

**STUDIENTAGUNG 2022**

**JOURNÉE D'ÉTUDE 2022**



# **Luftfahrt im Banne von Covid-19 und Ukraine-Krieg**

## **L'aviation dans les turbulences du Covid-19 et de la guerre en Ukraine**

**Einschränkungen des internationalen Luftverkehrs durch Covid-19-Massnahmen und Sanktionen**

**Les restrictions du transport aérien par les mesures sanitaires et les sanctions**

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# **CLOSURE OF AIRSPACE, SANCTIONS AND WAR: BUT ON WHICH LEGAL GROUNDS?**

## **Structure:**

- I. COVID-19: Closure of airspace worldwide**
- II. Precedents**
- III. Russian invasion of Ukraine**
- IV. Sanctions in international relations**
- V. War and emergency conditions**
- VI. ICAO/ICJ in international aviation disputes (1)**
- VII. Conclusions**

# I. COVID-19: Closure of airspace worldwide (1)

A variety of measures:

First State taking actions: North Korea, on 6.2.2020

- Hermetic closing of airspace: Ukraine; India

Closing of all airports: Iraq, Sri Lanka

- Restrictions on airspace access

- Prohibition of *all* international flights: India, Lebanon, Jordan, Sudan, Kenya, Nepal and Pakistan In some cases, differentiated measures: prohibition of international flights from specified States (China, South Korea, Italy, Spain etc.)
- Exceptions may be made for repatriation and sanitary flights, cargo flights, admission of crew



# I. COVID-19: Closure of airspace worldwide (2)

- Starting point: *sovereignty in national airspace* as evidenced by Articles 1 and 2 of the Chicago Convention (1944)
- *Closure of airspace* under the Chicago Convention, 1944

See, Art. 9(b):

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

- Is COVID-19 pandemic a ‘period of emergency’? Probably yes
- Who judges the urgency?
- Where does ‘differentiation’ end and ‘discrimination’ begin?
- Does the Chicago Convention (1944) apply in these conditions?
- No reference to ‘war’ – see Middle East, COVID-19 and Russia/Ukraine

## II. Precedents (1)



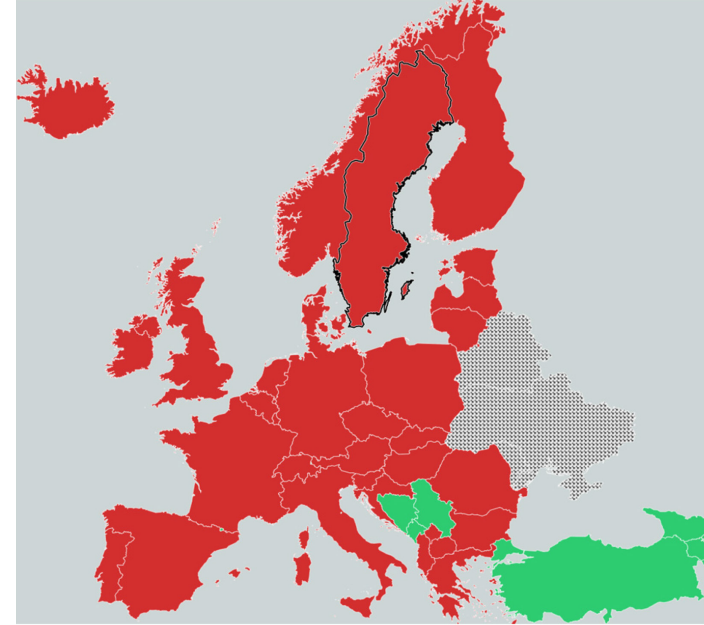
- ✓ **Middle East blockade**, since May 2017 till January 2021. Qatari aircraft prohibited from flying in surrounding States, followed by legal actions before ICAO and the International Court of Justice. Many of Qatar Airways eastbound flights toward Asia and Oceania have had to make a detour in the Strait of Hormuz. There is also a lot of connecting traffic Qatar Airways could pick up if it is allowed to operate flights through for instance Dubai.

## II. Precedents (2)



- ✓ Closure of Pakistani airspace in February 2019 because of the invasion by two Indian military aircraft; Opened up its airspace gradually in May/June 2019, Indian aircraft being the last to be allowed to fly there.
- ✓ After eruption of Icelandic volcano on 15 April 2010, several European States closed their airspace for *all* traffic;
- ✓ Upon '9/11', US airspace was closed for *all* traffic.

### III. Russian invasion of Ukraine (1)



- On 25 February 2022, the airspace over Ukraine, Moldova and part of Belarus was closed to all commercial flights.
- On 27 February 2022, European States closed their national airspaces for Russian flights. Exceptions were made for humanitarian flights operated by Russian aircraft.
- Canada banned Russian planes from entering its airspace from 28 February 2022.
- The US has closed its airspace to Russian aircraft, including private jets, from 3 March 2022.
- In retaliation, Russia has banned flights from these European and North American States.

