cumulative tests under Article 9 and rest on the same nationality-based distinction that the Convention does not allow. Whether they share the same position under the secondary rules of State responsibility is examined in the remainder of this chapter.

4.3 The EU Airspace Closures as Countermeasures Under ARSIWA

Chapter 3 identified six conditions for a lawful countermeasure: the existence of a prior internationally wrongful act, standing, a purpose of inducing compliance, proportionality, reversibility and temporary character, and the procedural conditions of notification and prior demand. This section applies them to the EU closures one by one.

Section 3.1 established that the threshold for distinguishing between retorsion and countermeasures is whether the conduct in question breaches an international obligation.¹⁸⁵ Section 4.2 concluded that both the EU's and Russia's closures are *prima facie* breaches of the Chicago Convention. Therefore, the conduct cannot constitute retorsion, and the wrongfulness of the EU's *prima facie* breach is precluded only if the ARSIWA conditions for countermeasures are satisfied.

4.3.1 Prior Internationally Wrongful Act

On 24 February 2022, Russia launched a full-scale armed attack on Ukraine.¹⁸⁶ The conduct was characterised as aggression by the UNGA Resolution ES-11/1,¹⁸⁷ and the ICJ in its Order on Provisional Measures of 16 March 2022, ordered Russia to suspend its military operations in the territory of Ukraine.¹⁸⁸ Attribution to Russia is uncontested, and the EU closures were adopted in response to this conduct.¹⁸⁹

That conduct satisfies the prior internationally wrongful act condition of Article 49(1). Russia's armed attack breaches the prohibition on aggression identified by the ICJ in *Barcelona Traction*

¹⁸⁵ ARSIWA Commentary 2001, Part Three Ch. II intro, para. 3.

¹⁸⁶ UNGA Resolution ES-11/1; *Ukraine v. Russia* (Provisional Measures), para. 17.

¹⁸⁷ UNGA Res ES-11/1, para. 2.

¹⁸⁸ *Ukraine v Russian Federation* (Provisional Measures), para. 86.

¹⁸⁹ European Commission 2022.

as the paradigm case of an obligation owed *erga omnes*.¹⁹⁰ Therefore, the breach is of a *jus cogens* norm, attributable to the responsible State and ongoing as at the date of submission.

Article 49(1) requires that countermeasures be taken against the State responsible for the wrongful act. The Council Regulation (EU) 2022/334 targets aircraft registered in or operated by Russian carriers, as well as aircraft owned, chartered, or otherwise controlled by Russian persons or entities.¹⁹¹ These categories are evidently directed at the responsible State, and the condition is met, meaning that the EU's measures respond to the responsible State of the breach.

4.3.2 Standing and Third-Party Countermeasures

Section 3.3.2 argued that third-party States have standing. This thesis took the contested move from invocation under Article 48(1)(b) to the availability of countermeasures under Article 54's saving clause. In the EU closures context, the question is whether the EU's collective coordination affects the attribution of the closures, and whether the EU's Common Foreign and Security Policy ("CFSP") framing affects the standing analysis.

Regarding attribution, Article 92(a) of the Convention established that it is open to adherence by members of the United Nations and States associated with them. Therefore, the European Union is not itself a contracting State to the Chicago Convention. ARSIWA also only applies to States.¹⁹² The Article 9 obligation is between contracting States, and the territorial sovereign State exercises airspace sovereignty under each closure under Article 1 of the Convention. The closure of EU airspace to Russian aircraft is therefore best understood as 27 coordinated Member State closures adopted through a common Council Regulation. Each Member State is individually attributable for ARSIWA purposes, and the collective coordination through the EU does not displace it.¹⁹³

On standing, Article 42 ARSIWA is not an option for EU Member States as they are not parties to the armed conflict and are not individually injured. Article 42(b)(i) might be considered for bordering Member States such as Poland and Romania. Still, the provision addresses breaches

¹⁹⁰ *Barcelona Traction*, paras. 33–34; ARSIWA Commentary 2001, commentary to Art. 40, para. 4 (identifying aggression as the paradigm case of an obligation owed to the international community as a whole).

¹⁹¹ On the relationship between aircraft registration nationality and operator/control nationality under the Chicago Convention, see Zhang 2023, pp. 83–86.

¹⁹² ARSIWA Commentary 2001, commentary to Art. 1, para. 1. The parallel framework for international organizations is established in the ILC's Articles on the Responsibility of International Organizations, annexed to UNGA Resolution 66/100, but is not engaged here.

¹⁹³ ARSIWA Commentary 2001, commentary to Art. 57, paras. 1–2.

whose legal consequences differentiate the position of one State within a group, not the factual burden borne by particular States.¹⁹⁴ Article 42(b)(ii) is also unavailable: the breach does not radically restructure the performance obligations of any other State.

Standing for the EU Member States, therefore, rests on Article 48(1)(b) ARSIWA read with Article 54. The ICJ also identified the obligation to refrain from aggression as the paradigm *erga omnes* obligation in *Barcelona Traction*.¹⁹⁵ Dawidowicz identifies aggression as the strongest case for third-party countermeasures. The aviation-sector practice cited in the ARSIWA Commentary in connection with Article 54 (the suspension of Aeroflot landing rights in 1981, the South African Airways ban in 1986, and the Federal Republic of Yugoslavia flight ban in 1998) provides aviation-sector-specific State practice for closures.¹⁹⁶ The international community's response to Russia's aggression in 2022 reinforces the case for availability: closures by States, supplemented by UNGA Resolution ES-11/1, a proposed UN Security Council ("UNSC") Resolution vetoed by Russia,¹⁹⁷ and Russia's non-re-election to the ICAO Council in October 2022.¹⁹⁸ Third-party countermeasures to are defensible for claims for cessation, which aligns with the EU's stated purpose addressed in section 4.3.3.¹⁹⁹

A separate question is whether the EU's framing of its measures as CFSP restrictive measures rather than as countermeasures defeats the standing argument. Council Regulation (EU) 2022/334 was adopted as a CFSP measure, not as a countermeasure. The position taken here is that the availability of the doctrine does not depend on the invoking State's characterisation, but rather on operation. Scholarship has identified that states are reluctant to qualify their measures as countermeasures politically.²⁰⁰ In practice, this means that if invocation were a condition for operation, the doctrine would apply very rarely.