## II. Russian invasion of Ukraine – EU sanctions (2)

### Basic regulation:

EU Council Decision 2022/265 concerning the adoption of restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine – no mention of war, and no reference to air transport –

### EU Packages:

- EU Council Decision (CFSP) 2022/327, amending Council Decision 2014/512/CFSP, and (b) Council Regulation (EU) 2022/328, amending Council Regulation (EU) No 833/2014. These contain a comprehensive export ban on goods and technology, including aircraft and component parts in the aviation sector.
- EU Council Regulation 2022/334, amending EU Council Regulation 833/2014, and EU Council Decision (CFSP) 2022/335, which amends again Decision 2014/512/CFSP, in particular banning any Russian air carriers from flying into, over or out of the territories of the EU States.





## II. Russian invasion of Ukraine – EU sanctions (2)

- On October 6, 2022, the EU released its eighth ‘package’ of sanctions measures following Russia’s February 2022 invasion of Ukraine.
- Enforcement by ANSPs in EU States, via NOTAMs, to be coordinated via Network Manager Operations Centre (NMOC) Operations Manager (OM) – via email
- The Eurocontrol Network Manager (NM) continues to monitor the operational situation, coordinates lifting of restrictions and holds weekly ad-hoc coordination meetings to share network status.
- On 15 November 2022, the Council adopted the decision to launch the European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine) “to continue supporting Ukraine against the ongoing Russian. *war of aggression.*” (*italics added*)



## II. Russian invasion of Ukraine – EU sanctions (2)

- On 14 March 2022, introduction of a Russian act permitting Russian airlines to operate aircraft which were registered in Ireland and Bermuda.
- Re-registration of these aircraft in Russian aircraft register.
- No consent from owners/lessors of these nor consent from CAA's of Ireland/Bermuda
- Ireland and Bermuda cancelled the certificates of airworthiness of these aircraft because they could not assure safety supervision.
- Art. 18 CC 44: “An aircraft cannot be validly registered in more than one State, but its registration may be changed from one State to another.”
- See also, Art's 17, 19, 31, 33, 83 bis of CC 44
- See also, default mechanism in the Cape Town Convention (CTC), to which RF is a party
- Subject to reservations, States parties commit to respect existing contractual arrangements between the parties (Lessors/lessees)
- RF also in breach of CTC

CONVENTION  
ON  
INTERNATIONAL  
CIVIL AVIATION  
DONE  
AT CHICAGO  
ON THE  
7<sup>TH</sup> DAY OF DECEMBER  
1944

## II. Russian invasion of Ukraine – EU sanctions (2)

- Options for Russian airlines under CC 44:
  - Flying domestically – or to Belarus/North Korea etc.
  - Designate these aircraft as ‘State aircraft’ causing inapplicability of CC 44.
  - Flying internationally – hoping on a positive outcome – as to which see the role of the Eurocontrol network manager and national ANSPs.
- See also, the Sri Lanka incident of June 2022:
  - Aeroflot flew an Irish registered aircraft to Colombo, Sri Lanka, without valid certificate of airworthiness;
  - Government of Sri Lanka: this is a private matter
  - Colombo Commercial High Court lifted the previous order to detain, upon which Sri Lanka allowed the aircraft to leave the country, and this:
  - In disregard of Ireland’s rights and Sri Lanka’s obligations under CC 44.
- ICAO’s actions October 2022 Assembly Resolution A41-2:
  - Condemned dual registration of aircraft while allowing these aircraft without valid certificate of airworthiness’;
  - Considered these actions as ‘serious infractions of CC4;
- Moreover, the RF was not re-elected as an ICAO Council member.

# IV. Sanctions in international relations (1)

- Trade sanctions are a cornerstone of foreign policy for governments around the world and are used to punish violations of international law abuses or to enhance national security.
- A trade war occurs when one State/jurisdiction retaliates against another by placing restrictions on trade between the two jurisdictions.
- Is for instance Ireland involved with a ‘trade war’ with Russia?
- Ukraine is ‘at war’ with Russia - see the facts, and EU decisions
- Art. 89 of the Chicago Convention:

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.”
- If Ireland is ‘at war’ with Russia, can Russia rely on Art. 89 of the Chicago Convention in order to avoid penalties for double registration of Irish registered aircraft?
- See also Air Services Agreements (ASAs)

## IV. Sanctions international relations (2)

- The Chicago Convention (1944), does not refer to ‘sanctions’, or ‘counter-measures’ or retaliation but its Preamble proclaims that:
  - “it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends; ..... in order that international civil aviation may be developed in a safe and orderly manner ....”
- Air Services Agreements (ASA):
  - Do generally not regulate situations of ‘war’ or ‘aggression’;
  - Provide for negotiations and arbitration in case there are ‘disagreements’;
  - Revocation and suspension of the permit for the operation of internationally agreed air services under specified conditions, that is, non-compliance with:
    - nationality requirements;
    - Domestic regulations of the other party;
    - Internationally accepted safety rules;
    - Other provisions of the ASA.
  - Cancellation: 6 months/one year’s written to the other contracting party.