The standing condition is satisfied for the EU closures on the strongest defensible reading. The reading is contested, and the customary status of third-party countermeasures remains unsettled,

¹⁹⁴ Crawford 2013, p. 546.

¹⁹⁵ *Barcelona Traction*, paras. 33–34; See also ARSIWA Commentary 2001, commentary to Art. 40, para. 4.

¹⁹⁶ ARSIWA Commentary, commentary to Art. 54, para. 3.

¹⁹⁷ UN Security Council, Draft Resolution S/2022/155, On the situation in Ukraine. UN Doc S/2022/155, 25.2.2022. United Nations 2022. The UNSC Resolution was co-signed by 80 States, but vetoed by Russia.

¹⁹⁸ Reuters 1.10.2022.

¹⁹⁹ Dawidowicz 2017, p. 380. The point matters here because the limitation to cessation aligns with the EU's stated purpose.

²⁰⁰ Tzanakopoulos 2011, p. 188.

but the case for availability is at its strongest when the triggering wrong is aggression. Aviation-sector precedent and state practice exist for the type of measures adopted.

4.3.3 Compliance Purpose

According to Article 49(1) ARSIWA, countermeasures may only be taken to induce the responsible State to comply with its international obligations. Russia's submissions to the 41st and 42nd ICAO Assemblies characterise the closures imposed against it as "unilateral coercive measures", which indicates they are intended to punish rather than induce compliance.²⁰¹

A finding that challenges the EU's defence on this condition is the empirical finding that airspace closures as a foreign policy tool are ineffective at changing the target State's behaviour.²⁰² However, this finding does not defeat the inducement condition. Article 49(1) addresses measures taken "in order to induce" not "with the effect of inducing" or similar wording. As established in section 3.3.3, the inducement requirement is assessed by reference to the invoking State's purpose rather than the measure's likely effect. The finding is therefore important for evaluating efficacy, but does not defeat the inducement condition.

The Tribunal in *Air Service Agreement* emphasises that the legitimacy of a countermeasure is found in its purpose of restoring the "balance" of the relationship and creating a "pressure" that leads to a return to legality. The United States' measures were seen as fulfilling the compliance purpose and were not expected to produce French compliance alone. Still, they were part of an expressed demand for the resumption of an obligation that had been breached.²⁰³ On the other hand, scholarship has found that a countermeasure taken to purely "show a political force" cannot be legitimised.²⁰⁴

Council Regulation (EU) 2022/334 was adopted on 28 February 2022, a few days after Russia's attack, as part of a sanctions package intended to induce Russia's compliance with its obligations under the UN Charter, including the prohibition on the use of force in Article 2(4). The European Commission President's statement of 27 February 2022 framed the airspace closure as one element of a coordinated response, alongside financial, trade, and individual sanctions, all directed at the same compliance objective.²⁰⁵ The conditionality of the airspace measure

²⁰¹ A42-WP/256; A41-WP/456.

²⁰² Costas 2024, p. 185.

²⁰³ *Air Service Agreement*, para. 83.

²⁰⁴ Dawidowicz 2017, p. 297.

²⁰⁵ European Commission 2022.

mirrors that of the broader package: Article 3d remains in force, and the EU has consistently linked the lifting of sanctions to Russia's withdrawal from Ukraine. The airspace closure is therefore intelligibly embedded in a compliance-directed framework rather than an isolated punitive measure. As a result, the compliance-inducement purpose condition is satisfied in the EU closures.

4.3.4 Proportionality

Article 51 ARSIWA requires countermeasures to be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. The test is described as combining quantitative injury and qualitative factors of the injury suffered, the importance of the interest protected by the breached rule, but also takes into account the gravity of the internationally wrongful act and the rights in question.²⁰⁶ On the invoking State's side of the assessment sits the gravity of Russia's breach and the rights protected by Article 2(4). On the target side sit the operational effects on the target State and third States, and the structural cost of partial withdrawal from a uniform multilateral standard.

The gravity of the triggering breach is at the upper limit of what modern international law recognises. Aggression is a violation of *jus cogens* and a breach of obligations *erga omnes*; it involves loss of life and the violation of territorial integrity. The right protected by Article 2(4) of the UN Charter is the freedom from armed attack and the territorial integrity of States, which are more fundamental than the right being suspended, which is non-discriminatory access to airspace under the Chicago Convention. The assessment of *Nicaragua* has identified serious breaches of communitarian norms (e.g. aggression) as the strongest case for the availability of third-party countermeasures,²⁰⁷ which weighs heavily in the EU's favour.

The operational effects of the EU closure primarily affect Russian carriers' access to European markets. Council Regulation (EU) 2022/334, Article 3d eliminates Russian carriers' scheduled services to the EU and prohibits Russian-registered aircraft from entering EU airspace. The third category of Article 3d, "aircraft owned, chartered or otherwise controlled by Russian natural or legal persons regardless of registration"; however, extends the prohibition to aircraft registered in third States that are commercially connected to Russian interests. That extension produces operational effects on aircraft whose registration is not Russian and whose registry

²⁰⁶ ARSIWA Commentary 2001, commentary to Art. 51, para. 6.

²⁰⁷ Dawidowicz 2017, pp. 70–71.

States are not parties to the underlying dispute. These third-State registry effects sit alongside the direct effects on Russian carriers.

On the structural dimension, the Chicago obligations are integral rather than bilateralisable, as established in section 3.2.3. The suspension of non-discriminatory access against Russia is not a bilateral suspension but a modification of a uniform multilateral standard owed to all contracting States.²⁰⁸ The proportionality assessment, therefore, weighs not only the operational and economic costs to Russian carriers and to non-party-State carriers operating affected routes, but also the structural cost of partial withdrawal from a uniform multilateral standard. The position taken here is that the gravity of the triggering wrong absorbs this structural cost. When the triggering act is the violation of a *jus cogens* norm owed *erga omnes*, the proportionality assessment cannot treat the structural cost of partial withdrawal from a sectoral uniformity standard as sufficient to defeat the response. A doctrine that prevented third-party countermeasures in response to the most serious breaches of the international legal order in order to preserve the uniform application of a sectoral treaty would yield Charter obligations to the Chicago Convention's non-discrimination architecture, which is an inversion the hierarchy of norms.