## IV. Sanctions in international relations (3)

- See also, Air Arbitral award on the Air Service Agreement of 27 March 1946 between the USA and France 9 December 1978, concerning change of gauge rights of US carrier Panam on flights between London and Paris.
- France objected such rights, but The Tribunal decided that US carriers were entitled under the 1946 Agreement to operate with a change of gauge in London.
- Principal considerations of the Tribunal:
  - “81. ... If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through "counter-measures".
  - 83. It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach;”
- Hence:
  - The adoption of ‘counter measures’, or sanctions, are allowed under international law, including international air law;
  - Such counter measures must meet the test of proportionality.

## V. War and emergency conditions

French President Macron, on 15 March 2020: “*Nous sommes en guerre.*” (‘we are at war’), and President Trump (US) refers to Corona as ‘the invisible enemy.’

See, Art. 89 of the Chicago Convention (1944), on *War and emergency conditions*

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

- ✓ No international law definition of the term ‘war’
- ✓ The Chicago Convention of 1944 was built on the ashes of the Second world War, with a very visible enemy: aircraft, soldiers, tanks, etc.
- ✓ See provisions speaking of ‘belligerents’, States which were invaded, neutral States and the reference to munitions of war in Art. 35.
- ✓ Art. 89 CC44 has neither been explained nor referred to by States or ICAO.
- ✓ The term ‘trade war’ was not in the minds of the drafters of CC 44.
- ✓ See also: Art. 1 on Sovereignty of States, overruling all other obligations, including those on closure of airspace, ASAs, and the prohibition of discrimination (CC 44).

## VI. ICAO/ICJ in international aviation disputes (1)

- Submission of request by Qatar to ICAO to urge the blocking States to lift all the restrictions over the high seas and in their Flight Information Regions (FIRs),
- The ICAO Council encouraged the parties to engage into consultations and negotiations, using the platform of ICAO, “to ensure the promotion of the implementation of optimal technical solutions” with the purpose of accommodating concerns about flight routes and the provisions of air traffic services as a consequence of the blockade.
- The ICAO Council also stressed that it is basically a *safety organisation and that questions such as political issues must be addressed in other fora.*
- On 27 June 2018, the four blocking States submitted their dispute with Qatar regarding their sovereign airspace to the International Court Justice (ICJ), claiming that the ICAO “was not competent to consider that dispute.”
- On 14 July 2020, the ICJ held that the ICAO Council has jurisdiction over the dispute regarding the restrictions imposed on Qatar-registered aircraft and that the application of Qatar was admissible.
- Thus, *the International Court of Justice has made an important decision on the scope of the jurisdictional competencies of the ICAO Council.*



## VI. ICAO/ICJ in international aviation disputes (2)

Resolution A41-2: Infractions of the Convention on International Civil Aviation (CC 44) by the Russian Federation. This resolution:

- *Reaffirmed* its commitment to the sovereignty, independence, and territorial integrity of Ukraine, as secured by Article 1 of CC 44 – and international customary law - and deplored in the strongest terms the aggression by the Russian Federation against Ukraine in violation of the Charter of the United Nations.
- *Expresses concern* over the threatened safety of international civil aviation by the act of Russia, in contravention of which ICAO's primary objective of ensuring the safety of international civil aviation worldwide (see Chicago Convention).
- *Condemned* the violation of the territorial integrity and sovereignty of Ukraine, including its sovereign airspace, which is inconsistent with Article 1 of the Chicago Convention and urged the Russian Federation to cease its unlawful activities, to ensure the safety and security of international civil aviation in all affected areas.
- *Noted* non-compliance with Articles 17 ff of the CC 44 provisions the dual registration of aircraft by the Russian Federation, permitting the operation of those aircraft without valid certificates of airworthiness.
- *Called upon* the Russian Federation to immediately cease and urgently remedy its infractions of the Chicago Convention.

## VII. Concluding remarks

- The 21<sup>st</sup> century is marked by instances re 'closure of airspace'
- Airspace has been closed in order to stop the 'spread of disease' (Art. 14 CC 44) – As long as Covid 19 travels around the world, people cannot travel around the world.
- Airspace has been used as a strategic weapon in case of warfare and political tensions between States
- Sanctions and other remedies are applied in international aviation relations
- These must meet several tests, including 'proportionality'
- No direct legal basis for sanctions in CC 44 or in ASAs
- 'War' has been a reason for closure of airspace – but what is 'war'?



## VII. Concluding remarks

- Discussion in ICAO re Russia Ukraine: no reference to Art. 89 CC 44 (on warfare)
- Two instances where this provision (A 89) has been invoked: Egypt/Israel and Iraq/Israel, late 1940s. basis for denying Israeli aircraft to fly through airspaces of Egypt/Iraq.
- Role of ICAO: “a safety organisation” whereas “questions such as political issues must be addressed in other fora” (*Middle East*) – to a ‘genuine UN’ organization which makes strong statements on sovereignty and – nearly dictating the Russian Federation to cease its military operations and remedying its infractions of CC44.
- *Is sovereignty back in the air?* - see also other areas – where markets, and airports, are not as open anymore as they used to be.



THANK YOU FOR YOUR MOST APPRECIATED ATTENTION

VIELEN DANK FÜR IHRE GEDULDIGE AUFMERKSAMKEIT!

MERCI DE VOTRE PATIENCE ET ATTENTION