The proportionality assessment for the EU closures is therefore very demanding, but the framework can accommodate them. The gravity of Russia's breach of Article 2(4), and the *jus cogens* and *erga omnes* character of the prohibition violated, weigh heavily on the EU's side. The operational, third-party, and structural costs are real but, individually, do not reach a level that exceeds the gravity of the triggering wrong. A less grave triggering breach would not produce the same result.

4.3.5 Reversibility and Temporary Character

Section 3.3.5 established two distinct conditions. Reversibility, under Articles 49(2) and (3) of the ARSIWA, establishes that a countermeasure must permit the resumption of performance when the underlying breach ends. A temporary character is assessed by reference to the underlying breach rather than clock time, meaning that a measure that extends for as long as the triggering breach continues, and only for that duration, satisfies the temporary requirement.

²⁰⁸ Dawidowicz 2017, p. 381 takes the position that integral obligations cannot be the subject of countermeasures. The reasons for adopting the softer reading defended in section 3.2.3, that the categorical exclusion is best understood as addressed to obligations whose content is the protection of fundamental interests rather than regulatory multilateral obligations of the Chicago type.

Civil-aviation airspace access through EU airspace is instantaneously resumable. The four-year duration does not undermine the temporary character because Russia's armed attack has continued throughout the period the closures have been in force, and the *Air Services Agreement* Tribunal confirmed that countermeasures may continue for as long as the wrongful act they respond to continues.²⁰⁹ Article 53 ARSIWA requires termination once the responsible State has complied with its obligations. Russia has yet to comply with its obligations, and the closure may therefore continue while the breach continues.

Reversibility is satisfied: the suspended obligation, non-discriminatory airspace access, can be restored at any time by the EU's lifting of the closure. Downstream commercial consequences from the period of suspension are real, but the reversibility condition under Article 49(3) concerns the obligation itself, not the operational effects of the measure's duration.

A separate question is whether the structural commercial effects of the closures defeat the reversibility condition. Airlines have restructured their networks, and freight has been redirected through hubs in the Middle East.²¹⁰ Those shifts are difficult to undo instantaneously when the underlying breach ends and the closures are lifted. The position this thesis takes is that the legal reversibility concerns the resumption of the suspended obligation, not the elimination of commercial consequences flowing from the period of non-performance. This is due to Articles 49(2) and (3), which address the suspended obligation, not third-party effects. Therefore, the EU closures satisfy the reversibility and temporariness conditions of ARSIWA.

4.3.6 Procedural Conditions

Article 52(1) ARSIWA requires the invoking State to call upon the responsible State to comply with its obligations and to notify the responsible State of any decision to take countermeasures. Article 52(2) permits urgent countermeasures necessary to preserve the State's rights without prior satisfaction of these conditions. Article 52(3) requires that countermeasures be suspended if the wrongful act has ceased and the dispute is pending before a court or tribunal with binding authority.

Article 52(1) is not engaged in a strict formal sense by Council Regulation (EU) 2022/334. The Regulation was not preceded by a separate document characterised as a notification of intent to

²⁰⁹ *Air Services Agreement*, para. 83.

²¹⁰ ITF 2022, p. 3.

take countermeasures or as a formal demand to comply. The substantive communication around the closure, however, was extensive: public statements by EU institutions and Member States demanding Russia's withdrawal from Ukraine; the UN Security Council's draft resolution of 25 February 2022, vetoed by Russia; and UNGA Resolution ES-11/1 of 2 March 2022.²¹¹ According to the ARSIWA Commentary, formal notification is not required where substantive communication has already conveyed the claim. The substance of Article 52(1) is therefore satisfied.

Article 52(3) is engaged after a countermeasure has been taken, requiring its suspension when the wrongful act has ceased, and the dispute is pending before a court or tribunal with binding decision-making authority. Russia's filing of A42-WP/256 with the ICAO Assembly in 2025 raises the question of whether the dispute is now pending before a forum with binding-decision authority for Article 52(3) purposes. First of all, the wrongful breach has not ceased, and section 3.2.2 also establishes that the ICAO Council's powers under Articles 84-88 of the Chicago Convention do not function as an exclusive means of dispute resolution. The Council can determine non-conformity, but it cannot order the provisional measures identified in the ARSIWA Commentary as substituting for self-help during proceedings.²¹² The provision, therefore, does not require the EU to suspend its measures.

In any event, Article 52(2)'s urgency exception is available. Russia's invasion was an ongoing use of force producing immediate and continuing harm to Ukraine and creating immediate operational risks to civil aviation. The exception applies on these facts.

4.3.7 The EU Closures as Lawful Countermeasures

The EU closures satisfy the conditions of Articles 49 to 53 ARSIWA. The prior wrongful act condition is satisfied because Russia's armed attack on Ukraine is a *jus cogens* breach owed *erga omnes*, attributable to Russia and is ongoing. Standing rests on Article 48(b)(1) read with Article 54 on the Dawidowicz reading of the availability of third-party countermeasures. The case for availability is at its strongest in this context, as the triggering wrong is aggression, there is sector-specific State practice, the claim is for cessation and the post-2022 institutional response has been substantial.

²¹¹ UN Doc S/2022/155.

²¹² ARSIWA Commentary 2001, commentary to Art. 52, para. 8.

The inducement purpose is satisfied by the EU's expressed purpose of inducing Russian compliance with international obligations. The proportionality requirement is satisfied. On the one hand, the seriousness of Russia's breach of a *jus cogens* obligation owed *erga omnes* weighs strongly in favour of the EU measures. On the other hand, proportionality must also account for the structural costs of departing from a uniform multilateral aviation regime, as well as the operational consequences and effects on third parties. When these competing considerations are balanced against one another, the EU's measures remain proportionate.

The reversibility and temporariness conditions are also satisfied. Airspace access is instantaneously resumable, and the measure's duration is tied to the continuation of Russia's continuing breach. The downstream commercial effects are not the kind of irreversibility Article 49(2) and (3) address. The procedural conditions are satisfied through Article 52(2) urgency exception, the gravity of the triggering wrong supplying the urgency justification.

The verdict is that the EU's *prima facie* breach of the Chicago Convention is precluded from wrongfulness under ARSIWA, but a less grave triggering wrong would not produce the same conclusion.

4.4 Russia's Airspace Closures

The preceding section concluded that the EU's closures can plausibly be sustained as third-party countermeasures responding to Russia's breach of Article 2(4) of the UN Charter. This section analyses Russia's reciprocal closures in turn. Russia's submission of A42-WP/256 to the 42nd ICAO Assembly characterises the closures as forced reciprocal responses to "unilateral coercive measures" by the EU.

4.4.1 Precluded by Prior Lawful Countermeasures

Section 3.3.1 established that a lawful countermeasure is not an internationally wrongful act, and that a State whose claimed trigger is another State's lawful countermeasure cannot satisfy the prior wrongful act condition in Article 49(1).²¹³ The rule follows from the application of Articles 22 and 49(1) together: Article 22 precludes the wrongfulness of a measure that satisfies the conditions of Articles 49 to 53, with the consequence that a measure that qualifies the conditions is no longer "an internationally wrongful act" within the meaning of Article 49(1). This

²¹³ ARSIWA Commentary 2001, commentary to Art. 49, paras. 1–4.

means that a State cannot satisfy the condition of a prior internationally wrongful act by pointing to another State's lawful countermeasure as the triggering wrong.

Section 4.3 concluded that the EU's closures plausibly satisfy the ARSIWA conditions as third-party countermeasures responding to Russia's Article 2(4) breach. On the primary reading of this thesis, the EU's closures are therefore lawful countermeasures within the meaning of Article 22. Russia's reciprocal closure, instituted by the Federal Air Transport Agency on 28 February 2022, targets the exact States whose closures triggered it, is reactive in its expressed motivation, and operates in the same sector. A lawful countermeasure is not an "internationally wrongful act" within the meaning of Article 49(1); accordingly, Russia has no triggering wrong against which to direct countermeasures and the cumulative conditions in Articles 49 to 53 are not reached. A State whose measure might otherwise satisfy proportionality, inducement, reversibility and the procedural conditions is nonetheless foreclosed from invoking the defence if its trigger is another State's lawful countermeasure.

This conclusion is reinforced by the objective standard for countermeasures, a State that resorts to countermeasures based on its own characterisation of the triggering act does so at its own risk, and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.²¹⁴ It is not enough for Russia to establish that it views the EU's closures as unlawful; Russia would have to establish that they are unlawful, not only that it was reasonable to think so.

The primary reading of this thesis is that the EU's closures satisfy the ARSIWA conditions for the countermeasures doctrine, which rests on the standing reading that third-party countermeasures are available to the EU Member States in this situation. The principal vulnerability to this conclusion is the argument that the customary status of third-party countermeasures remains unsettled and that the *opinio juris* element is too ambiguous to support their availability.²¹⁵ If the EU's standing is rejected, the cumulative ARSIWA conditions for countermeasures are not satisfied, and the EU's closures remain *prima facie* breaches of the Chicago Convention. The EU's measures are then seen as internationally wrongful acts. Russia is then responding to conduct whose wrongfulness has not been precluded and is a *prima facie* breach. The countermeasures rule analysed in section 4.4.1 does not foreclose Russia's response at the

²¹⁴ ARSIWA Commentary 2001, commentary to Art. 49, para. 3.

²¹⁵ Hofer 2025, pp. 316–317.

threshold. Russia's measures must therefore be tested against the remaining cumulative conditions for the countermeasure defence to be available to them.

4.4.2 Independent Grounds of Illegality

Russia's potential countermeasures defence fails at least three further ARSIWA conditions, each of which would suffice on its own. The conditions are inducement, the procedural conditions and proportionality. These are addressed on the alternative reading, under which the EU's standing fails and the EU's closures are reclassified as *prima facie* breaches of the Chicago Convention. On that reading, the counter-countermeasures rule analysed in section 4.4.1 does not foreclose Russia's response at the threshold, and Russia's measures must be tested against the remaining cumulative conditions.

To begin with, the compliance-inducement purpose: Article 49(1) requires countermeasures to be taken "in order to induce" the responsible State to comply with its international obligations. Section 3.3.3 defended a purpose-based reading. Russia's expressed purpose, as stated in A42-WP/256, is that they are a forced response to "unilateral coercive measures"²¹⁶ and alleged breaches of the Convention. This does not take the form Article 49(1) requires: a demand directed at inducing the cessation of a specified primary-rule breach attributable to a target State. The closures were adopted within days of the EU's measures, were reciprocally targeted, and publicly framed as protection of sovereign prerogatives rather than as compliance pressure. They were characterised by Russia's own submissions across the two ICAO Assemblies as a "permanent deterrent" rather than a temporary instrument tied to cessation. The structural symmetry of the measures is more consistent with retaliation than inducement.

The inducement analysis operates identically on the alternative reading. If the EU's standing fails and the EU's closures are reclassified as *prima facie* breaches of the Chicago Convention, Russia now has a prior internationally wrongful act available to point to. However, the condition is whether Russia's purpose in adopting its measure was to induce the EU to cease that wrong. Russia's purpose, on its own account, is not compliance-directed. Defensive and sovereignty-protective framings are structurally incompatible with the compliance-directed purpose required by Article 49(1), and that incompatibility remains regardless of how the EU's measure

²¹⁶ A42-WP/256, para. 1.4.

is characterised. Russia would have to articulate a demand that the EU lift its closure as a condition of Russia lifting its own.

Secondly, on the procedural conditions: Article 52(1) requires the injured State to call upon the responsible State to fulfil its obligations and to notify any decision to take countermeasures, accompanied by an offer to negotiate. Russia's public record contains no such demand, no notification of intent to take countermeasures, and no offer to negotiate. The 2025 submission to the 42nd Assembly does not retroactively cure the deficit: notification under Article 52(1) is a precondition for the resort to countermeasures rather than something that can be satisfied subsequently. Article 52(2)'s urgent-countermeasures exception is unavailable. The urgency the provision contemplates concerns rights at risk of irreversible loss, not the political timing of a reciprocal measure adopted within days of the triggering action.²¹⁷ Russia was not responding to an urgent threat to its essential rights.

The procedural analysis operates identically on the alternative reading. Whether the EU's closures are characterised as lawful countermeasures or as *prima facie* breaches, Russia's procedural conduct is the same. The Article 52(2) urgency analysis is unaffected for the same reason: the imminent risk of irreversible loss of rights does not appear in either scenario.

Thirdly, on proportionality: Article 51 requires countermeasures to be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. The quantitative dimension that the response is in the same field as the claimed triggering wrong, supports satisfaction on Russia's side.²¹⁸ On the other hand, the Commentary emphasises that the gravity of the wrongful act and the rights in question need to be weighed,²¹⁹ and both point towards Russia's response being disproportionate to the breach it is responding to. The EU was responding to a breach of Article 2(4) of the UN Charter, an obligation of *jus cogens* in character, owed *erga omnes*, involving loss of life and the violation of territorial integrity.²²⁰ Russia's claimed trigger for the closures is the EU's discriminatory closure of airspace.

The operational and economic effects of Russia's closure are substantial. Finnair's Helsinki–Tokyo route's duration increased by up to three and a half hours and produced forty per cent

²¹⁷ ARSIWA Commentary 2001, commentary to Art. 52, para. 6.

²¹⁸ *Ibid.*, commentary to Art. 51, para. 3.

²¹⁹ ARSIWA Commentary 2001, Art. 51, para. 6.

²²⁰ Barcelona Traction, paras. 33–34; ARSIWA Commentary 2001, commentary to Art. 40, para. 4.

more CO₂ emissions per flight.²²¹ Detailed trajectory modelling of Finnair's Helsinki–Singapore route, comparing pre- and post-invasion operations, shows post-closure increases of 13.7% in flight distance, 14.1% in flight duration, and 18.6% in fuel burn.²²² The closure of Russian airspace has been estimated to affect roughly 80% of routes connecting Asia to Europe, which is a market that represented 4.5% of global international passenger traffic and over 20% of global international air cargo in 2021.²²³ Finnair, whose business model was built on overflying Russian airspace on Europe–Asia routes, has shifted its network towards Western destinations, and air freight flows between Europe and Asia have partially redirected to hubs in the Middle East.²²⁴

The proportionality analysis shifts in the alternative reading. If the EU's measure is reclassified as a *prima facie* Chicago breach rather than as a lawful countermeasure responding to aggression, the wrong Russia that would be responding to is now the same in kind as the wrong Russia's measure produces. The Commentary's relatedness factor²²⁵ weighs more easily on Russia's side in that scenario, and the gravity gap between the suspended and the breached obligations narrows.

The asymmetric verdict therefore rests on four grounds: the counter-countermeasures foreclosure, plus the three independent failures developed above. It rests on two grounds on the alternative reading: inducement and procedure, both unaffected by the shift in the standing analysis on the EU side. On either reading, Russia's closures cannot be justified as countermeasures. The asymmetry between the EU's and Russia's positions is the product of the structurally different positions the two States occupy under the doctrine, and the doctrine produces this asymmetry regardless of how the contested standing question is ultimately resolved. Russia's submissions to ICAO, examined in the following section, confirm rather than contest the pattern.

4.4.3 Russia's Submission to the International Civil Aviation Organization

Russia has filed multiple working papers and statements with ICAO on airspace closures between 2022 and 2025. The two most significant for this thesis are A41-WP/456, submitted to the Executive Committee of the 41st Session of the Assembly on 1 August 2022, and A42-

²²¹ ITF 2022, p. 3.

²²² Zengerling *et al* 2024, p. 9.

²²³ ITF 2022, p. 3; IATA 2022, pp. 3,5.

²²⁴ ITF 2022, p. 4.

²²⁵ ARSIWA Commentary 2001, Art. 51, para. 6.

WP/256, submitted to the Executive Committee of the 42nd Session in July 2025 and revised on 12 September 2025. Read together, the two submissions provide a continuous view of Russia's legal position on the closures over the three years following their imposition.

The 2022 submission characterises the closures imposed against Russia as breaches by other States of the Chicago Convention and of general international law. Its title identifies the closures as incompatible with the Convention's provisions and expressly characterises the discriminatory closures by the responding States as a "direct violation" of Article 9(b).²²⁶ Chapter 2 of this thesis reached the same conclusion on Article 9(b) and on the Convention's broader non-discrimination architecture. The characterisation is accurate, but it is also symmetrical; it applies to Russia's own reciprocal closures, which breach the same provisions on the same nationality-based grounds.

Russia also refers to the UN Charter, arguing that the adoption of sanctions is the prerogative of the UNSC under Chapter VII, and that unilateral measures beyond the Council's authorisation undermine the value and effectiveness of the UNSC's measures.²²⁷ Russia also invokes the right to freedom of movement under the Universal Declaration of Human Rights²²⁸ and also cites UNGA Resolutions 76/161 and 76/191 in support of its position on the humanitarian consequences of unilateral coercive measures.²²⁹ A41-WP/456 includes an appendix containing a draft resolution calling on Member States to denounce unilateral restrictive measures and to take measures directed at putting an end to their adoption and application.²³⁰

The 2025 submission preserves the 2022 framing. Its title reaffirms the "incompatibility of unilateral coercive measures with the provisions of the Convention"; the executive summary asserts the politicisation of international air law; and grounds the argument in the UN Charter

²²⁶ A41-WP/456, para. 2.3.

²²⁷ *Ibid.*, para. 2.1.

²²⁸ *Ibid.*, para. 2.5, citing UN General Assembly Resolution 217 A (III), Universal Declaration of Human Rights. UN Doc A/RES/217(III) adopted 10.12.1948. United Nations 1948.

²²⁹ *Ibid.*, para. 2.8, citing UN General Assembly Resolution 76/161, Human Rights and Unilateral Coercive Measures. UN Doc A/RES/76/161 adopted 16.12.2021. United Nations 2021; and UN General Assembly Resolution 76/191, Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries. UN Doc A/RES/76/191 adopted 16.12.2021.

²³⁰ *Ibid.*, Appendix, Draft Resolution A41/xx, paras. 1–2.

principle of non-intervention, citing the Friendly Relations Declaration,²³¹ and UNGA Resolution 78/135 on human rights and unilateral coercive measures.²³² The empirical figures cited by Russia are unchanged from 2022: fifty million square kilometres of closed airspace, equivalent to 10 per cent of global airspace and 37.5 per cent of national airspaces.²³³ Russia does not defend its own reciprocal closures in its submission, other than illustrating them as forced consequences of the closures imposed against it.²³⁴ In its appendix, it proposes amendments to ICAO Assembly Resolution A41-4 to strengthen existing policy language on the use of legal instruments for political purposes.²³⁵ The draft resolution from 2022 has become a proposed amendment to the existing policy in 2025.

Russia's affirmative case across the two submissions therefore rests on four pillars: the Friendly Relations Declaration's non-intervention principle, including its statement against coercive economic and political measures; UNGA Resolution 78/135 on unilateral coercive measures; Article 13 UDHR on freedom of movement; and the Chicago Convention's non-discrimination architecture and sovereign-equality principle.

The Friendly Relations Declaration elaborates the principle of non-intervention and includes a statement that no State has the right to use economic or political measures to coerce another. That principle operates within the broader framework of customary international law, which recognises countermeasures as a circumstance precluding wrongfulness. If the EU's measures qualify as lawful countermeasures responding to an Article 2(4) breach, they are not the coercion the Declaration addresses; whether they so qualify is the question Chapter 4 has established in the EU's favour.

UNGA Resolution 78/135 is non-binding and does not alter the customary-law position on countermeasures.²³⁶ Article 13 UDHR protects movement within a State's territory and entry to and exit from one's own country; it does not bear on the overflight rights of foreign aircraft. Sovereign equality is an organising principle of the Chicago system and of general international law, but does not preclude lawful countermeasures between States. The non-discrimination

²³¹ UN General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. UN Doc A/RES/2625(XXV) adopted 24.10.1970. United Nations 1970; A42-WP/256, para. 1.2

²³² A42-WP/256, para. 1.2; UN General Assembly Resolution 78/135, Human Rights and Unilateral Coercive Measures. UN Doc A/RES/78/135 adopted 19.12.2023. United Nations 2023.

²³³ *Ibid*, para. 2.3; A41-WP/456, para. 2.4.

²³⁴ *Ibid*, para. 1.4.

²³⁵ *Ibid*, Appendix A.

²³⁶ Crawford 2019, p. 18.

claim under Article 9(b) is, as already noted, correct as far as it goes, but it does not settle whether wrongfulness is precluded.

Russia labels the closures imposed against it as "coercive unilateral measures," implying they are unlawful.²³⁷ The 2022 submission's grouping of the EU's measures with restrictions on Belarus, Iran, Venezuela and the DPRK as a "permanent deterrent" and compares the EU response to geopolitically motivated unilateral economic measures, but the legal question of whether any given set of measures qualifies as countermeasures requires separate analysis under the ARSIWA conditions.

The institutional response is also relevant for this analysis. Russia's draft resolution was not adopted at the 41st Assembly, and its proposed amendment was not adopted at the 42nd. Resolution A42-5 preserved the existing General Policy text in Appendix A.²³⁸ The same 42nd Assembly adopted Resolution A42-2, "Infraction of the Convention on International Civil Aviation by the Russian Federation," formally finding Russia in breach of the Convention on a separate matter: recurring radio frequency interference originating from Russia, which the Council determined violates the principles of the Convention.²³⁹ The matter is distinct from airspace closures, but the contrast is informative: the Assembly that received Russia's coercion-based framing of the closures also formally found Russia in violation of the Convention on a different matter of conduct in the aviation sector.

The submissions show that Russia's legal argument is based on breaches of the Chicago Convention and other general principles of international law, such as non-intervention. The significance of this for this thesis is that Russia does not defend its own closures through the State responsibility framework.

4.5 Chapter Conclusion

The analysis in this chapter produces an asymmetric verdict. On the strongest defensible reading of the doctrine, the EU's closures are plausibly not wrongful as third-party countermeasures in response to Russia's breach of Article 2(4) of the UN Charter. Russia's reciprocal closures

²³⁷ A41-WP/456; A42-WP/256.

²³⁸ ICAO Assembly Res A42-5, Appendix A.

²³⁹ ICAO Assembly Res A42-2, para. 2.

cannot be precluded on any reading. The two States occupy structurally different positions under the law of State responsibility, producing a different verdict for each.

The EU's closures justifiably satisfy each of the cumulative conditions in Articles 49 to 53, but the satisfaction is dependent on the unusual gravity of the triggering wrong by Russia. Standing rests on the contested availability of third-party countermeasures under Article 54 read with Article 48(1)(b). The aviation-sector practice cited in the ARSIWA Commentary and the substantial post-2022 institutional response together support the reading that the practice can form the basis of custom. The compliance-inducement purpose is satisfied because of the EU's expressed purpose, and embedding the closures in a wider package meant to exert pressure for cessation. Proportionality is satisfied because the weighed principles and elements. Reversibility and temporary character are satisfied because airspace access is instantaneously resumable, and the measure's temporariness is continuous with the breach. The procedural conditions are imperfectly satisfied, but the Article 52(2) urgency exception is engaged.

A less grave triggering breach would not produce the same conclusion. The gravity of an Article 2(4) violation that breaches a *jus cogens* norm and an *erga omnes* obligation is substantial, and a breach of lesser gravity would not carry the same weight. The chapter concludes that the EU closures are defensible, but only if the triggering wrong is of this exceptional character.

Russia's position differs because the primary reading of this chapter is that the EU's closures qualify as lawful countermeasures, which forecloses the countermeasures doctrine for Russia. A State whose claimed triggering wrong is another State's lawful countermeasure cannot satisfy the prior wrongful act condition of Article 49(1), because a lawful countermeasure is not an internationally wrongful act within the meaning of Article 22. Russia's reciprocal closure fails at the threshold, and the remaining cumulative conditions are not reached.

If the contested standing question is resolved against the EU and the EU's closures are reclassified as *prima facie* Chicago Convention breaches, Russia's response is no longer foreclosed as a counter-countermeasure. It must be tested against the remaining cumulative conditions. Russia's purpose, as characterised in its terms as sovereignty-protective and a "permanent deterrent" measure, is structurally incompatible with the compliance-inducement purpose Article 49(1) requires. Russia's procedural conduct is also not enough to satisfy the condition, and the Article 52(2) urgency exception is unavailable on the facts since Russia faced no imminent risk of irreversible loss. Each of these failures is independent of how the EU's standing question is resolved, and each is sufficient on its own to defeat the countermeasures defence.

The asymmetric verdict therefore rests on four grounds on the primary reading and on two grounds on the alternative reading. The primary reading combines Article 49(1) foreclosure with the independent failures on inducement, procedure and proportionality. The alternative reading retains the grounds of inducement and procedure that operate identically regardless of how the EU's standing is characterised.

Russia's submissions to the 41st and 42nd ICAO Assemblies confirm rather than displace this conclusion. Russia does not characterise its own closures as countermeasures and does not refer to ARSIWA in either submission. The affirmative case Russia advances on the Friendly Relations Declaration, UNGA Resolution 78/135, Article 13 of the UDHR, and the Chicago Convention's non-discrimination architecture does not engage the framework that controls the preclusion of wrongfulness question. Furthermore, the 42nd Assembly declined to adopt Russia's proposed amendment to Resolution A41-4, and the same Assembly adopted Resolution A42-2 formally finding Russia in infraction of the Convention on a separate matter.

The asymmetric verdict is defensible on the strongest reading of the doctrine and robust in the alternative reading. Still, it sits at the outer edge of what current international law can accommodate. The broader implications for the relationship between the Chicago Convention and the law of State responsibility, and for the regulation of nationality-based airspace closures more generally, are taken up in the final chapter.

5 Conclusion

The analysis in chapters 2 to 4 has examined the legality of nationality-based airspace closures across two bodies of international law and tested the findings against the post-2022 EU-Russia closures. This concluding chapter returns to the research questions set out in section 1.2 and draws together the analysis's findings. Section 5.1 answers the three sub-questions in order and identifies the structural finding about the interaction between the two bodies of international law that the EU-Russia case study reveals. Section 5.2 develops the implications of the analysis for the Chicago Convention and for the operation of the countermeasures doctrine in the aviation sector. Section 5.3 takes a *de lege ferenda* position on the doctrinal development the post-2022 practice has produced. Section 5.4 acknowledges the limits of the present research and identifies prospects for future research.

5.1 Main Findings

The primary research question of this thesis was to what extent the Chicago Convention limits a State's discretion to impose nationality-based airspace closures, and under what conditions the countermeasures doctrine under general international law can preclude the wrongfulness of such measures. The three sub-questions structured the analysis: the primary-rule question of the Convention's regulation, the secondary-rule question of the countermeasures doctrine's operation on Chicago Convention breaches, and the application question of how the two interact when tested against the EU-Russia closures.

The first sub-question is answered in chapter 2. Nationality-based airspace closures imposed for political purposes are *prima facie* breaches of the Chicago Convention. Article 1's recognition of complete and exclusive sovereignty operates as the foundational principle and baseline from which the Convention proceeds, not as a residual source of authorisation for conduct that the Convention's other provisions specifically regulate or restrict. Article 9 specifies the conditions under which airspace closures are permitted, and nationality-based closures fail each of the tests of the provision. The Convention's broader non-discrimination architecture, visible in Articles 11, 15, 22, 37 and 44 and the preamble's commitment to equality of opportunity, confirms the argument. Non-discrimination is not an isolated Article 9 condition but a structural principle of the Chicago regime. A reading of Article 1 as residual authorisation would deprive the Convention's substantive obligations of effect, a result the principle of effectiveness in treaty interpretation does not allow.

The second sub-question is answered in chapter 3. The countermeasures doctrine in Articles 22 and 49 to 53 ARSIWA is formally available for breaches of Chicago Convention obligations. Article 50 does not exclude them, since freedom of overflight is a treaty-based entitlement rather than a peremptory norm, and the other categories of Article 50(1) are not relevant to airspace measures. Article 55 on *lex specialis* does not displace ARSIWA either, because the Convention's dispute-settlement architecture differs from the regimes the ARSIWA Commentary identifies as displacing the general rules. The integral character of the non-discrimination architecture affects the application of the conditions but does not categorically foreclose the countermeasures doctrine. Third-party countermeasures are at least defensibly available for grave breaches of obligations *erga omnes*, with the case particularly strong for aggression. However, the doctrine's customary status remains contested. The conditions in Articles 49 to 53 are demanding, but satisfiable.

The third sub-question is answered in chapter 4 and produces an asymmetric verdict. The EU's closure plausibly satisfies each of the conditions, with the analysis sitting at the outer edge on standing. The wrongfulness of the EU's *prima facie* Chicago breach is therefore precluded under Article 22 ARSIWA on the primary reading. Russia's closure fails on multiple independent grounds. Article 49(1) forecloses the defence at the threshold by depriving Russia of the prior internationally wrongful act required by Article 49(1), since Russia is responding to a measure that is a lawful countermeasure on the primary reading. The defence fails independently on the inducement, procedural, and proportionality conditions. The asymmetric verdict survives the alternative reading on which the EU's standing fails. The grounds for Russia's failure shift from a lack of a prior wrongful act to inducement and procedure, but the conclusion remains the same.

The same primary-rule characterisation produces different secondary-rule outcomes depending on the doctrinal position each State occupies. The framework that justifies a third-party response to aggression denies justification to the reciprocal closure imposed by the aggressor.

5.2 Implications for the Chicago Convention and the Law of State Responsibility

The thesis exposes a structural tension between the Chicago Convention and the law of State responsibility, a tension that the post-2022 closures have highlighted but not resolved. The Convention's non-discrimination architecture and cooperative intent can be seen in Articles 9, 11, 15, 22, 37 and 44, and are supported by the preamble's language of equality of opportunity and the avoidance of friction. The Convention has been designed so that political disputes between contracting States should not result in selective withdrawal from the uniform standard. The countermeasures doctrine reintroduces that exact logic into the sector. A defensible third-party countermeasure under ARSIWA produces, on the Chicago side, the same effect that the Convention was built to exclude, which is the selective suspension of overflight access based on nationality. The verdict reached in chapter 4 is therefore an uncomfortable one. The wrongfulness of the EU's *prima facie* breach is precluded, but the framework that precludes it operates contrary to the Convention's structural logic.

The tension is especially pronounced in the application of the doctrine, namely the proportionality condition under Article 51 ARSIWA. The non-discrimination architecture of the Convention is integral in the sense developed in section 3.2.3. Suspension of those obligations against one target State is not a bilateral suspension capable of being isolated from the wider regime.

Still, it is rather a modification of a uniform multilateral standard owed to all contracting States. The cost of partial withdrawal, a uniform standard, sits alongside the operational and economic costs. The EU closures meet the condition only because the gravity of Russia's breach of Article 2(4) weighs heavily on the other side. A less grave triggering wrong would most likely not produce the same outcome.

The doctrine's place in the broader architecture of international law enforcement is a second implication of the analysis. The case for the customary availability of third-party countermeasures and the self-help they provide is at its strongest precisely where the UN Charter's centralised response is foreclosed, and the post-2022 situation is a very good illustration of this point. Russia holds a permanent seat on the UN Security Council. It has used its veto to block resolutions on the conflict in Ukraine, including the draft resolution co-sponsored by 81 States in February 2022.²⁴⁰ The Security Council's collective security architecture is highly unlikely to result in a Chapter VII response to the conduct of a permanent member and its allies. If third States are unable to respond outside the Council through the doctrine of third-party countermeasures, the international legal system effectively grants veto power to aggressors. The doctrine's defensible availability for grave breaches of obligations *erga omnes* is therefore not a marginal feature of the law of State responsibility, but rather the means by which the international legal order maintains a response to the most grave wrongs when centralised enforcement is unavailable.

5.3 De Lege Ferenda

The analysis points to one institutional reform that addresses a structural problem exposed by the post-2022 closures. The ICAO Council has merits jurisdiction over disputes between contracting States under Article 84 of the Convention, but it lacks the authority to order provisional measures. The ARSIWA Commentary identifies provisional-measures authority as one feature of a regime that can substitute for self-help under Article 55, and its absence is part of the reason the Chicago Convention does not displace the countermeasures doctrine in its field of application. Article 84 could be supplemented with the authority to order provisional measures pending

²⁴⁰ UN Doc S/2022/155.

a merits process. This change would give the Council the procedural capacity to address ongoing disputes about Convention obligations without forcing the parties to rely on self-help during proceedings that may extend over multiple years.

The proposal follows from section 3.2.2. The Council's existing enforcement tools in Articles 87 and 88 are designed for non-conformity findings and do not address the period during which the dispute is pending. The post-2022 closures have been in effect for over four years without an ICAO merits process, while parties have rerouted networks and restructured commercial operations.

Without an institutional alternative to self-help during aviation-sector proceedings, third-party countermeasures bear the full burden of responding to grave breaches. The reform would not displace the countermeasures doctrine, but it would relieve it of the full structural burden. It would allow the customary norm to develop without the pressure that comes from being the only available mechanism.

However, there are potential costs to the proposed reform that need to be considered. Contracting States may resist an amendment that limits their authority to decide over airspace in cases of contested conduct. The Chicago regime was built as a technical cooperation framework, and adding provisional measure authority in politically charged disputes would test the Council's neutrality. The reform is therefore desirable in theory, but unlikely to be implemented in practice.

5.4 Limitations and Prospects for Future Research

As this is a master's thesis, the research has limitations in scope. The temporal scope is limited to the post-Second World War Chicago regime; the material scope is confined to overflight and transit rights under the Chicago Convention; landing rights and air services agreements have been excluded. The analysis covers only civil aircraft, peacetime conditions, and territorial airspace. Unmanned aerial vehicles, no-fly zones under Chapter VII of the UN Charter, and questions concerning flight information regions fall outside the analysis. The EU dimension has been engaged only to the extent that the legal character of the EU's collective action affects the secondary-rules analysis, and EU law as such has not been examined. Each of these limitations was necessary to keep the research within manageable bounds, and each opens the door to further research.

Institutional questions are one route for further research. The ICJ confirmed the ICAO Council's jurisdiction under Article 84 in the 2020 Qatar judgment.²⁴¹ Still, the Council has not established a merits process for the EU-Russia closures or for any comparable contemporary dispute. Whether the Article 84 mechanism is functionally capable of resolving disputes of this character, and whether the procedural reform proposed in section 5.3 could be designed to address the politicisation cost identified there, are questions that would benefit from a focused study rather than the doctrinal treatment this thesis has given them.

Obtaining the preparatory works of the Chicago Convention proved more difficult than expected, partly because of ICAO's ongoing digital migration. The 1948 published proceedings of the Chicago Conference provided a basis for the limited preparatory works engagement undertaken here. Still, a fuller treatment of the drafters' intent on the questions this thesis has examined, particularly the relationship between Article 1's sovereignty recognition and Article 9's specific grounds, would benefit from access to material that was not readily available within the timeframe of this research. Broader engagement with non-Western scholarship on third-party countermeasures and on the legitimacy of the post-2022 sanctions regime would complement the perspective adopted here, and would be a natural starting point for research that takes the present analysis further.

²⁴¹ Jurisdiction of the ICAO Council under Article 84, p. 81.